To Be Argued By:
MARLA DUNN
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

JEROME DAVID, TIMOTHY ASKEW, and TERRENCE SKEETE,
individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

DOCKET NO. 2012-5819

#1 MARKETING SERVICE, INC., R Y B REALTY LLC, TOP OF THE HOB, INC.,
85 M.A., INC., YURY BAUMBLIT, RIMMA BAUMBLIT, ELITA GERSHENGORN,

Defendants-Respondents,

BTYSG LLC, VISHNU BANDHU, 212 ENTERTAINMENT LTD.,
MP STANHOPE LLC, and 85 KINGSTON LLC,

Defendants.

BRIEF FOR PLAINTIFFS-APPELLANTS

LISA E. CLEARY
ADAM BLUMENKRANTZ
JAMES KERWIN
MARLA DUNN
KRISTEN L. RICHER
MAREN MESSING
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

JEANETTE ZELHOF
TANYA KESSLER
MATTHEW MAIN
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, New York 10007
(212) 417-3700

Attorneys for Plaintiffs-Appellants

Kings County Clerk's Index No. 30238/10

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

Jerome David, Timothy Askew, and Terrence Skeete, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

#1 Marketing Service, Inc., R Y B Realty LLC, Top of the Hob, Inc., 85 M.A., Inc., Yury Baumblit, Rimma Baumblit, Elita Gershengorn,

Defendants-Respondents,

BTYSG LLC, Vishnu Bandhu, 212 Entertainment Ltd., MP Stanhope LLC, and 85 Kingston LLC,

Defendants.

Docket No. 2012-5819

---

1. The index number of the case is 30238/10.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, Kings County.

4. The action was commenced on or about December 13, 2010 by service of summons and complaint; the answer of Defendant was served on or about January 28, 2011.

5. The nature and object of the action is landlord tenant –rent stabilization.

6. This appeal is from the Order of Honorable David B. Vaughan, entered in favor of Defendants, against Plaintiffs on June 20, 2012 which granted Defendants' motion for summary judgment.

7. The appeal is on a full reproduced record.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Whether the Supreme Court erred in granting summary judgment dismissing Plaintiffs' claims in light of the fact that material questions of fact remain unresolved for each of Plaintiffs' claims and the lack of any discovery in this case.

Yes. The Supreme Court erred.

NATURE OF THE CASE

This is a class action lawsuit brought by current and former tenants of Defendants' so-called "three-quarter houses." A three-quarter house is a term coined for residential buildings that have been leased by private companies and converted into rooming houses. The houses are typically overcrowded and are characterized by unsanitary conditions, constant threats of unlawful self-help evictions, and daily harassment by three-quarter house staff. Operators of three-quarter houses, like the Defendants in this case, target individuals who are homeless or in a temporary shelter, have disabilities or substance abuse problems, or are recently released from prison. In an effort to distinguish themselves from ordinary landlords—and in the process attempt to unilaterally exempt themselves from their duties as ordinary landlords—the operators cynically refer to their houses as "programs," akin to legitimate supportive housing institutions licensed and regulated by government. But unlike legitimate supportive housing programs, the Defendants in this case and most other three-quarter house operators are not

licensed by any government agency, provide no supportive services whatsoever, and are, in fact, nothing more than ordinary private landlords.

The Defendants in this case are typical of most three-quarter house operators in New York City. The Defendants recruited Plaintiffs by promising them "state of the art" facilities, counseling and social support services to help them get back on their feet, vocational training and assistance finding permanent housing. Upon moving into the houses, Plaintiffs discovered that Defendants offered to them none of these promised services. Instead, the Defendants crammed Plaintiffs into small, shared rooms, where they were subject to uninhabitable living conditions, including rampant rodent and bed bug problems, and frequent lack of heat and gas. Defendants also pressured Plaintiffs to sign waivers that purported to strip them of their rights under the local landlord-tenant and rent-stabilization laws, and that subjected them to eviction without court process. Empowered by these waivers, Defendants made it a practice to evict tenants from their three-quarter houses without notice or process, or to harass tenants until they left on their own.

Plaintiffs filed this lawsuit to obtain relief from these practices, to hold Defendants accountable for their misrepresentations, and to confirm that Plaintiffs remain entitled to protection under the local landlord-tenant and rent-stabilization laws. The trial court, despite earlier having granted a preliminary injunction on the basis that Plaintiffs were likely to succeed in this action, entered

an order granting Defendants' motion for summary judgment against all of Plaintiffs' claims. Plaintiffs now appeal from that order.

Though Plaintiffs have received no opportunity for discovery in this case—owing to Defendants' refusal to cooperate in the pretrial conference and discovery process—Plaintiffs were able to present to the trial court evidence allowing a reasonable fact finder to conclude that Defendants' misrepresentations were unlawful and unjust, and that Defendants' actions were in violation of local landlord-tenant and rent-stabilization law. Plaintiffs also demonstrated that the opportunity for discovery would likely yield evidence that further supports these claims. Defendants, in contrast, failed to meet their burden of showing that the record presented to the trial court contained no open, material questions of fact as to each of Plaintiffs' claims and that Plaintiffs' claims should be dismissed.

The record abounds with open issues of fact that made summary judgment inappropriate in this case, particularly in light of the lack of discovery or disclosure to date. The trial court's failure to engage any of that evidence and to recognize these open questions was in error. Moreover, the reasoning of the Court's three-sentence order—that Plaintiffs are licensees and not subject to rent stabilization law—is not relevant to or dispositive of many of Plaintiffs' claims.

In light of these errors, this Court should vacate the trial court's order granting summary judgment and reinstate each of Plaintiffs' claims.

STATEMENT OF FACTS

I. BACKGROUND

A. The Parties

Defendant-Respondents #1 Marketing Services, Inc.; RYB Realty; Top of the Hob, Inc.; 85 M.A., Inc.; Yury Baumblit; Rimma Baumblit; and Elita Gershengorn (collectively, the "Defendants") are the operators of several three-quarter houses in Brooklyn and Queens, New York (the "Houses").[1] Defendants lease or leased the properties in question from the buildings' owners,[2] and then rented bunk beds in shared rooms to individual members of the Plaintiff class. Yury and Rimma Baumblit own and manage the above-named entities. Elita Gershengorn manages several of Defendants' properties. Defendants have never resided in the properties at issue in this case, and have used them solely for commercial purposes. Though Defendants represent that they operate a "transitional housing program" in the Houses, Defendants have no license to provide rehabilitative or social services and do not operate subject to any government oversight.

---

[1] The properties at issue in this case include buildings at 647 Rutland Road, Brooklyn, New York; 649 Rutland Road, Brooklyn, New York; 42 Christopher Avenue, Brooklyn, New York; 44 Christopher Avenue, Brooklyn, New York; 85 Kingston Avenue, Brooklyn, New York; 24 Suydam Place, Brooklyn, New York; and 144-01 Lakewood Avenue, Jamaica, New York.

[2] The owners of these properties have either settled with the Plaintiff-Appellants or are not party to this appeal.

Plaintiff-Appellants (the "Plaintiffs") are recently homeless and at-risk individuals who are or were residents of the Houses operated and managed by Defendants. In order to reside in Defendants' Houses, Plaintiffs generally pay approximately $215 each month in rent. Most are able to pay this only by assigning their monthly rent allotment (termed a "shelter allowance") from the New York City Human Resources Administration ("HRA") to Defendants. The HRA has no independent relationship or association with Defendants, and does not condition Plaintiffs' shelter allowance on their participation in any support or treatment program for homeless individuals or individuals with substance-abuse problems. (R. 751-52.) Defendants receive rents on behalf of residents through their HRA benefits in the same manner as other landlords in New York City.

B. The Defendants' Recruitment Efforts

Plaintiffs, many of whom were homeless and living in local shelters prior to relocating to Defendants' Houses, were either directly recruited by or received marketing materials from Defendants encouraging them to move in. (R. 592-93.) These materials represented that Defendants provide a "Transitional Housing Program" or "Substance Abuse Treatment Program" with a "comprehensive team of professional house managers, security, [Certified Alcohol and Substance Abuse Counselors] and case managers." They boasted a "state of

the art facility" where the "focus is based on Moslow's *(sic)* theory"[3]; one in which individuals would receive "assistance with permanent housing under HRA 2010E (F),"[4] could attend substance abuse treatment, could obtain "referrals to vocational and educational programs and services," and could "develop independent living and work skills" through Defendants' program. (R. 481-83.) Defendants made similar promises during recruiting sessions at some of Plaintiffs' shelters. (R. 592-93, 605-06.) Plaintiffs have submitted affidavits from residents of the Houses stating that they were led to believe they would receive individualized psychological assessments, on-site counseling and vocational training. (R. 592-93, 594-600, 606, 719-20.)

Enticed by these representations, Plaintiffs were taken—sometimes in groups, by van, from their respective homeless shelters and with their belongings—to the Houses. (R. 593, 600, 606.) Upon arrival, Defendants handed Plaintiffs large stacks of documents (the "Agreements") and pressured Plaintiffs to sign the Agreements without having an opportunity to read, let alone discuss or negotiate, their terms. (R. 594, 600, 606, 646, 674.) The Agreements included standardized consent forms that purported to strip the tenants of their rights under local housing law, including their right to eviction proceedings before being

---

[3] This refers to Maslow's Hierarchy of Needs, a psychological theory concerning the core needs that must be met in order for a person to grow and become self-motivated.

[4] HRA 2010E(F) refers to supportive housing operated with funding from and oversight by government agencies. This housing is unrelated to HRA rental benefits.

discharged from the buildings. They also included House Rules that imposed restrictions on Plaintiffs' living conditions and stated that residents could be evicted after 6 to 9 months' occupancy. Defendants did not provide a translated copy of the Agreements to non-English speaking residents. (R. 667.) Plaintiffs—because they were not given an opportunity to read the forms, and were assured that they could stay as long as they paid or until they obtained permanent housing—did not understand that Defendants had reserved the right to evict them after six months or upon completion of a substance abuse program.

Plaintiffs who were reluctant to sign on the spot were told they could not live in the Houses and would have to leave immediately. Members of the Plaintiff class have attested that they felt pressured to sign the papers without knowing what was in them, because they were homeless and had nowhere else to go if Defendants forced them to leave. (R. 594, 720.) Upon signing, Plaintiffs were often directed to head immediately to the HRA to fill out paperwork assigning their benefits to Defendants, and to enroll in a substance abuse program pre-determined by Defendants. Some Plaintiffs never received copies of the papers they signed. (R. 600, 606.)

C. Living Conditions, Lack of Services and Unlawful Evictions

The Houses operated by the Defendants were anything but the comprehensive transitional housing programs—with "state of the art facilit[ies]"—

that were promised to Plaintiffs. Plaintiffs submitted affidavits explaining that, despite their belief that they would receive counseling and other transitional services upon moving to Defendants' Houses, they received no counseling, vocational training or assistance in finding permanent housing. (R. 595-97, 603, 608, 675, 719-21.)

The quality and legality of the housing were also less than promised. In their affidavits submitted to the Court, the Plaintiffs state that they were often packed four individuals to a room, in bunk beds, in violation of local housing ordinances and the buildings' certificates of occupancy. (R. 573-76, 596-601, 606-10.) Residents reported persistent problems with vermin—including rats, bedbugs and cockroaches—and, at times, a lack of gas and heat in their apartments. (R. 578-91, 600-01, 603, 609, 639-40, 653-55, 665, 667, 672-74, 721.) Apartments in the building were often in disrepair. (R. 578-79, 596, 601, 610.) Defendants also instructed Plaintiffs to deny city housing inspectors access to the building. (R. 602-03, 610.) Those who complained about these problems, whether to Defendants or to city agencies, were harassed, and at times were threatened with violence and eviction. (R. 596-97, 601-03, 608-20, 716, 761.)

Residents of the houses also were subject to a range of burdensome restrictions. They were forced to vacate their rooms during certain hours of the day (R. 432-33, 638), and were not permitted to lock the doors to their rooms in

order to protect their belongings (R. 608, 765). Defendants required Plaintiffs to attend substance abuse treatment programs without regard to whether they were necessary or appropriate for the individual Plaintiffs. (R. 6-7, 594, 656, 667, 675.) And, from time to time, Defendants forced residents of the buildings to relocate from room to room, or to new houses managed by Defendants. (R. 640.)

Defendants also evicted Plaintiffs from the three-quarter houses without court process. Plaintiffs submitted affidavits to the Court that recounted instances of Defendants or their employees removing residents' possessions from their rooms while the residents were gone and changing the locks, relocating residents to other properties without notice and, in some cases, evicting tenants in the middle of the night. (R. 603, 640, 656, 665, 667, 721, 763-64.) These conditions were wholly inconsistent with what Plaintiffs—relying on Defendants' marketing materials and oral representations—understood they would be receiving when they decided to move into Defendants' Houses.

II. PROCEDURAL HISTORY

A. The Complaint and Temporary Restraining Order

Plaintiffs filed a class action complaint against Defendants and the building owners on December 13, 2010. (R. 29.) They alleged five causes of action: (1) deceptive practices in violation of General Business Law ("GBL") § 349; (2) unconscionable contracts of adhesion; (3) violations of New

York City Code provisions prohibiting harassment and unlawful eviction; (4) violations of the New York Rent Stabilization Law and Code ("RSC"); and (5) unjust enrichment. (R. 53-59.) Plaintiffs also sought a temporary restraining order ("TRO") and preliminary injunction ("PI") to prevent the Defendants from retaliating against Plaintiffs during the pendency of the case. (R. 65, 612-15.) Plaintiffs supported these claims with affidavits from the class representatives and other residents of the Houses. (R. 592-611.) The Court granted the TRO and set a hearing date for the Preliminary Injunction. (R. 612-15.)

B. Preliminary Injunction and Class Certification

Defendants opposed the Preliminary Injunction and submitted 136 form affidavits, which they claimed represented the views of the tenants residing at the houses. (R. 616-63; *see also* R. 135-428.) However, several tenants later came forward and stated that they had not been given an opportunity to read or review the forms, and that they felt pressured by Defendants to sign the papers. (R. 641-42, 654-73, 716.) Though some of the residents did not speak English, Defendants did not translate or explain the documents to them. (R. 650, 654.) Several of these residents have since recanted the statements they made in Defendants' form affidavits. (*See* R. 655-57, 666-68, 674-75, 716-17.)

Along with Plaintiffs' Reply, which explained why Plaintiffs were likely to succeed on the merits, Plaintiffs also submitted affidavits attesting to this

coercion. On February 9, 2011, the Court, upon reviewing these papers and hearing oral argument, granted Plaintiffs' motion for a Preliminary Injunction. (R. 665-67.)

C. Plaintiffs' Attempts to Proceed with Discovery

In March 2011, Plaintiffs served Defendants with document requests and interrogatories. In addition to requesting general information regarding the various Defendant companies, and their staff and structure, Plaintiffs sought discovery of Defendants' marketing materials and efforts, the qualifications and responsibilities of Defendants' employees, the documents they required tenants to sign, and any applicable disciplinary policies. Plaintiffs also requested information on the maintenance and management of the Houses, records of occupants and rent payments, and any records of payments made to Defendants in connection with a resident's participation in a substance abuse program.

Defendants did not respond to Plaintiffs' requests and interrogatories, instead seeking and obtaining an adjournment of the parties' preliminary conference, which was originally scheduled for May 18, 2011. In a follow-up phone call on May 31, 2011, counsel for Defendants refused to cooperate with the requests and stated his intent to continue to seek adjournments until the Court

resolved or the Plaintiffs dropped a then-pending contempt motion against them.[5] Plaintiffs wrote to Defendants' counsel asking him to reconsider, but received no response. On June 10, 2011, Plaintiffs sought relief from the Court, but received no reply. (R. 772-73.)

As a result of Defendants' refusal to comply with the discovery procedures set out in the CPLR, Plaintiffs have received no discovery in this case. Instead, the record is limited to Plaintiffs' affidavits, any documents Plaintiffs were able to obtain by conducting their own research of publicly available sources, and any documents submitted by Defendants in their motions to the Court.

D. Defendants' Motion for Summary Judgment

Defendants moved for summary judgment on November 8, 2011, relying largely on the same evidence and arguments advanced previously in opposition to Plaintiff's motion for a Preliminary Injunction. They argued primarily that Plaintiffs are licensees of the three-quarter houses—a disputed assertion, which, even if true, would not resolve many of the claims in this action.[6]

---

[5] On May 6, 2011, Plaintiffs filed a motion seeking a finding of contempt against Defendants for numerous violations of the Court's PI. That motion was pending at the time that Plaintiffs attempted to initiate discovery. Defendants claimed that they were excused from discovery because Plaintiffs had filed contempt orders against them for failing to abide by the terms of the Court's PI. (*See* R. 772.)

[6] Defendants also argued that Plaintiffs' claims were barred by *res judicata* and collateral estoppel because a former RYB resident previously sued Yury Baumblit, one of the Defendants, for unlawful eviction and lost. (R. 19-21 (citing *McIntosh v. Yury Baumblit, et al.*, 18194/2010 (Kings Cty. Civ. Ct. Nov. 10, 2010); *see* R. 558-67.) Though the Court did not rule on these grounds, Plaintiffs reiterate that the claim is utterly without merit.

Much of Defendants' motion relied on unsupported statements by counsel. In addition, Defendants also relied once again on the contested form affidavits that they originally submitted to the Court in opposition to Plaintiffs' motion for a preliminary injunction. Of course, as form affidavits, these documents were of little persuasive value, *see Ford v. Chapman*, 25 A.D.3d 339, 340, 807 N.Y.S.2d 53 (1st Dep't 2006), and, in any event, they did not demonstrate the absence of any material factual issues.

ORDER APPEALED FROM

Without oral argument, the Court granted Defendants' motion for summary judgment and dismissed all of Plaintiffs' claims on June 20, 2012. The entirety of the Court's reasoning, as set forth in its one-paragraph, handwritten, summary order, was that "[t]he [Defendants] are running a transitional housing program. The [Plaintiff] class members are mere licensees and not subject to rent stabilization." (R. 4.)

The Court's order did not address Plaintiffs' arguments that Defendants had not met their prima facie case in seeking summary judgment, and

---

McIntosh concerned a single petitioner who brought a lock-out proceeding in Housing Court. The claim was resolved against him because the Housing Court found that, on the facts of that case, the petitioner had failed to offer sufficient credible evidence to prove his case. *Id.* at *9 (R. 566). Plaintiffs claims here are different, and involve different evidence and additional Defendants. Thus, neither identity of issue nor identity of the parties is satisfied. *See Shaid v. Consol. Edison Co.*, 95 A.D. 2d 610, 614, 467 N.Y.S.2d 843 (2d Dep't 1983). Nor could the Housing Court have addressed the present claims in resolving the *McIntosh* dispute, because it lacks jurisdiction to consider general civil claims. *See* N.Y.C. Civ. Ct. Act § 110(a).

that numerous material questions of fact remained. Nor did the Court discuss Plaintiffs' other claims, address the lack of discovery in the case, weigh the evidence then in the record, or explain how Plaintiffs' licensee status was determinative of the entire case.

Plaintiffs filed a timely notice of appeal that same day.[7]

ARGUMENT

I. STANDARD OF REVIEW

"Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Stukas v. Streiter*, 83 A.D.3d 18, 22, 918 N.Y.S.2d 176 (2d Dep't 2011). In reviewing a motion for summary judgment, "the court must view the evidence in the light most favorable to the nonmoving party. The function of the court . . . is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *Stukas*, 83 A.D.3d at 22. Summary judgment is warranted only where the moving party has "tender[ed] sufficient evidence to eliminate any material issues of fact from the case." *Rozz v. Village Auto Body Works, Inc.*, 35 Misc. 3d 13, 15, 942 N.Y.S.2d 310, 312 (2d Dep't 2012). Therefore, to survive summary judgment, the nonmoving party need only rebut by "rais[ing] a triable

[7] Plaintiffs moved on June 21, 2012 for a preliminary injunction or stay of enforcement pending appeal, and for a preference on appeal. That motion was denied.

issue of fact with respect to the elements or theories established by the moving party." *Stukas*, 83 A.D.3d at 25.

In evaluating the evidence before it, the court must also consider whether the party opposing summary judgment has been afforded an opportunity to conduct discovery. "[W]here the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion," summary judgment is unwarranted if "it appears that facts supporting the opposing party's position may exist but cannot then be stated." *James v. Aircraft Servs. Int'l Group*, 84 A.D.3d 1026, 1027, 924 N.Y.S.2d 114, 115 (2d Dep't 2011) (citations omitted).

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MATERIAL QUESTIONS OF FACT REMAIN FOR EACH OF PLAINTIFFS' CLAIMS

The Court's unexplained conclusion that Plaintiffs are licensees and that rent-stabilization law does not apply to Plaintiffs in this case is unsupported by the record. Moreover, the Court's determination as to whether Plaintiffs are licensees is not dispositive of several of Plaintiffs' claims.

Reading the record in the light most favorable to Plaintiffs, and accounting for the lack of discovery in this case, Defendants failed to offer sufficient evidence to warrant summary judgment. Even without the benefit of discovery, Plaintiffs demonstrated that material questions of fact remain as to each cause of action.

A. Deceptive Business Practices under GBL § 349

Plaintiffs sought relief under New York's General Business Law ("GBL") § 349, arguing that Defendants' marketing efforts misrepresented the services they provided, and the legality and quality of the Houses. In seeking summary judgment, Defendants argued that Plaintiffs were never promised more than a place to sleep and that any other statements were "a very limited use of puffery." (R. 12-13.) As for the legality of the housing, Defendants crassly argued that, whatever the quality of their facilities, "they are certainly better than a cardboard box." (R. 13.)

The Court failed to address Plaintiffs' GBL § 349 claim when granting summary judgment. Because the record before the Court contains questions of fact regarding what, precisely, Plaintiffs were promised and whether those representations were true, summary judgment was improper and this cause of action should be reinstated.

1. Legal Standard

A claim for deceptive business practices under GBL § 349 requires a plaintiff to "demonstrate that a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it." *Ladino v. Bank of America*, 52 A.D.3d 571, 574, 861 N.Y.S.2d 683 (2d Dep't 2008) (citations omitted). Deceptive acts and

practices are those "likely to mislead a reasonable consumer, acting reasonably under the circumstances." *Oswego v. Marine Midland Bank*, 647 N.E.2d 741, 744, 85 N.Y.2d 20 (1995). Importantly, whether a "reasonable consumer in plaintiffs' circumstances" would have been misled can be a question of fact, particularly where the parties dispute what information was provided and in what manner. *Id.*

Consumer oriented conduct is that which has the potential to harm "similarly situated consumers." *Corsello v. Verizon New York, Inc.*, 77 A.D.3d 344, 365, 908 N.Y.S.2d 57 (2d Dep't 2010). The harm need not be pecuniary. *Oswego*, 647 N.E.2d at 745. In the context of housing, § 349 has been applied against landlords who misrepresent the nature and legality of the housing they offer to prospective tenants. *See Buyers and Renters United to Save Harlem v. Pinnacle Group NY LLC*, 575 F. Supp. 2d 499 (S.D.N.Y. 2008); *Meyerson v. Prime Realty Servs., LLC*, 7 Misc. 3d 911, 796 N.Y.S.2d 848 (N.Y. Sup. Ct. 2005); *Bartolomeo v. Runco*, 162 Misc. 2d 485, 488, 616 N.Y.S.2d 695 (Yonkers City Ct. 1994), *overruled on other grounds by Corbin v. Briley*, 192 Misc. 2d 503, 504 (App. Term, 2d Dep't 2002).

2. Plaintiffs presented sufficient evidence that Defendants misrepresented the quality of housing and the services offered by RYB to demonstrate open, material questions of fact

The question of what Defendants promised the tenants in their recruiting efforts is contested by the parties, thus rendering summary judgment

inappropriate at this stage of the proceedings. *Oswego*, 647 N.E.2d at 744. Defendants argued that they never represented the Houses as more than a "place to sleep." (R. 12.) Even without the benefit of discovery, however, Plaintiffs were able to present evidence that Defendants' marketing efforts led Plaintiffs to believe that they were enrolling in a full-service transitional housing program, complete with on-site counselors, assistance enrolling in vocational training programs, and assistance finding permanent housing. (R. 592-93, 600, 605-06, 720.) Several individuals attested that Defendants made these promises both in off-site recruitment presentations and at the Houses when Plaintiffs first arrived. Indeed, RYB's marketing materials—submitted to the court by the Defendants themselves—imply that Defendants offered these services. (R. 481-83.) At minimum, the parties dispute what promises were made, thus presenting open issues of fact as to these claims.

Moreover, Defendants' attempt to dismiss any representations they made as mere puffery does not resolve these open questions. A puffery defense is a "seller's claim that no reasonable person would believe some sales promotion to be literally true." *Gaidon v. Guardian Life Ins. Co. of America*, 725 N.E.2d 598, 612, 94 N.Y.2d 330 (1999) (Bellacosa, J., dissenting). Puffery has been defined as the "vague expression[] of hope and future expectation," *High Tides LLC v. DeMichele*, 88 A.D.3d 954, 958, 931 N.Y.S.2d 377 (2d Dep't 2011), and is best

understood in contrast to "explicit promises" that refer to tangible or concrete services that the seller claims to provide. *Mintz v. American Tax Relief, LLC*, 16 Misc. 3d 517, 523, 837 N.Y.S.2d 841 (N.Y. Sup. Ct. 2007).

Defendants own submissions to the Court establish that they promised to provide the tenants with "support to move into housing and obtain employment," "[r]eferrals to vocational and educational programs and services," and a "compassionate and comprehensive team" of people to assist in their recovery in a "state of the art facility where [the] focus is based on Moslow's *(sic)* theory." (R. 482-83.) On their face, these materials promise "concrete services" and cannot be classified as mere puffery under the prevailing standard. Plaintiffs have presented evidence that they relied on these concrete, specific promises and were harmed by Defendants' failure to provide such services. At minimum, this, too, presents an open, disputed question of fact.

3. Plaintiffs' evidence demonstrated open questions of fact regarding Defendants' misrepresentation of the legality of the housing that they provided

Defendants also failed to make a prima facie case for summary judgment on Plaintiffs' claim that Defendants misrepresented the legality and habitability of the Houses. Despite the lack of discovery in this case, Plaintiffs presented the Court with ample evidence that Defendants' properties were substandard, often lacked heat or gas, and were infested with vermin such as

bedbugs, cockroaches and rats. This evidence included several affidavits from tenants, *supra*, as well as city housing records documenting these problems over an extended period of time. (R. 578-91.) Defendants' only attempt to rebut this evidence was to deny these problems' existence and to offer the 136 contested form affidavits from the buildings' tenants. (*See* R. 135-428.) At minimum, Plaintiffs have presented sufficient evidence to survive summary judgment and to have an opportunity for discovery.

In support of their motion for summary judgment, Defendants argued that Plaintiffs signed waivers when they moved in, and that even sub-standard housing is "better than a cardboard box." (R. 13.) This response, however, misses the point entirely. Plaintiffs have offered sufficient evidence to demonstrate that the tenants relied on RYB's marketing and recruitment efforts, chose to live at the Houses, and paid rent or assigned their public benefits to Defendants, only to wind up in substandard housing. Simply, for the amount Plaintiffs' paid or assigned to Defendants, they were not provided what Defendants promised them. This is sufficient to state an injury under § 349. *See Bartolomeo*, 162 Misc. 2d at 490; *North State Autobahn, Inc. v. Progressive Ins. Group*, 953 N.Y.S.2d 96, 2012 N.Y. App. Div. LEXIS 6891, at *13-14 (2d Dep't 2012). The Court therefore erred in granting summary judgment against Plaintiffs' claim under GBL § 349.

B. Unconscionable Contracts of Adhesion

Plaintiffs argued that RYB's House Rules and Waiver of Participant Rights (the "Agreements") were unconscionable and sought a declaration that any agreement allowing Defendants to move the tenants "from room to room or building to building at will," or to "'discharge' tenants without court process" was therefore unenforceable. (R. 29.) In seeking summary judgment, Defendants argued that these Agreements were not unconscionable because Plaintiffs had "ample time" to review them, and because the terms were standard for the industry. (R. 14-15.) Defendants' only support for these assertions was the 136 contested form affidavits.

The Supreme Court did not address this claim in granting summary judgment. Nor does its finding that Plaintiffs are licensees have any bearing on this issue. Because Defendants failed to sustain their burden of showing that were no material questions of fact regarding this issue, this cause of action should be reinstated.

1. Legal Standard

An unconscionable contract is "one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *King v. Fox*, 851 N.E.2d 1184, 1191, 7 N.Y.3d 181 (2006). A

court evaluating such contracts considers both the procedural and substantive fairness of the contract at the time of the agreement.

Procedural unconscionability "concerns the contract formation process and the alleged lack of a meaningful choice." *State of New York v. Wolowitz*, 96 A.D.2d 47, 67, 468 N.Y.S.2d 131 (2d Dep't 1983). Examples include "high pressure commercial tactics, inequality of bargaining power, deceptive practices and . . . an imbalance in the understanding and acumen of the parties." *Id.* Substantive unconscionability is more concerned with the fairness of the contract terms, including disclaimers and limits on the drafting party's obligations. *Simar Holding Corp. v. GSC*, 87 A.D.3d 688, 690, 928 N.Y.S.2d 592 (2d Dep't 2011). The two operate on a sliding scale: "[T]he more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated." *Id.*

Though a finding of unconscionability is a finding of law, not fact, "[w]here there is doubt . . . , there must be a hearing where the parties have an opportunity to present evidence with regard to the circumstances of the signing of the contract, and the disputed terms' setting, purpose and effect." *Id.* Because Plaintiffs and Defendants contest the fairness of the House Rules and Waiver terms, as well as the procedural fairness of the contract signing process, Plaintiffs are entitled to additional discovery and a fact-finding hearing on these issues.

2. Plaintiffs presented sufficient evidence of procedural and substantive unfairness to survive summary judgment

Plaintiffs presented the Court with evidence that the Agreements were assented to under procedurally unconscionable conditions. Several tenants attested that Defendants gave them no time to review the agreements, told them they did not need to review the terms and pressured them to sign the papers or immediately leave. Some Plaintiffs never received a copy of the Agreements they signed. (R. 601, 606, 646, 666-74.) Moreover, Plaintiffs' affidavits explain that, by the time they arrived at Defendants' Houses, they had nowhere else to go and no way to leave. (R. 606.) These facts were sufficient to demonstrate a material question of fact. *See Wright v. Lewis*, 21 Misc. 3d 1120A, *10-11, 873 N.Y.S.2d 516 (Kings Cty. Sup. Ct. 2008); *see also Wolowitz*, 96 A.D.2d at 74. Though Defendants contest the procedural unfairness of the Agreements, they do so based solely on their own self-serving affidavits and on the 136 contested form affidavits, which are of limited value. *See Ford*, 25 A.D.3d at 340.

The record before the Court also established that the terms of the agreements were unconscionable. Defendants' Agreements purported to strip Plaintiffs of their fundamental rights under landlord-tenant and rent-stabilization law, (R. 432-34), a contract term so severe that it is typically regarded as void and counter to public policy. *Wright*, 21 Misc.3d 1120A at *11.

3. This case does not present the unique factual circumstances present in *Coppa v. LaSpina*

Though Defendants have repeatedly attempted to avoid a finding of unconscionability by likening their Agreements to those upheld in this Court's decision in *Coppa v. LaSpina*, they have failed to set forth sufficient facts to support that theory. *See* 41 A.D.3d 756, 839 N.Y.S.2d 780 (2d Dep't 2007).

In *Coppa*, this Court approved the terms of an agreement in which the defendant—a not-for-profit, federally funded mental illness rehabilitation program—required the plaintiff, a patient of the program, to waive her statutory right to challenge the program's decision to discharge or evict her from the house. *See* 41 A.D.3d at 758. In approving the agreement, the Court relied on the extensive factual development in the case before it, noting that the agreement was not boilerplate but had been individually bargained-for based on the plaintiff's history of being litigious and difficult; that the federal statute that afforded those rights made them waiveable; and that the plaintiff had not been procedurally disadvantaged during the execution process. *Id.* at 758-59.

None of the unique factual circumstances present in *Coppa* exist here. For one, unlike in *Coppa*, the terms of the Agreements were not individually negotiated but were imposed uniformly on all members of the Plaintiff class. *Compare id.* at 759, *with Wright* 21 Misc. 3d 1120A at *10-11. For another, whereas the waiver in *Coppa* concerned the plaintiff's rights under the federal

program that funded the defendant's rehabilitation facility, in this case Defendants have forced Plaintiffs to waive their rights under New York's tenant protection laws—laws which, per their terms, are not waivable. *See infra*. Nor are the Houses in any way government sanctioned or monitored. *Compare with Coppa*, 41 A.D.3d at 758. Defendants thus have not met their burden in proving the fairness of these Agreements, or of the signing process that produced them.

Finally, to the extent that the Court's decision to dismiss this claim rested on its conclusion that Plaintiffs were mere licensees, its reasoning is unsound. To conclude that Plaintiffs were licensees by operation of the Agreements they signed, the Court must have first determined that those Agreements were valid and enforceable. That conclusion, however is not set forth in the Court's decision. Nor is it supported by the record at this stage of the proceedings. There remain open questions of fact that warrant additional discovery and fact-finding. *Simar Holding*, 87 A.D.3d at 690.

Plaintiffs' claim that the Agreements are unconscionable contracts of adhesion should be reinstated.

C. Unjust Enrichment

Building on Plaintiffs' claims that Defendants used deceptive practices to recruit the tenants to live in the houses, and that the tenants' Agreements were void as contracts of adhesion, Plaintiffs also argued before the

Court that Defendants were unjustly enriched by their scheme to rent substandard housing to Plaintiffs. Defendants, in seeking summary judgment, argued that this claim failed because there was no privity between Defendants and Plaintiffs, and because Defendants never promised more than a place to sleep. The Court's order failed to address this claim, or the parties' arguments. Moreover, its conclusion that Plaintiffs are licensees is irrelevant to this issue, because it is not dispositive of Plaintiffs' claims that Defendants misrepresented the quality of the housing they received and the services offered by RYB.

Unjust enrichment is a quasi-contractual remedy requiring a showing that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) "that it is against equity and good conscience to permit the [defendant] to retain" that benefit. *Georgia Malone & Co., Inc. v. Rieder*, 973 N.E.2d 743, 746, 19 N.Y.3d 511 (2012). New York courts are clear that privity is not a required element of a claim for unjust enrichment, requiring only that the parties be tethered by a "sufficiently close relationship" that "the relationship between [them] . . . is not too attenuated." *Id.* at 747. While a valid and enforceable contract will generally preclude an unjust-enrichment claim, *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 274, 12 N.Y.3d 132 (2009), here Plaintiffs have simultaneously challenged the validity of the Agreements they signed.

Though Defendants argued before the Supreme Court that the unjust enrichment claim failed for want of "privity," this argument misstates the law. As noted above, strict privity is not required to establish a claim of unjust enrichment. *Georgia Malone & Co.*, 973 N.E.2d at 747. Here, where Plaintiffs were recruited by and dealt directly with Defendants, interacted with them on a daily basis, and paid rent or assigned their benefits to them, Plaintiffs' relationship with Defendants is sufficiently direct to support a claim for unjust enrichment.

Further, a showing of deceptive business practices is sufficient to constitute a prima facie case of unjust enrichment. *See McKinnon v. Int'l Fid. Ins. Co.*, 182 Misc. 2d 517, 522, 704 N.Y.S.2d 774 (2d Dep't 1999) ("[I]nasmuch as the allegations set forth herin establish prima facie causes of action for fraud and a violation of [GBL] § 349, plaintiff's unjust enrichment claim must stand."). Plaintiffs presented the Court with evidence that Defendants promised them more than a bed to sleep in, as well as misrepresented the habitability and legality of the Houses. Defendants have not met their burden of showing that no material questions of fact remain with respect to those promises. *Supra*. The Court's grant of summary judgment on this claim was therefore in error.

Plaintiffs' unjust enrichment claim should be reinstated.

D. Unlawful Harassment and Eviction of Tenants, N.Y.C. Admin. Code. §§ 26-521(a), 27-2005(d)

Plaintiffs also sought a declaratory judgment that Defendants unlawfully harassed, evicted or attempted to evict residents of the Houses by failing to comply with the notice and process requirements afforded Plaintiffs by New York's landlord-tenant laws. Defendants moved for summary judgment on these claims, arguing that neither § 26-521(a), nor § 27-2005(d), applies here because the House residents are licensees and not tenants. Defendants also argued that no such harassment or attempted eviction occurred.

The Court concluded that Plaintiffs were licensees and dismissed these claims. In doing so, the Court erred in two respects. First, the Court overlooked the substantial material questions of fact that exist as to whether Plaintiffs are licensees in the first place. Second, the Court ascribed greater significance to the licensee-tenant question than is warranted under the law. Because a waiver of the protections afforded by §§ 27-2005(d) and 26-521(a) is contrary to public policy, and because both provisions attach regardless of the formal status of an individual occupant, summary judgment on these claims was in error.

Passed in 1982 to supplement Title 7 of New York Real Property Actions and Proceedings Law (RPAPL) and to provide New York City residents additional legal and process protections, the New York City Unlawful Eviction

Law (UEL) prohibits a landlord from using self-help measures to evict or attempt to evict an "*occupant* of any dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer." N.Y.C. Admin. Code § 26-521(a) (emphasis added); *see also* N.Y. Real Prop. Acts. § 711, 713; N.Y. City Council, N.Y.L.S. Legislative History: Local Law #56, Unlawful Evictions (1982), at 1-3 (discussing intent to supplement RPAPL and need for this legislation). Self-help measures include the threat of force and the interruption of essential services. *Id.* Adding teeth to the prohibition, the UEL classified unlawful eviction attempts as misdemeanor crimes, subject to prosecution and penalty, and provided supplemental civil relief. *Id.*

The New York City Tenant Protection Act extends additional safeguards to tenants. Under that act, a landlord "shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling," N.Y.C. Admin. Code §27-2005(d), in an attempt to cause or encourage the individual to vacate the dwelling or surrender his rights to occupancy, N.Y.C. Admin. Code § 27-2004(a)(48)(g). Examples of harassment include the use of force, threats, repeated discontinuance of essential services, and the removal of doors at the dwelling or of tenants' possessions. N.Y.C. Admin. Code § 27-2004(a)(48)(g). These prohibitions operate outside the Rent Stabilization Code, and apply without regard to the rent stabilization status of the building. *See City of New York v. Park South*

Assoc., 139 Misc. 2d 997, 998, 529 N.Y.S.2d 261 (N.Y. Sup. Ct. 1988). Simply put, when a landlord has allowed an individual to occupy a dwelling for an extended period of time, he must use lawful process to evict the occupant.

Defendants' primary defense to the claims under N.Y.C. Admin. Code §§ 26-521(a) and 27-2005(d) was that Plaintiffs were licensees and not tenants, and therefore were not protected by those provisions. Defendants also argued that, as a matter of fact, no such harassment or unlawful eviction occurred. Neither of these arguments warranted summary judgment in Defendants' favor.

1. Defendants failed to substantiate their claim that Plaintiffs are mere licensees

Defendants argued that the record demonstrated that Plaintiffs had no recourse against eviction without process because they were licensees of the HRA or, in the alternative, of Defendants. But Defendants failed to make a prima facie case for summary judgment under either theory.

Defendants' assertion that Plaintiffs were licensees of the HRA is absurd on its face. For one thing, HRA had no property rights in the buildings at issue and could not therefore grant a "license" to Plaintiffs with respect to those properties. Moreover, Defendants presented the Court with no evidence indicating that Plaintiffs are licensees of the HRA. In contrast, Plaintiffs presented the Court with an affidavit from the HRA stating in no uncertain terms that HRA has no contractual relationship with RYB and does not consider the House residents to be

its licensees. (R. 751.) *Compare with Branic Int'l Realty Corp. v. Pitt*, 30 Misc. 3d 29; 916 N.Y.S.2d 459 (App. Term, 1st Dep't 2010) (agreement between landlord and government entity to provide rooms on an emergency basis); *Coppa*, 41 A.D.3d 756 (government contracts and government oversight); *Fed'n of Orgs., Inc. v. Bauer*, 6 Misc.3d 10, 788 N.Y.S.2d 806 (2d Dep't 2004).

Moreover, the notion that Plaintiffs were licensees of the HRA would lead to the absurd conclusion that *any* individual who received a shelter allowance from HRA would lose protections under landlord-tenant law merely by accepting the subsidy. Defendants have cited no law that would support such a radical departure from established law for potentially millions of New Yorkers.[8]

Nor have Defendants offered any evidence to substantiate their claims that Plaintiffs are their licensees. Defendants relied on this Court's decision in *Coppa* to argue that they, like the rehabilitation center in that case, run a full-service transitional housing program, and that Plaintiffs signed waivers and are therefore licensees of that program. (R. 9-10.) But Defendants' reliance on *Coppa* is misplaced.

As previously discussed, the *Coppa* defendants—operators of a full-service, government-licensed rehabilitation center—presented unique and fact-

---

[8] The HRA provides public benefits in various capacities to more than 3 million New Yorkers. N.Y.C. Human Resources Admin, "About HRA/DDS," http://www.nyc.gov/html/hra/html/ -about/about_hra_dss.shtml (last visited Nov. 19, 2012).

specific circumstances that warranted treating the petitioner in that case as a licensee. *Supra*. In contrast, where an unlicensed boarding house operates without connection to a government entity, courts have found that waivers or licensee agreements similar to that used by RYB are void or unconscionable, and have treated the residents of these houses as tenants rather than licensees. *See Smith v. Donovan*, 61 A.D.3d 505, 878 N.Y.S.2d 675 (1st Dep't 2009) (concluding that residents of a "three-quarter house" in the Bronx are "tenants" for the purpose of N.Y.C. Admin. Code § 26-301); *see also City of New York v. Butt*, N.Y.L.J., Nov. 7, 1994, p. 28, col. 5 (App. Term, 1st Dep't) (holding that seeking and accepting payment from the City Department of Social Services was recognition of occupant as lawful tenant of the premises) (R. 757); *Birnbaum v. Corbett*, N.Y.L.J., Dec. 27, 1990, p. 26, col. 3 (App. Term, 2d & 11th Dep'ts) (holding that where a landlord accepts rent from a residential occupant, it cannot maintain that the occupant is a mere licensee) (R. 756); *Wright*, 21 Misc. 3d 1120A at *11; *Davidson v. House of Hope*, 19600/12, N.Y.L.J. 1202579307267, at *3 (Kings Cty. Civ. Ct. Nov. 15, 2012) (R. 778); *Gregory v. Crespo*, 801290/12, N.Y.L.J. 1202545578195, at *1 (Bronx Cty. Civ. Ct. March 6, 2012) (R. 729).

Defendants failed to present sufficient evidence to align themselves with the *Coppa* defendants. They are not government-affiliated, government-monitored, licensed programs charged with the care of individuals in need of

supportive housing. According to their own affidavits, Defendants run a simple boarding house and provide Plaintiffs with nothing more than a place to sleep. (*See* R. 7.) They have defended against Plaintiffs' other claims by repeatedly making this assertion. They therefore cannot credibly attempt to piggyback on not-for-profit organizations that do provide full-service, licensed rehabilitation programs in an attempt to avoid the obligations of local landlord-tenant law. At minimum, Defendants' inconsistency on this point highlights that the proper characterization of the Houses remains an open, material question of fact.

2. Defendants' assertion that Plaintiffs are licensees does not foreclose relief under §§ 26-521(a) and 27-2005(d)

Regardless of whether the Plaintiffs are classified as tenants or licensees, they remain entitled to protection under § 26-521(a) as occupants of the buildings. Under the UEL, a landlord may not evict without process the occupant of any dwelling unit who has lawfully occupied the space for thirty days or more, or who has entered into a lease with respect to the dwelling. N.Y.C. Admin. Code § 26-521(a). N.Y.C. Admin. Code § 27-2005(d) is similarly broad in terms of its coverage. *See* § 27-2005(d) (protecting any "tenant[] or person[] lawfully entitled to occupancy of the dwelling"). Neither turns on whether the residents are tenants or licensees, but only whether they have lawfully occupied the building for a sufficient period of time. An occupant of a dwelling, by virtue of remaining in the dwelling for an extended period of time, is afforded the benefit of §§ 26-521(a) and

27-2005(d).[9] *Romanello v. Hirschfeld*, 98 A.D.2d 657, 658, 470 N.Y.S.2d 328 (1st Dep't 1983) ("The law is clear and well established that a landlord may not oust an occupant of an apartment from those premises without resorting to proper legal process and providing legal notice.") (Fein and Milonas, JJ., dissenting), *aff'd as mod.*, 63 N.Y.2d 613, 468 N.E.2d 701 (1984) (adopting reasoning of dissent in 98 A.D.2d 657, 470 N.Y.S.2d 328).

Because it is undisputed in this case that residents of the Houses occupy their dwellings for months at a time, Plaintiffs are entitled to the benefit and protection of § 26-521(a) and § 27-2005(d); *cf. Davidson*, 19600/12, N.Y.L.J. 1202579307267, at *3 (finding, pursuant to RPAPL § 711 and the NYC Administrative Code § 26-521, a resident of an unlicensed, unregulated housing facility could not be evicted without due process of law); *Gregory*, 801290/12, N.Y.L.J. 120254557895, at *1 (finding that plaintiff was afforded the benefits of "tenancy" for purposes of eviction law because he occupied the apartment for more than 30 days and paid rent on a monthly basis).

3. Waivers of the protections afforded by §§ 26-521(a) and 27-2005(d) are void as against public policy

To the extent Defendants also argue that Plaintiffs should not be afforded the protections set forth in §§ 26-521(a) and 27-2005(d) because they

---

[9] Indeed, under the RPAPL, even licensees are entitled to 10 days' notice before eviction. *See* N.Y. Real Prop. Acts. § 713.

waived such rights in the Agreements, their argument is flawed. The purported waivers of rights under §§ 26-521(a) and 27-2005(d) should be treated as contrary to state and city public policy and void.[10]

As a general matter, contract provisions that have the effect of undermining state statutes are typically void. *See, e.g.*, *Wright*, 21 Misc. 3d 1120A, at *11; *Bregman v. 111 Tenants Corp.*, 30 Misc. 3d 1236A, 2011 N.Y. Misc. LEXIS 990, at *8-9 (N.Y. Sup. Ct. 2011). New York's RPAPL § 780—the state unlawful eviction law which spurred the creation of New York City's UEL—makes clear that "any provision of a lease or other agreement" that purports to waive the benefit of the RPAPL for any "tenant, resident or occupant of a dwelling" is "against public policy and shall be void." N.Y. Real Prop. Acts. § 780. Thus, because Defendants' waivers would undermine state bars against unlawful eviction without process, they are unenforceable. *Id.*; *see, e.g.*, *Davidson*, 19600/12, N.Y.L.J. 1202579307267, at *4 (finding a purported "Waiver of Tenant Rights" that "provides for eviction with no legal process, no opportunity to

[10]This argument is independent of and in addition to Plaintiffs' argument that these waivers should be treated as void and unenforceable because they are unconscionable contracts of adhesion. As discussed above, Plaintiffs demonstrated that material questions of fact exist as to that issue, thus making summary judgment inappropriate.

challenge basis for eviction, and permits [the house operator] to perform illegal evictions in clear violation of two statutes [is] unenforceable").[11]

Furthermore, it makes little sense that the City's unlawful eviction and anti-harassment laws, which are designed to *supplement* and provide *additional* protection to the RPAPL, could be so easily bypassed by a landlord's decision to classify an occupant as a licensee. The City's attempt to protect at risk individuals from eviction without process would be greatly undermined were this the case. Defendants' Agreements, which purport to waive these protections, should therefore be treated as void as contrary to state and local policy.

4. Plaintiffs have offered sufficient evidence of harassment and unlawful evictions to survive summary judgment

Finally, Defendants' insistence that neither harassment nor unlawful evictions have ever occurred at their properties is at odds with the record before the Court. Even without the benefit of discovery, Plaintiffs presented the Court with evidence of intimidation, threats, the removal of tenants' possessions without consent, and frequent lockout attempts. (R. 602-03, 640, 656, 665-68, 720-21, 763-65.) Indeed, Defendants' own affidavits make it clear that these evictions—referred to by Defendants as "discharges"—were common operating procedure. (R. 25.) Defendants' only evidence to the contrary rests in several utility bills,

[11]Driven by similar policy concerns, waivers of rights under New York City's Rent Stabilization Law are also treated as contrary to public policy and void. *See Riverside Syndicate v. Munroe*, 882 N.E.2d 875, 853 N.Y.S.2d 263 (2008). See *infra* for additional discussion of this issue.

which they say demonstrate that the heat was never turned off at their properties (R. 549-54), and the 136 form affidavits contested by Plaintiffs (R. 135-428). At minimum, the record is conflicted on this issue and summary judgment was not warranted.

Plaintiffs' claims of unlawful eviction and harassment under New York's landlord-tenant laws should therefore be reinstated.

E. Violations of New York City Rent Stabilization Code

Plaintiffs' sought to hold Defendants liable for violations of New York City's Rent Stabilization Code (the "RSC"), which among other things protects tenants in rent-stabilized buildings from eviction without process, harassment and termination of a lease without notice and an opportunity to renew. *See* 9 N.Y.C.R.R. §§ 2520.12, 2522.5(a)(1), 2523.5(a), 2524.1(a), and 2525.5. Defendants moved for summary judgment, asserting that the RSC did not apply to any of their properties, and alternatively that Plaintiffs were licensees and had waived any rights under the RSC. (R. 16-17.)

The Court granted summary judgment against Plaintiffs' claims under the RSC, concluding that Plaintiffs are licensees and are not protected by the rent-stabilization law. In doing so, the Court ignored evidence submitted by Plaintiffs (and by Defendants themselves) that flatly contradicted this conclusion. Moreover,

because the licensee and waiver issues are contested and are not dispositive of these claims, Plaintiffs' RSC claims should be reinstated.

1. Plaintiffs offered sufficient evidence to create a material question of fact regarding whether certain of Defendants' properties are rent stabilized

A building can be subject to the RSC in a number of ways. As is relevant to this case, buildings with six or more units, built prior to January 1, 1974, are subject to the RSC unless otherwise exempt. N.Y.C. Admin. Code *et seq.*; Emergency Tenant Protection Act of 1974 ("ETPA"), §§ 8621–8634 (McKinney's Unconsolidated Laws). Additionally, a property can become subject to the RSC if its owners take advantage of the benefits provided by N.Y. Real. Prop. Tax 421-a. That provision exempts property owners from local real estate taxes if they develop affordable housing on under-utilized parcels of land. *Id.* In return, the developed properties become subject to the RSC. *Id.*

A building subject to rent stabilization is supposed to be registered annually with the DHCR—the agency tasked with oversight of the RSC. N.Y.C. Admin. Code § 26-517. However, absent a landowner's decision to self-report, DHCR has no means of tracking the rent-stabilized status of a particular property. The agency itself warns that its records may be incomplete. (R. 758.) In recognition of this flaw, the RSC affords alternative methods of assessing whether a building is subject to rent stabilization. *See, e.g.*, N.Y.C. Admin Code § 26-

516(a); *Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 42-43, 822 N.Y.S.2d 103 (2d Dep't 2006).

Here, evidence in the record indicated that the RSC likely applies to several of Defendants' properties. Defendants' own affidavits admit that three of its properties—42 Christopher Avenue, 44 Christopher Avenue and 85 Kingston Avenue—have six or more units and were built before 1974. (R. 737.) This would bring them squarely within the reach of the RSC, *supra*. Further, Plaintiffs, without the benefit of discovery, were able to find publicly accessible tax records indicating that the House at 24 Suydam Place actually receives a 421-a tax benefit, subjecting it the RSC as a matter of law. (R. 747.)

Defendants offered no material evidence indicating that these properties are subject to any sort of exception or carve-out. Instead, Defendants insisted that the RSC did not apply to its properties based on the Leases and Certificates of Occupancy for the buildings, and on a single phone call to DHCR, which yielded no agency records stating that the properties are rent-stabilized. However, for the aforementioned reasons, the call to DHCR is of little probative value.

Thus, at minimum, there remains a material question of fact regarding the rent stabilization status of these properties.

2. Defendants' waiver and licensee arguments are not dispositive of this issue

Defendants argued before the Court that Plaintiffs waived their rights under the RSC when they signed the House Agreements. This argument fails for two reasons. First, waivers of the protections afforded by the RSC and the ETPA are void as against public policy. 9 N.Y.C.R.R. §§ 2500.12, 2500.13, 2520.3. Courts have consistently recognized that allowing such waivers would subvert the protections afforded by rent stabilization law and have disallowed them for this reason. *Riverside Syndicate v. Munroe*, 882 N.E.2d 875, 878, 853 N.Y.S.2d 263 (2008); *Wright*, 21 Misc. 3d 1120A at *11. This is true even when the waiver is part of a "sweetheart lease" that benefits the tenant or occupant of the property. *Drucker v. Mauro*, 30 A.D.3d 37, 38, 814 N.Y.S.2d 43 (1st Dep't 2006); *390 West End Assocs. v. Harel*, 298 A.D.2d 11, 16, 744 N.Y.S.2d 412 (1st Dep't 2002). Second, and relatedly, material questions of fact remain regarding whether those waivers were contracts of adhesion. *Supra*. The waivers thus cannot be dispositive of Plaintiffs' RSC claims.

Finally, there is no dispute that Defendants did not afford Plaintiffs their rights under the rent-stabilization laws. Plaintiffs were not offered leases as tenants or the option to renew such leases. Plaintiffs were harassed and evicted from the Houses without process.

Based on the evidence in the record, material questions of fact remain as to whether Plaintiffs are entitled to protection under the rent-stabilization laws in some of Defendants' Houses. The Court's grant of summary judgment on Plaintiffs' RSC claims was improper, and these claims should be reinstated.

F. Illusory Tenancy

Plaintiffs asserted that Defendants' management of the rent-stabilized properties resulted in illusory tenancies insofar as Defendants attempted to maximize profits by cramming residents into the houses and purporting to strip them of the RSC's protections. Defendants, in addition to arguing that these properties are not rent-stabilized, argued that they cannot be held responsible for any resulting illusory tenancy because the building owners never explained that the properties were rent stabilized.

The Court's order did not specifically reference Plaintiffs' illusory tenancy claims. However, in concluding that Plaintiffs were licensees and not protected by the rent stabilization laws, the Court failed to recognize that material questions of fact remained on both issues. *Supra*. Moreover, the record shows that Plaintiffs adequately demonstrated a prima facie case for an unlawful illusory tenancy under the RSC. Defendant failed to rebut that with sufficient evidence to warrant summary judgment. This claim should be reinstated.

An illusory tenancy is "indicated where the prime tenant rents an apartment, which it never intends to occupy but rather rents for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the RSL." *270 Riverside Drive, Inc. v. Wilson*, 195 Misc. 2d 44, 49, 755 N.Y.S.2d 215 (N.Y. Civ. Ct. 2003); *see also Primrose Mgmt. v. Donahoe*, 253 A.D.2d 404, 405-06, 676 N.Y.S.2d 585 (1st Dep't 1998). In evaluating an illusory tenancy claim, "courts must ask the following question: 'Is the prime tenant a legitimate resident who is merely protecting his valuable property rights during a temporary absence from his home, or is he a businessman in an illegal middle market?'" *Art Omni, Inc. v. Vallejos*, 15 Misc.3d 870, 876, 832 N.Y.S.2d 915 (N.Y. Civ. Ct. 2007) (quoting *Bruenn v. Cole*, 165 A.D.2d 443, 447, 568 N.Y.S.2d 351 (1st Dep't 1991)). Where a court finds that an illusory tenancy has been created, the subtenant is afforded the benefits of a full tenancy along with the protections provided by the RSC. *270 Riverside*, 195 Misc.2d at 49-50.

In this case, the record demonstrated that Defendants leased these buildings intending to turn them into for-profit boarding houses. Defendants do not and can not contest that they never intended to live in these buildings as tenants. Further, the record is replete with evidence that the Houses were overcrowded—likely to boost profit (R. 591, 601-03, 608-10); and that Defendants retained physical control of the properties by limiting Plaintiffs' ability to use the

apartments during the day and denying them keys to the building or locks for their doors (R. 608). These are the hallmarks of an illusory tenancy. *See Art Omni*, 15 Misc.3d at 875-76.

Though Defendants deny having actual knowledge of the rent-stabilized status of these buildings, such a denial is insufficient to meet their prima facie burden for summary judgment. The case law is clear that actual knowledge of the rent-stabilized status of the buildings is not required; constructive knowledge can be sufficient. *See Primrose Mgmt.*, 253 A.D.2d at 405; *Bruenn v. Cole*, 165 A.D.2d 443, 568 N.Y.S.2d 351 (1st Dep't 1991).

Here, Plaintiffs have sufficiently demonstrated constructive knowledge at this stage of the proceedings. For one, several of the Houses are covered by the rent-stabilization law because they contain six or more units and were built prior to 1974. (R. 737.) Defendants themselves admitted this to the Court. *Supra*. Moreover, even without the benefit of discovery, Plaintiffs were able to locate publicly available tax records indicating that the property at 24 Suydam Place is rent stabilized. (R. 747.) There is no reason that Defendants—individuals with plenty of experience dealing with complicated real estate transactions—could not have done the same.

Finally, Plaintiffs have not had an opportunity to test Defendants' assertions about the lack of actual knowledge or collusion through the discovery

process. For this reason, and because Defendants have not demonstrated the absence of a material question of fact on how Defendants used the rent-stabilized properties at issue, the Court's grant of summary judgment was inappropriate. Plaintiffs should be afforded an opportunity to resolve these questions with the benefit of discovery.

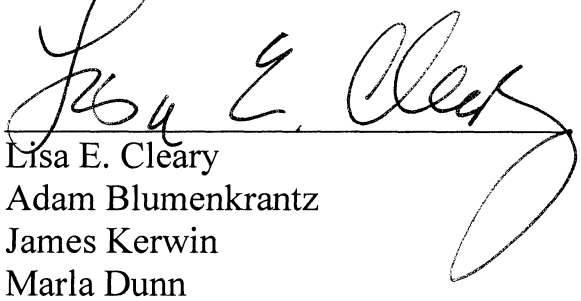
CONCLUSION

For the foregoing reasons, this Court should vacate the Supreme Court's order granting summary judgment, reinstate Plaintiffs' claims and remand this case for further proceedings.

Dated: New York, New York
December 19, 2012

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP

By: 

Lisa E. Cleary
Adam Blumenkrantz
James Kerwin
Marla Dunn
Kristen L. Richer
Maren Messing
1133 Avenue of the Americas
New York, New York 10036-6710
Telephone: (212) 336-2000

MFY LEGAL SERVICES, INC.
Jeanette Zelhof

Tanya Kessler
Matthew Main
299 Broadway, 4th Floor
New York, NY 10007
Telephone: (212) 336-2000

Attorneys for Plaintiffs

Certificate of Compliance

This computer-generated brief was prepared using a proportionally spaced font.

Name of typeface: Times New Roman

Point Size: 14

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is **9,933**.