SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 13, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7932- Index 113051/11
7933- 106532/11
7934-
7935 Gary Smoke,
Plaintiff-Respondent,

-against-

Windermere Owners, LLC, et al.,
Defendants-Appellants.

- - - - -

Luissa Chekowsky,
Plaintiff-Respondent,

-against-

Windermere Owners, LLC, et al.,
Defendants-Appellants.

_____

Rosenberg Feldman Smith, LLP, New York (Richard Bruce Feldman of counsel), for appellants.

Marc Bogatin, New York, for respondents.

_____

Judgments, Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017 and October 30, 2017, awarding, inter alia, treble damages to plaintiffs against defendants, unanimously affirmed, and the matter remanded for a determination and award to plaintiffs of their reasonable attorneys' fees and

costs in connection with these appeals. Appeals from order, same court and Justice, entered October 18, 2017, which, after a nonjury trial, directed entry of judgments in favor of plaintiffs, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

In the *Smoke* action, by order entered December 30, 2014, Supreme Court granted plaintiff's motion on the issue of liability on his rent overcharge claim. In *Chekowsky*, this Court reversed the order of Supreme Court entered July 24, 2013, denying plaintiff's motion for summary judgment on liability on her rent overcharge claim, and granted her motion (*Chekowsky v Windemere Owners, LLC*, 114 AD3d 541, 541 [1st Dept 2014]). Both cases were consolidated for trial on the issue of whether plaintiffs were entitled to treble damages due to defendants' willfulness in overcharging plaintiffs. Because the issue of defendants' liability on the rent overcharge claims in both cases has already been determined, the sole issue presented on this appeal is whether the trial court's finding of willfulness was correct.

Defendants failed to overcome the presumption of willfulness arising from the rent overcharges and removal of plaintiffs'

apartments from rent regulation (*see Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 455 [1st Dept 2004]; *see also Adria Realty Inv. Assoc. v New York State Div. of Hous. & Community Renewal*, 270 AD2d 46 [1st Dept 2000]). Neither defendant called a witness or presented other evidence showing that it had no reason to believe that the overcharges were improper. While Windermere Owners LLC (Owners) was not the landlord when the apartments were improperly removed from rent regulation, it did not show that the prior owner, Windemere Chateau, Inc. (Chateau), failed to provide it with the relevant records or that it relied on statements made to it by Chateau. Indeed, Owners had provided evidence of individual apartment improvements at an earlier stage in the proceedings, demonstrating that it had records relating to renovations in the apartments, which it presumably obtained from Chateau. Nor was evidence presented that any invoices relating to claimed improvements in the apartments were missing.

Defendants offer no authority to support their contention that the severe penalty of treble damages is reserved for landlords that systematically and deliberately charge unlawful rents. Treble damages are mandated where the landlord fails to refute the presumption of willfulness, whether the overcharge was

systematic or a one-time event (*see* Administrative Code of City of NY § 26-516[a]).

Plaintiffs are entitled to an award of their reasonable attorneys' fees and costs in responding to these appeals (*see Washburn v 166 E. 96th St. Owners Corp.*, 166 AD2d 272 [1st Dept 1990]).

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9604 The People of the State of New York, Ind. 1078/16
Respondent,

-against-

Maurice Harmon,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Benjamin Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered December 21, 2016, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and promoting prison contraband in the first degree, and sentencing him, as a second felony drug offender, to an aggregate term of four to six years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the "dangerous contraband" (Penal Law § 205.00[4]) element of first-degree promoting prison contraband (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We also find that defendant was not entitled to submission of second-degree promoting prison contraband, because there was no

reasonable view of the evidence, viewed most favorably to defendant, that the 35 bags of heroin he possessed in a detention facility was nondangerous contraband (*see People v Glover*, 57 NY2d 61, 64 [1982]).

"[T]he test for determining whether an item is *dangerous* contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*People v Finley*, 10 NY3d 647, 657 [2008]). In *Finley*, the Court of Appeals concluded that small amounts of marijuana did not qualify as dangerous contraband, but in explaining the test for dangerousness, it cited a Practice Commentary stating that heroin has been found to qualify as such (*id.*). Courts have found heroin to be dangerous contraband both before *Finley* (*People v Watson*, 162 AD2d 1015, 1015 [4th Dept 1990], *appeal dismissed* 77 NY2d 857 [1991]) and afterwards (*People v Verley*, 121 AD3d 1300, 1301 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015]), at least under particular fact patterns.

Furthermore, in this case there was specific testimony that heroin can easily cause an overdose. Moreover, defendant

possessed 35 bags, which is consistent with distribution rather than with personal use. Under *Finley*'s "substantial probability" test, there was no requirement of proof that defendant or another inmate *actually* used or intended to use enough heroin to cause death or serious injury. We find it unnecessary to address whether possession of a very small amount of heroin would establish dangerous contraband, or create a jury issue requiring submission of the lesser offense.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Without expansion of the record, counsel's remarks to the court do not establish the objective unreasonableness of his performance, or any prejudice. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell

below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9605 In re Jaime A.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 25, 2018, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute overdriving, torturing and injuring animals, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in imposing a period of supervised probation, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). In light of the seriousness of the underlying act of animal cruelty, appellant's need for continuing

mental health and drug treatment, appellant's mother's professed inability to adequately supervise him, and appellant's history of poor school attendance, an adjournment in contemplation of dismissal would not have provided sufficient supervision.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9606-
9607 In re 200 East 62nd Owner LLC, Index 160665/16
Petitioner-Respondent,

-against-

Central Interiors Inc.,
Respondent-Appellant.

_____

Hollander Law Group, PLLC, Great Neck (Michael R. Strauss of counsel), for appellant.

Duane Morris LLP, New York (Frederick Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 12, 2018, bringing up for review an order, same court and Justice, entered on or about June 29, 2018, which, sua sponte, confirmed the report of a judicial hearing officer calculating the amount of reasonable attorneys' fees due after inquest, unanimously affirmed, without costs. Appeal from the June 29, 2018 order, dismissed, without costs, as subsumed in the appeal from the judgment.

The findings of the judicial hearing officer, made upon reference after respondent's default, are "substantiated by the record" and should not be disturbed (*Freedman v Freedman*, 211 AD2d 580, 580 [1st Dept 1995]). As no appeal lies from the

previous orders that were entered on default (CPLR 5511), respondent's challenge to the judgment entered after inquest brings up for review only matters treated at the inquest (*Lehman Bros. Holdings, Inc. v Matt*, 34 AD3d 290, 291 [1st Dept 2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9608 The People of the State of New York, Ind. 3337/14
Respondent,

-against-

Francis Benjamin,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), and White & Case LLP, New York (Michaela E. Pickus of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered August 8, 2016, as amended September 6, 2016, convicting defendant of promoting prison contraband in the first degree, and sentencing him to a term of 2⅓ to 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

The court providently exercised its discretion when it denied defendant's motion to dismiss the indictment, which was the only remedy requested for the belated, midtrial disclosure of Department of Correction use of force reports. The prosecutor had made diligent efforts to obtain this *Rosario* material sooner,

but it had been misfiled by a correction officer. The court provided a suitable remedy when it gave counsel a two-day adjournment to review the material before cross-examining certain witnesses, along with the opportunity to recall other witnesses for further cross-examination based on the belatedly disclosed material. Accordingly, defense counsel received this material when it was still useful because he was able to cross-examine the applicable witnesses effectively (*see People v Castillo*, 34 AD3d 221, 222 [1st Dept 2006], *lv denied* 8 NY3d 879 [2007, and defendant has not shown any substantial prejudice from the delay in disclosure (*see People v Banch*, 80 NY2d 610, 617 [1992]).

The court also providently exercised its discretion when it declined to strike the testimony of a correction officer (again the only remedy requested) based on his belated disclosure of a calendar book entry. The sparse entry contained information already known to defendant, namely, the times and locations of the officer's duties on the day of the incident. Defendant was able to cross-examine the officer about the entry, and there was likewise no prejudice.

To the extent defendant is claiming that the alleged nondisclosure of a videotape also constituted a *Rosario* violation, we find that the record fails to support defendant's

assertion that such a videotape ever existed.

By failing to object, by failing to make specific objections, or by failing to request further relief after the court sustained objections, defendant failed to preserve his remaining challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks were generally permissible responses to defense counsel's attacks on the officers' credibility. Any isolated improper remarks were sufficiently addressed by the court's instructions to the jury.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9609 Andre Jackson, Index 302435/15
Plaintiff-Appellant,

-against-

"John Doe," the name "John Doe" being fictitious and intended to designate the person operating the automobile of said Juan Roman Martinez at the time and place herein alleged, Juan Roman Martinez,
Defendant-Respondent,

"John Doe 1," the name "John Doe 1" being fictitious and intended to designate the person operating the automobile of said Just Bagels Manufacturing Inc., at the time and place herein alleged, Just Bagels Manufacturing Inc.,
Defendant.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Cindy S. Simms of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about August 31, 2018, which granted the motion of defendant Juan Roman Martinez for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant satisfied his prima facie burden of showing that plaintiff did not sustain a serious injury to his cervical spine, lumbar spine or left wrist as a result of the 2013 motor vehicle accident. Defendant's neurologist found that plaintiff had full range of motion and negative test results in his cervical and lumbar spine, and that any injuries had resolved (*see Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]). Defendant's expert was not required to review plaintiff's medical records before forming his opinion (*see Mena v White City Car & Limo Inc.*, 117 AD3d 441 [1st Dept 2014]). Defendant also relied on plaintiff's deposition testimony admitting that he returned to work full-time as a personal trainer within two months of the accident, received just three months of physical therapy and sought no further medical treatment following a November 2014 procedure to his lumbar spine. This testimony both defeats plaintiff's 90/180-day claim and demonstrates that his injuries were not serious, but were minor in nature (*see Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601, 602 [1st Dept 2018]; *Frias v Son Tien Liu*, 107 AD3d at 590). Defendant further pointed out that plaintiff was required to explain his extended gap in treatment following the November 2014 procedure (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact. He provided no medical evidence of serious injury to his cervical spine or wrist, but only the report of his treating physician, who first examined plaintiff's lumbar spine six months after the accident. Neither plaintiff nor the physician explained plaintiff's two separate two-year gaps in treatment (*see Pommells* at 576*; Alverio v Martinez*, 160 AD3d at 455). Furthermore, in the absence of any admissible evidence of contemporaneous, post-accident treatment or evaluation of his alleged injuries, plaintiff failed to raise an issue of fact as to whether his conditions were causally related to the accident (*see Santos v Traylor-Pagan,* 152 AD3d 406 [1st Dept 2017]; *Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9610 Pablo Arias, Index 451990/14
Plaintiff-Respondent,

-against-

Anjo Manufacturing Co., Inc.,
Defendant-Appellant.

_____

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for appellant.

Ginarte Gonzalez Gallardo & Winograd, LLP, New York (Joel Celso of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered April 9, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff fell from a ladder while working in defendant's warehouse facility, and received workers' compensation benefits from his employer, nonparty David Rosen Bakery Supply (DRBS).

Defendant failed to establish prima facie that plaintiff was its special employee (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]. In particular, the deposition testimony of plaintiff's purported supervisor failed to establish that defendant exerted sufficient direction and control over plaintiff's work (*see Thompson*, 78 NY2d at 557). The supervisor

testified that he did not give plaintiff instructions or check on plaintiff periodically throughout the time plaintiff worked at the warehouse and that he went to the warehouse only once to show plaintiff what needed to be done and did not know about the other work plaintiff was doing. Indeed, he testified that plaintiff went to DRBS's offices every morning to check in and receive his assignments. The supervisor's affidavit appears to have been tailored to avoid the consequences of his earlier testimony, but in any event does not establish the requisite direction and control.

Defendant also failed to establish that it was DRBS's alter ego (*see Moses v B & E Lorge Family Trust*, 147 AD3d at 1046-1047; *Gonzalez v 310 W. 38th, L.L.C.*, 14 AD3d 464 [1st Dept 2005]; *see also Paulino v Lifecare Transp.*, 57 AD3d 319 [1st Dept 2008]). There is no evidence in the record showing the relationship between the two companies, e.g., payroll records or contracts, or

other documents demonstrating that DRBS controlled defendant's day-to-day operations or finances.

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9612 In re Andrew J. Stankevich, Index 101119/16
Petitioner-Appellant,

-against-

The New York City Police Department,
Respondent-Respondent,

William T. Bratton, etc.,
Respondent.

_____

Andrew J. Stankevich, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered May 17, 2018, denying the petition to compel respondents to disclose records requested by petitioner pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously modified, on the facts, to vacate the award of costs and disbursements, and otherwise affirmed, without costs.

The court properly dismissed this proceeding as time-barred. Petitioner commenced this proceeding in July 2016, more than four months after the January 2016 denial of petitioner's administrative appeal as to his first FOIL request (CPLR 217[1]). Petitioner's second FOIL request, though broader than his first

request, was essentially "duplicative of his prior request, and therefore did not extend or toll his time to commence an article 78 proceeding" (*Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]; *see Matter of Walker v Roque*, 137 AD3d 643 [1st Dept 2016]). Petitioners' allegations of misrepresentations by the NYPD, including allegedly inaccurate statements as to whether responsive records could be located, do not present a "rare exception" to the general rule "that estoppel is not available against a governmental agency in the exercise of its governmental functions" (*Pless v Town of Royalton*, 81 NY2d 1047, 1049 [1993] [internal quotation marks omitted]).

Even if this proceeding is timely as to any nonduplicative portions of petitioner's second FOIL request, that request was properly denied. Petitioner failed to meet his burden to reasonably describe the records sought (*see e.g. Matter of Asian*

Am. Legal Defense & Educ. Fund v New York City Police Dept., 125 AD3d 531 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]).

Under the specific facts here, we modify to delete the award of costs and disbursements to respondents.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9615 The People of the State of New York, Ind. 2369/12
Respondent,

-against-

Nasean Bonie,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Benjamin Wiener of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

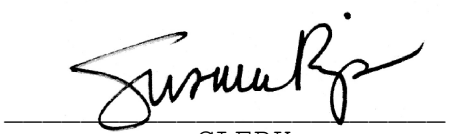
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered April 22, 2015,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019



CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9616 Patricia Halloran, etc., Index 21037/15E
Plaintiff-Respondent,

-against-

Ajay N. Kiri, M.D., et al.,
Defendants-Appellants,

Farmingdale Wellness Center, et al.,
Defendants.

_____

C. Cardillo, P.C., Brooklyn (Paul C. Bierman of counsel), for appellants.

Jacoby & Jacoby, Medford (Susan Ulrich of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered April 20, 2018, which denied defendants-appellants' motion for summary judgment, unanimously affirmed, without costs.

On October 6, 2013, the 26-year-old decedent, Kristen Hurley, was found unresponsive in her bedroom by her grandmother. An autopsy report from the Nassau County Office of the Medical Examiner revealed that decedent had accidentally died from acute intoxication by the combined effect of fentanyl, heroin, oxycodone, and alprazolam.

Decedent was involved in a motor vehicle accident in 2007, in which she injured her left shoulder. Decedent underwent

surgery for her shoulder in June 2008 and December 2009. After that surgery, decedent's care was transferred to pain management physicians. Decedent was released from treatment by those physicians after she insisted on narcotic analgesics before the prescribed time. Decedent returned to her treating orthopaedic surgeon in August 2010 and repeatedly requested a narcotic analgesic prescription, but the surgeon denied her request and told her that the goal was to stop the medications completely.

Decedent underwent a third shoulder surgery on November 2010 and was given a one-month supply of narcotic analgesics. Later that month, decedent admitted to her orthopaedic surgeon that she was taking her medications more frequently and in greater quantities than prescribed. Decedent requested additional narcotic analgesics, but the surgeon denied her request and later informed her that he would not prescribe any further narcotic pain medication.

Decedent was treated by two other doctors before she was seen by defendant Ajay Kiri, M.D. One physician diagnosed decedent with opioid dependence, noted recent track marks, told decedent that she was an addict, and offered to prescribe decedent Suboxone, but she refused. The other physician prescribed oxycodone, but discharged decedent from his care when

she tested positive for cocaine use.

Decedent first presented to Dr. Kiri on August 31, 2012, with a chief complaint of chronic pain. Decedent reported that she had been seeing her orthopaedic surgeon for pain medication, but was looking for a more local doctor. Dr. Kiri refilled decedent's high-dose oxycodone prescription, but discontinued the OxyContin and prescribed fentanyl patches. Dr. Kiri stopped the fentanyl, and restarted the high-dose OxyContin after decedent complained of a rash. Dr. Kiri's handwritten notes from decedent's December 28, 2012 visit stated: "Discuss need to lower medication. Patient actively asked for more." Dr. Kiri later began prescribing decedent Xanax (alprazolam) for anxiety. Dr. Kiri never lowered decedent's prescriptions for opioids below the original level and never contacted her orthopaedic surgeon. Dr. Kiri continued treating the decedent, and prescribing opioids and Xanax, until her death.

Plaintiff, on behalf of decedent, sued defendants-appellants, asserting causes of action for wrongful death, medical malpractice, negligence, and lack of informed consent. Plaintiff's theory of liability is that Dr. Kiri prescribed decedent opioids despite the fact that her medical records showed illicit drug use and opioid seeking behavior and, as a result,

Dr. Kiri enhanced and encouraged decedent's behavior until she accidentally overdosed. Defendants-appellants moved for summary judgment dismissing the complaint on the ground that, as relevant here, decedent's death was not proximately caused by Dr. Kiri's acts or omissions. The motion court denied defendants-appellants' motion.

This is not one of the rare cases in which proximate cause can be found lacking as a matter of law (*Hain v Jamison*, 28 NY3d 524, 530 [2016]). The opinions of appellants' experts were not probative as to causation because they are conclusory and contradicted by the Medical Examiner's report (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Moreover, appellants' experts failed to show that they were qualified to opine on the cause of decedent's death (*Steinberg v Lenox Hill Hosp.*, 148 AD3d 612, 613 [1st Dept 2017]).

Appellants' argument that Dr. Kiri's acts or omissions could not qualify as a proximate cause as a matter of law because decedent used illicit drugs or evinced drug seeking behavior before Dr. Kiri's treatment misses the point. Plaintiff's theory of liability is that Dr. Kiri's prescription of high-dose opioid pain killers for more than a year, despite the fact that her medical records showed drug use and drug seeking behavior,

escalated, enhanced, or encouraged that behavior. An accidental overdose is not an unforeseeable result of prescribing, or over-prescribing, opioid painkillers to a patient who displays signs of addiction (*see Levitt v Lenox Hill Hosp.*, 184 AD2d 427, 429 [1st Dept 1992]). More specifically, here, decedent's procurement and use of illicit drugs were not unforeseeable in light of the indicia of addiction or misuse noted in her medical records. Because decedent's use of illicit drugs was not unforeseeable, her drug use was not an intervening cause and did not amount to a separate act of negligence that independently caused her death.

Appellants' policy argument is unpersuasive. A determination that proximate cause must be decided by a jury in this case does not set any requirement that every doctor in the state has to become its own detective agency prior to administering a prescription for pain medication. Causation will be determined in connection with whether Dr. Kiri's treatment of decedent fell below the applicable standard of care, which is not at issue on this appeal. Moreover, this argument again misses the point. Plaintiff is not arguing that Dr. Kiri should have acquired decedent's medical records before he prescribed any pain medication to her. Rather, plaintiff is arguing that, at some

point during his 14-month treatment of decedent, Dr. Kiri should have collected her recent medical records or, at least, contacted her treating orthopaedist to create a treatment plan. This presents an issue for the jury.

Appellants failed to make a prima facie showing that they obtained decedent's informed consent (Public Health Law § 2805-d[1],[3]; *Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009], *affd* 15 NY3d 907 [2010]). Appellants' experts' opinions were conclusory because they did not set forth what reasonably foreseeable risks should have been disclosed by Dr. Kiri to decedent regarding his prescriptions of opioids or Xanax. The statements of appellant's experts that decedent knew of the consequences of combining her prescriptions with alcohol and illicit drugs and that she was fully advised of the dangers of opioids are not supported by the record. Moreover, there is no

evidence or testimony that Dr. Kiri informed decedent of the risks of taking Xanax.

We have considered the remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9617 In re New York City Health and Hospitals Corporation,
Petitioner,

-against-

Howard A. Zucker, M.D., etc., et al.,
Respondents.

Index 155746/17

_____

Katten Muchin Rosenman LLP, New York (Joseph V. Willey of counsel), for petitioner.

Letitia James, Attorney General, New York (Matthew William Grieco of counsel), for respondents.

_____

Determination of respondent New York State Department of Health, dated February 23, 2017, which, after a hearing, affirmed the findings of an audit conducted by respondent Office of the Medicaid Inspector General (OMIG) disallowing approximately $1.44 million in Medicaid payments claimed by petitioner for medical care rendered to five undocumented aliens, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [John J. Kelley, J.], entered June 14, 2018), dismissed, without costs.

Respondents rationally construed the governing Medicaid statutory and regulatory framework as limiting reimbursable

treatment for care for undocumented aliens' "emergency medical conditions" to treatment for acute symptoms, not extending to treatment for chronic conditions not manifesting in acute symptoms (*see* 42 USC § 1396b[v][3]; 42 CFR 440.255[b][1]; Social Services Law § 122[1][e]; 18 NYCRR 360-3.2[j][1][iii]; *Greenery Rehabilitation Group, Inc. v Hammon*, 150 F3d 226, 232-233 [2d Cir 1998]).

Substantial evidence supports respondents' determination that petitioner failed to meet its burden of presenting documentation showing that its care for "emergency medical conditions" on the dates at issue was reimbursable (18 NYCRR 519.18[d][1]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Petitioner's contentions are largely premised on a misconstruction of the Medicaid framework as permitting reimbursement for treatment of emergency medical conditions — such as a course of antibiotics for an infection initially manifesting with a fever — even after the emergent condition — the fever — has subsided. In any event, during days of hearing testimony, OMIG's peer reviewer explained his decisions whether to allow or disallow the hundreds of claims at issue, citing documentary evidence that he had examined. To the extent petitioner points to other evidence that might have

supported different outcomes, it is unavailing, as we "may not weigh the evidence or reject the choice made by [OMIG] where the evidence is conflicting and room for choice exists" (*see Matter of Collins v Codd*, 38 NY2d 269, 270-271 [1976] [internal quotation marks omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9618 The People of the State of New York, Ind. 2173/09
Respondent,

-against-

Francisco Sostenes,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Ronald Alfano of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about April 4, 2014, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points under the risk factor for failure to accept responsibility, based on defendant's failure to complete a sex offender treatment program as well as his statements tending to negate his guilt. The record also supports the court's discretionary upward departure, based on clear and convincing evidence establishing the existence of aggravating factors not adequately accounted for in the risk

assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861–862 [2014]), most notably an admitted prior sex offense with disturbing similarities to the underlying crime. We also find no basis for a downward departure.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Tom, Gesmer, Moulton, JJ.

9619 Tonya Brown, et al., Index 655271/17
Plaintiffs-Respondents-Appellants,

-against-

Cerberus Capital Management, L.P., et al.,
Defendants-Appellants-Respondents.

_____

Lowenstein Sandler LLP, New York (Brandon M. Fierro of counsel), for appellants-respondents.

Joshua L. Seifert PLLC, New York (Joshua L. Seifert of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 30, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss all of plaintiff Tonya Brown's claims pursuant to CPLR 3211(a)(5) and the ninth and tenth causes of action asserted by plaintiffs other than Brown pursuant to CPLR 3211(a)(1) and (7), and denied their motion to dismiss the first through eighth, thirteenth, and fifteenth causes of action asserted by plaintiffs other than Brown, unanimously modified, on the law, to deny defendants' motion to dismiss the tenth cause of action as to all plaintiffs and deny the motion to dismiss Brown's first through fourth, thirteenth, and fifteenth causes of action, and otherwise affirmed, without costs.

Contrary to defendants' contention, Brown did not release her claims. The purported release appears in a Repurchase Agreement that defendants Covis Pharmaceuticals, Inc. (CPI), Covis Management Investors US LLC (Management Investors US), and Covis US Holdings, LLC (Covis US) sent Brown. These defendants had not yet signed it when they sent it to her. Brown signed it but made a handwritten change. Hence, the document that she returned was a counteroffer and a rejection of the offer made by these defendants. None of the defendants signed the Repurchase Agreement as modified by Brown, so it was not a binding contract (*see e.g. Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507 [1st Dept 2014]).

Defendants contend that Brown ratified the Repurchase Agreement by cashing a check. However, CPI, Management Investors US and Covis US made a unilateral decision to send the check; the CEO of CPI wrote to Brown, "The closing of the repurchase of your profits interests will occur on or before February[] 26, 2015, *whether or not you execute your repurchase agreement"* (emphasis added). Moreover, Brown's delay in acting to repudiate the agreement was far less than the delay in *Allen v Riese Org., Inc.* (106 AD3d 514, 517-518 [1st Dept 2013]). Accordingly, her acceptance of the check did not constitute a ratification of the

Repurchase Agreement.

The claims that require scienter are not barred by collateral estoppel arising from the dismissal of plaintiffs' prior federal action, because the standard for pleading scienter for federal securities fraud claims is more stringent than the standard for pleading scienter in New York state court (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Defendants misapprehend or mischaracterize plaintiffs' fraud claims (the first through eighth causes of action). Plaintiffs do not merely allege that defendants entered into contracts without intending to honor them; the complaint identifies specific misrepresentations of fact. The boilerplate merger clause in plaintiffs' Award Agreements "does not preclude parole evidence establishing fraudulent inducement to enter into the contract" (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015]; *see also Jadoff v Gleason*, 140 FRD 330, 334-335 [MD NC 1991]). The complaint adequately pleads scienter under New York law (*see Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003]).

The court correctly dismissed the ninth cause of action, for breach of fiduciary duty, on the ground that no fiduciary duty was owed to plaintiffs, who were at-will employees who

contributed no capital to Management Investors US and stood at no risk of loss if the venture failed. Plaintiffs' contractual right to share in the venture's profits, should any profits be realized in the future, did not render them investors to whom fiduciary duties were owed. "[A] mere expectancy interest does not create a fiduciary relationship. Before a fiduciary duty arises, an existing property right or equitable interest supporting such a duty must exist" (*Simons v Cogan*, 549 A2d 300, 304 [Del 1988]).

The tenth cause of action (negligent misrepresentation) should not be dismissed. Of the jurisdictions whose laws are potentially applicable to this claim (New York, North Carolina, New Jersey, Minnesota, and possibly Delaware), only New York appears to require a special relationship of trust or confidence (*see e.g. Lord Abbett Mun. Income Fund, Inc. v Citigroup Global Mkts., Inc.*, 2012 WL 13034154, *9 [D NJ, July 12, 2012, Civil Action No. 11-5550(CCC)] [unlike New York, New Jersey does not require special relationship]; *Raritan Riv. Steel Co. v Cherry, Bekaert & Holland*, 322 NC 200, 203, 208-209, 367 SE2d 609, 611, 614 [1988] [adopting Restatement (Second) of Torts § 552 (1977) and noting that Restatement is less restrictive than New York]), and even in this State, the existence of a special relationship

"is a factual issue inappropriate for summary adjudication" (*Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 174 [1st Dept 2004]).

The thirteenth cause of action alleges that Management Investors US and Covis US breached the 2013 award agreements by – among other things – repurchasing plaintiffs' profits interests even though their call options had expired. The motion court correctly found that, pursuant to Management Investors US's operating agreement (which prevails over the award agreements), defendants had 30 days from the date of each plaintiff's termination to exercise their call rights. The court erred in finding defendants' December 31, 2014 call untimely as to plaintiffs Elizabeth Homan and Jeffrey Sampere, who were terminated on December 1 and 15, 2014, respectively. However, this cause of action is not based solely on defendants' allegedly untimely exercise of their call option.

Defendants' sole argument on appeal regarding the fifteenth cause of action (civil conspiracy) is that it should be dismissed

if the underlying causes of action (e.g., fraud) are dismissed. Since we are affirming the motion court's denial of defendants' motion to dismiss the fraud claims, we also affirm its denial of their motion to dismiss the conspiracy claim.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9621-
9622 Index 154934/15

Robert Siegel,
Plaintiff-Appellant,

-against-

The Dakota, Inc., et al.,
Defendants-Respondents.

Harris Beach PLLC, Albany (Victoria A. Graffeo of counsel), for appellant.

Smith Gambrell & Russell, LLP, New York (John Van Der Tuin of counsel), for respondents.

Order, Supreme Court, New York County (David Benjamin Cohen, J.) entered February 8, 2018, which granted defendants' motion to dismiss the amended complaint, and order, same court and Justice, entered on or about July 19, 2018, which, to the extent appealable, denied plaintiff's motion for renewal, unanimously affirmed, without costs.

The motion to dismiss was properly granted in its entirety. As this Court held in its November 22, 2016 order affirming the dismissal of the original complaint, "The continuing wrong doctrine is inapplicable to this case" (144 AD3d 555, 556 [1st Dept 2016], *appeal dismissed* 29 NY3d 1026 [2017]). Contrary to plaintiff's contentions, many, if not most, of the allegations in

the amended complaint simply repeat those that were deemed untimely in the original complaint.

As to the new allegations, plaintiff's causes of action against the former board member defendants cannot be saved. Despite plaintiff's discovery of an alleged scheme by the former board members to deprive him of use of his apartment in December 2015, there was no basis for tolling the statute of limitations or to apply the two-year statute of limitations under CPLR 213(8) since plaintiff admits he discovered this alleged new evidence by reviewing board minutes from more than a decade ago that were available to him at the time (*Lim v Kolk*, 111 AD3d 518, 519 [1st Dept 2013]). In any event, plaintiff neither pleaded fraud nor do his allegations amount to a de facto fraud that would allow him to rely on the longer limitations period (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]).

Plaintiff's conclusion that the other shareholders' alleged use of his apartment's ventilation ducts rendered his apartment uninhabitable is unsupported by any contract provision, statute, regulation, or violation of duty, and therefore fails to state a claim for breach of contract (*Rimrock High Income Plus [Master] Fund, Ltd. v Avanti Communications Group PLC*, 157 AD3d 543 [1st

Dept 2018]). What is more, as this Court's prior order determined, plaintiff also does not have a claim for breach of the warranty of habitability or for partial eviction based on his inability to achieve a prospective condition in the apartment, such as his own dedicated ventilation ducts (144 AD3d 555, 556).

With respect to defendants' alleged refusal to amend the certificate of occupancy to plaintiff's liking, the motion court providently determined that the alleged cause of action would have accrued more than a decade before plaintiff commenced the action. Plaintiff also failed to state a claim for violation of Multiple Dwelling Law §§ 301 and 302, as the motion court determined that on its face, the building's certificate of occupancy permitted residential occupancy in the basement.

The motion court also properly denied plaintiff's motion for renewal, given that, at most, the "new" evidence presented merely brought into sharper relief plaintiff's hypothetical concern that

the Department of Buildings could potentially place undesirable requirements on his alteration work.

We have considered the parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9623 Celeste Wenegieme, Index 304056/16
Plaintiff-Appellant,

-against-

Southstar Funding, LLC, et al.,
Defendants-Respondents.

_____

Celeste Wenegieme, appellant pro se.

Hinshaw & Culbertson, LLP, New York (Benjamin S. Noren of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about June 14, 2018, which granted the motion of defendants US Bank, N.A., Wells Fargo Bank, N.A., and Mortgage Electronic Registration Systems (MERS) to dismiss the complaint, unanimously affirmed, without costs.

Even if denominated a "quiet title" action by plaintiff, this action is no different from her multiple prior attempts to vacate the foreclosure. Her quiet title cause of action rests on the same, previously-decided claims about the supposed invalidity of the mortgage, claims she has had a full and fair opportunity to litigate. Accordingly, the court below, as did Bronx Supreme Court in 2014 and as did Southern District of New York in 2017, properly dismissed the claim on collateral estoppel grounds (*see*

Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65 [1969]; *see also Wenegieme v US Bank, N.A.*, 2014 WL 5480610, 2014 NY Misc LEXIS 4473 [Sup Ct, Bronx Co, Sept. 17, 2014]; *Wenegieme v US Bank, N.A.*, 2017 WL 1857254, 2017 US Dist LEXIS 68909 [SDNY 2017], *affd* 715 Fed Appx 65 [2d Cir 2018]).

To the extent the action constitutes a challenge to the validity of the assignment or the chain of title to the mortgage, such challenge is not appropriately asserted in an action to quiet title (*see Cudjoe v Boriskin*, 157 AD3d 654 [2d Dept 2018]).

Plaintiff fails to show how CPLR 4539 advances her position. To the extent she had grounds to challenge the authenticity of the mortgage documents, such challenge, if appropriately asserted by her at all, would have been in opposition to the summary judgment motion in Bronx Supreme Court in 2013, a motion she did not oppose. She shows no reason why this Court should hear such challenge now.

More fundamentally, plaintiff fails to show that she has standing to challenge the mortgage. She does not adequately rebut the findings in the previous court decisions that she was not the borrower on the mortgage; her contrary allegation in the complaint is belied by the Sylvester affidavit in the record, and she annexes no other documents to show that she, rather than

Sylvester, was the original borrower or the assignee (*see e.g. Landau v Hallstead*, 159 AD3d 1095, 1097 [3d Dept 2018]; *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 105 AD3d 639 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *cf. Decana, Inc. v Contogouris*, 24 AD3d 297 [1st Dept 2005]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9624 The People of the State of New York, Ind. 3345/16
Respondent,

-against-

Luis Torres,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeanie Cambell-Urban of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered January 11, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9625N City & County Paving Corp., Index 24108/18E
Plaintiff-Respondent,

-against-

Titan Concrete, Inc.,
Defendant-Appellant.

_____

Farrell Fritz, P.C., Uniondale (Jason S. Samuels of counsel), for appellant.

Sullivan PC, New York (Peter R. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 3, 2018, which denied defendant's motion to disqualify plaintiff's counsel, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff's counsel represented defendant at the time that he commenced this action against defendant on plaintiff's behalf. Thus, the conflict of interest arose at that time and must be assessed as of that time (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a][1]; *Georgetown Co., LLC v IAC/Interactive Corp.*, 2017 NY Slip Op 30676[U], *7 [Sup Ct, NY County 2017]; *Vinokur v Raghunandan*, 27 Misc 3d 1239[A], 2010 NY Slip Op 51108[U], *3 [Sup Ct, Kings County 2010]).

Although the matter in which plaintiff's counsel represented

defendant is unrelated to the instant matter, we find that counsel should be disqualified because "an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests" (*Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; *see also* New York State Bar Association, Rules of Professional Rule Conduct, rule 1.7, comment 6 ["(A)bsent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, *even when the matters are wholly unrelated*"] [emphasis added]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9664 In re New York City Asbestos Litigation — Index 190187/15

- - - - -

Kristian Nichole Gibson, as Executrix for the Estate of Wayne Gibson,
Plaintiff-Respondent,

-against-

Air & Liquid Systems Corporation, etc., et al.,
Defendants,

Mack Trucks, Inc.,
Defendant-Appellant.

_____

Maimone & Associates, PLLC, Port Washington (Thomas J. Maimone of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 27, 2018, which denied defendant Mack Trucks, Inc.'s motion to dismiss the complaint and all cross claims as against it for lack of personal jurisdiction, unanimously affirmed, without costs.

The court properly denied defendant's motion to dismiss the complaint based upon a lack of personal jurisdiction. The defense was forfeited by not denying general jurisdiction with

specificity in the answer (*see Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183, 184 [1st Dept 2007]; *McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005]).

A party seeking dismissal on the grounds that the court does not have personal jurisdiction over it waives such objection if it is not raised in a responsive pleading or if the party, having previously moved for dismissal, failed to raise an objection to personal jurisdiction (CPLR 3211[a],[e]; *see also McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005]). The latter is not applicable here. Rather, the defendant argues that it asserted a defense of lack of personal jurisdiction in its answer, and thus preserved the issue for adjudication in its present motion.

Personal jurisdiction is not an element of a claim, and matters that are not elements need not be pleaded in the complaint (*see US Bank N.A. v Nelson*, 169 AD3d 110, 114 [2d Dept 2019]). Where the plaintiff has not alleged facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant must assert lack of personal jurisdiction as an affirmative defense in order to give plaintiff notice that it is contesting it (*see* CPLR 3018). Where the plaintiff elects to allege facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant's denial of those

allegations may be sufficient to preserve defendant's jurisdictional defense (*see Green Bus Lines v Consolidated Mut. Ins. Co.*, 74 AD2d 136, 143 [2d Dept 1980]).

In this case, while defendant's denial of specific jurisdiction was sufficient to preserve its defense, its claimed denial of general jurisdiction was insufficiently specific to preserve its defense. Accordingly, defendant waived its defense that the court lacked general jurisdiction over it.

The specific allegations of plaintiff's complaint paragraph three track, almost verbatim, the language of personal jurisdiction in CPLR 302, which provides the bases for specific jurisdiction. Defendant's denial of these allegations is sufficient to provide notice to plaintiff that it is contesting specific jurisdiction.

The allegations of plaintiff's complaint paragraphs 83 and 84 purport to establish a basis for general jurisdiction. They were not denied by defendant, rather defendant admitted them to the extent that it "is a duly organized foreign corporation doing business in New York . . ." This answer, interposed in 2004, before the Supreme Court's ruling in *Daimler AG v Bauman,* 571 US 117 (2014), would have provided a basis for general jurisdiction. It, therefore, does not qualify as a specific denial that would

have put plaintiff on notice that the defendant is contesting general jurisdiction. Defendant's failure to clearly provide an objection to general jurisdiction in its answer waived the defense and conferred jurisdiction upon the court (*McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2019

CLERK

C. Analysis

1. IAIs

Here, applying the *Northern Westchester* and 90-10 standards, the invoices and checks proffered by defendants at trial, when read together, and in conjunction with the testimony of the defense witnesses, more than sufficiently demonstrate that the costs of the 2009 IAIs well exceeded the $21,972.00 threshold needed for exemption of the apartment from rent stabilization. Specifically, with regard to the general contracting work performed by HFM in apartment 4K in 2009, defendants have presented documentary proof in the form of the HFM invoice, dated October 14, 2009, for $60,000.00 and the front and back of a cancelled check dated December 16, 2009 drawn on Chateau's

---

(2016-1), which "supersedes DHCR's Policy Statement 90-10 regarding the criteria which will be used when assessing an owner's substantiation for IAI expenditures." The 2016-1 criteria include:

> "1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
> "2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
> "3. Signed contract agreement; and
> "4. Contractor's affidavit indicating that the installation was completed and paid in full."

2016-1 further provides that "an owner should submit as many of the four listed forms of proof as the owner is able to provide . . . ." On this appeal, the parties appear to agree that 90-10 is the controlling standard, however.

account for $63,097.81 payable to HFM. The invoice sets forth in detail the work performed in "Suite #4K," including "installation of a new mica kitchen" and "construction of a new bathroom" with new "floor tiles."

The HFM invoice and Chateau check were both authenticated by the trial testimony of Molen and Baigelman. At trial, Molen laid a CPLR 4518 business record foundation for the invoice, and it was admitted into evidence. Molen further testified that HFM prepared its invoices contemporaneously with the performance of its services, and that the $63,097.81 check paid for the $60,000.00 invoice as well as other HFM invoices. This testimony is consistent with that of Baigelman, who testified that routinely, after work was performed by HFM, it sent him an invoice, which he reviewed and paid. He further testified that it was his common practice to pay all outstanding invoices in a single check. Further, Baigelman testified that he signed the $63,097.81 check on behalf of Chateau and that he believed that the HFM invoice was paid in full. Thus, the invoice and check have been authenticated by Molen's and Baigelman's testimony. Moreover, given Molen's testimony that he prepared invoices contemporaneously with the performance of services, as well as the temporal proximity of the invoice and the check, which are respectively dated in October and December of 2009, it is

reasonable to infer that the HFM invoice in question here was prepared contemporaneously with the completion of HFM's work in apartment 4K. Thus, the invoice and check, as authenticated by the testimony of Molen and Baigelman, whose credibility was not discounted by the trial court, satisfy the 90-10 requirements for substantiation of this IAI claim. Indeed, the HFM IAIs, in themselves, justify defendants' 2009 IAI rent increases.

The dissent's view that the $63,097.81 check does not substantiate that HFM performed the work in question because that check does not specifically reference apartment 4K and is in an amount greater than the HFM invoice takes into account neither Baigelman's testimony that it was his common practice to pay all outstanding invoices in a single check, nor the temporal proximity of the invoice to the payment.

Significantly, photographs of apartment 4K taken by plaintiff in January 2016 and admitted into evidence at trial depict what appears to be new flooring, new tiling and a new bathtub and sink in the bathroom, as well as new appliances and cabinets in the kitchen. As plaintiff testified, these photographs fairly and accurately reflected the condition of the apartment when plaintiff moved into it in 2009, and therefore corroborate the new kitchen and bathroom installation and other renovation work described in the invoice, as well as Baigelman's

testimony that the work performed probably involved a gut renovation of the kitchen and bathroom in apartment 4K. Thus, while not dispositive in themselves, the photographs, taken together with the documentary and testimonial evidence and all surrounding circumstances, establish HFM's work on the apartment and those IAIs.

The dissent completely discounts the photographs as being of no evidentiary value because they were taken in 2016 and therefore do not depict renovations performed in the kitchen and bathroom contemporaneously with the time they were performed. The record reflects, however, that the photographs were taken by plaintiff herself in apartment 4K after the 2009 renovations were performed, and, as plaintiff herself testified, fairly and accurately reflected the condition of the apartment at the time she moved in in 2009. Moreover, the photographs depict the kitchen, bathroom and flooring of the apartment as in a condition consistent with the relatively recent performance of the kinds of renovations described in the invoices that are included in the record. Thus, the photographs corroborate the 2009 renovation work described in the invoices, as well as Baigelman's and Molen's testimony. For purposes of this de novo review, it is sufficient that the record reflects that plaintiff took them in apartment 4K after the work in question was completed, and it is

of no moment that they were not shown to defendants' witnesses at trial.

Furthermore, Baigelman testified that his routine practice was to walk through an apartment after work was completed prior to paying an invoice, and that although he had no specific recollection of doing so in apartment 4K, he would not have paid an invoice for $60,000.00 without conducting a prior inspection to make certain that the work had been done. Thus, the weight of the evidence, including the invoice and check, as corroborated by the photographs of the apartment and the unchallenged testimony of Baigelman and Molen, amply substantiates defendants' claim that they paid $60,000.00 in general contracting expenses as set forth in the HFM invoice.

The dissent characterizes Baigelman's testimony as built on a series of assumptions based upon what he would do in the regular course of business, such as receiving an invoice for work performed in the apartment and performing an inspection of the apartment upon completion of the work. The dissent also refers to inconsistencies in Baigelman's testimony and conflicting documentary evidence, without providing any further explanation. Rather than considering Baigelman's testimony in conjunction with the testimony of Molen and Lorenz and the record documentary evidence and drawing reasonable inferences from such evidence,

the dissent discounts much of Baigelman's testimony on the ground that he could not recall specific aspects of his dealings with the contractors in regard to their work in apartment 4K.

In maintaining that defendants failed to submit documentation demonstrating that the IAIs were actually performed, however, the dissent fails to take into account that here, where defendants have submitted both invoices and checks, corroborated by Baigelman's and Molen's testimony, they have more than sufficiently substantiated their IAI claims in accordance with the 90-10 evidentiary standards and our Court's recent precedent (*see Stulz v 305 Riverside Corp.*, 150 AD3d 558, 558-559 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018] ["Defendant provided a construction contract, cancelled checks, and the testimony of the contractor to substantiate the IAIs"]; *Matter of Kolinsky v Towns*, 137 AD3d 496, 497 [1st Dept 2016] [DHCR finding that IAI claims substantiated by invoice, checks and owner's worksheet entitled to judicial deference]).

This case stands in stark contrast to the cases cited in the dissent, in which insufficient or no documentary proof was offered (*see Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017] [lack of documentation such as bills from contractor or records of payments]; *72A Realty Assoc. v Lucas*,

101 AD3d 401, 402-403 [1st Dept 2012] [absence of any record evidence in support of landlord's renovation claim, such as bills from contractor or records of payment for renovations]; *Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal*, 171 AD2d at 573-574 [landlord failed to provide invoices for stove, refrigerator and dishwasher and conceded that it had not paid for them; invoice for air conditioners proffered by landlord did not match serial numbers of those installed in apartment]). Moreover, this case is entirely different from *Smoke v Windermere Owners LLC* (130 AD3d 522 [1st Dept 2015]), and *Chekowsky v Windermere Owners* (114 AD3d 541 [1st Dept 2014]), both involving this same building, in that in both of those cases, the defendants' proffer was entirely devoid of adequate documentation in support of their IAI claims.

With respect to the plumbing IAIs, defendants submitted a copy of a check dated October 8, 2009, drawn on the Chateau account and made payable to Lorenz in the amount of $16,365.27, and a certificate of capital improvement stating that "kitchen and bathroom renovation" had been performed in "Apt. 4K," including "new waste, vent & water lines" and "new shower body, bathtub, toilet, basin & faucets." The record also includes two invoices from Lorenz, one dated September 29, 2009 in the amount of $13,251.95 for "Apt. 4K Kitchen & Bathroom - renovation" and

one dated July 28, 2009, in the amount of $3,113.32 for "replace[ment of] hot and cold water risers and valves in "Apt. 4K - 5K."

The trial court's decision erroneously excluded these two invoices from its consideration, however. Although the record reflects that plaintiff's counsel objected to their admission on the ground that he had not seen these invoices until their production in court by Annette Lorenz immediately prior to her testimony at trial on January 20, 2016, the record also indicates that copies of both invoices were attached as exhibits to defendants' motion for summary judgment dismissal dated August 7, 2012. This Court has the authority, on de novo review, to reconsider the evidentiary rulings of the trial court (*see Green*, 74 AD3d at 578-579 [Saxe, J., concurring] [ruling that expert testimony admitted by trial court should have been excluded]). Exercising that authority, we find that these two invoices should have been admitted into evidence, and we will now consider them on this de novo review.

Baigelman testified that the amount paid for plumbing work in apartment 4K was $13,251.95 and that the $16,365.27 check was in payment for both that invoice and the invoice for $3,113.32. Furthermore, Baigelman testified that the $16,365.27 check was probably in payment for work related to the gut renovation of the

kitchen and bathroom in apartment 4K noted previously. This testimony corroborates the documents proffered by defendants, including the two invoices referring to apartment 4K, the $16,365.27 check payable to Lorenz and the certificate of capital improvement, especially when the temporal proximity of these documents is considered. Moreover, Annette Lorenz authenticated the certificate of capital improvement by testifying that she recognized her secretary's handwriting and the signature of the licensed plumber for Lorenz on the document. Thus, the weight of the evidence supports the conclusion that defendants paid at least $13,251.95 for plumbing work performed in apartment 4K.

It is undisputed that defendants substantiated their claim that $5,650 in electrical work was performed by CES in the living room, bedroom, bathroom and kitchen in apartment 4K in 2009.

Added together, all three sets of charges, for general contracting, plumbing and electrical work, not including the $3,113.32 for plumbing work in both apartment 4K and apartment 5K, totals $78,901.95, which arithmetically is well in excess of the $21,972.00 stipulated threshold for defendants to have lawfully declared apartment 4K exempt from rent stabilization and to have legitimately charged plaintiff the monthly rent she paid in 2009 and thereafter, as the dissent concedes. Moreover, all three contractors' invoices refer to kitchen and bathroom work

performed in apartment 4K in 2009. Further, as already stated, the invoices and checks related to general contracting and plumbing work in the apartment were corroborated by the testimony of Baigelman, Molen and Annette Lorenz, and supported by the photographs of the recently renovated rooms in the apartment.

In sum, reading all three sets of invoices and checks together, in terms of the amounts spent on IAIs in apartment 4K in 2009 and the invoices' common references to bathroom and kitchen renovation in the apartment, as corroborated by the testimony of the defense witnesses, and the timing of the invoices, payments, and renovated condition of the apartment as of 2009 as shown by plaintiff's photographs, the weight of the evidence overwhelmingly supports the conclusion that defendants lawfully declared apartment 4K exempt from rent stabilization and therefore did not impose a rent overcharge on plaintiff.

Although the trial court found the testimony of Baigelman, Molen and Annette Lorenz insufficient to substantiate defendants' claims on the ground that all of those witnesses lacked personal knowledge that the 2009 IAIs in apartment 4K were performed, there is no requirement of such proof.[3] The cases cited by the

[3] Notwithstanding the dissent's position that we have mischaracterized the trial court's decision by describing it as imposing a personal knowledge requirement, the trial court's decision, in fact, found that "defendants failed to substantiate

trial court do not impose a personal knowledge requirement, however. Rather, consistent with 90-10, they require such documentary proof as "'bills from a contractor . . . or records of payments for the [claimed improvements]'" (*see Altschuler v Jobman 478/480, LLC*, 135 AD3d at 440, quoting *72A Realty Assoc. v Lucas*, 101 AD3d at 402). Here, defendants have supplied copies of invoices from three contractors describing IAIs performed in apartment 4K and copies of the front and back of cancelled checks in payment of those invoices, and have provided supporting testimony, and have therefore met both the *Altschuler* and 90-10 requirements for substantiation of their claims.

With respect to the circumstances under which a landlord is entitled to impose an IAI rent increase, the Rent Stabilization Code at 9 NYCRR 2522.4(a)(1), provides, in pertinent part:

> "An owner is entitled to a rent increase where there has been . . . installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In the case of

---

[HFM's] bill for $60,000.00 in general contracting work in plaintiff's apartment" because they "produced no witness with personal knowledge substantiating that the work shown on the invoice was completed in Apartment 4K" (*DiLorenzo v Windermere Owners LLC*, 2017 WL 9857178, *2 [Sup Ct, NY County Oct. 18, 2017]. Furthermore, in finding that "defendants failed to substantiate that the plumbing work claimed actually was completed in Apartment 4K," the trial court observed that "Annette Lorenz . . . had no personal knowledge of any plumbing work performed in Apartment 4K" (*id.*).

> vacant housing accommodations, tenant consent shall not be required."

Here, the IAIs in question were performed in 2009, when the apartment was vacant and prior to plaintiff's moving into the apartment later in 2009. Accordingly, defendants need not have, and, indeed, could not have, obtained her consent for her IAI rent increase.

2. Duplication/Useful Life

Plaintiff's argument that the 2009 IAIs do not qualify apartment 4K for exemption from rent stabilization because they are duplicative of, or were made during the useful life of, IAIs made to apartment 4K in 1995 and 1998 is unavailing on this record. In her complaint, plaintiff made no mention of the IAIs she now asserts were performed in 1995 and 1998. Moreover, plaintiff failed to amend her complaint to include her factual averments and legal claims in this regard or to make a motion before the trial court based upon them. Because this argument raises an issue that was "not asserted in the complaint or in [the one motion included in the record that was made] before the motion court, [it] is not properly before us in the context of this appeal" (*see Safka Holdings, LLC v 220 W. 57th St. L.P.*, 142 AD3d 865, 866 [1st Dept 2016]).

The dissent cites no pertinent authority in support of its

differing view that plaintiff had no obligation to plead that the 2009 IAIs were performed during the useful life of the 1995 and 1998 IAIs, and that defendants were obligated to raise the useful life issue as an affirmative defense. *Scholastic Inc. v Pace Plumbing Corp.* (129 AD3d 75 [1st Dept 2015]), cited in the dissent, pertains to a defendant's burden to plead a limitations period as an affirmative defense but has no bearing on whether defendants have the burden to plead and prove, as an affirmative defense, that the 2009 IAIs were not duplicative of, or not performed during the useful life of, the 1995 and 1998 IAIs in this case (*see id.* at 86). Moreover, in *Scholastic*, this Court reasoned that the defendant should plead the limitations period as an affirmative defense because the plaintiff was entitled to have notice of the defense and conduct discovery accordingly, explaining that "prejudice is the critical concern" (*id.*). Here, this Court is conducting a de novo review of the evidentiary facts before the trial court, not a review of a state agency determination, as in *Matter of 985 Fifth Ave. v State Division of Hous. & Community Renewal* (171 AD2d at 572). The record indicates that plaintiff did not raise the useful life issue until the filing of her pretrial memorandum of law on December 9, 2015, approximately 3½ years after filing her complaint on August 31, 2011 and only one month prior to the commencement of the

trial. Thus, in this case, it was defendants, not plaintiff, who were prejudiced by plaintiff's delay in raising this issue, although she could have done so by amending her complaint.

In any event, defendants were not required to include in their DHCR registration forms descriptions of any IAIs performed in 1995, 1998 or 2009 or to adhere to a useful life schedule in performing IAIs (*see* 9 NYCRR 2522.4[a][1] [no provision for DHCR application, review or approval process for IAIs]; *cf.* 9 NYCRR 2522.4[a][2][d], [e] [providing for DHCR application and review process and useful life schedule for "major capital improvements"]; *Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36, 42 [2d Dept 2006] [contrasting subdivisions 1 and 2 of 9 NYCRR 2522.4[a]).[4]

In her post-argument supplemental submission, plaintiff relies on the recent decision in *Rossman v Windermere Owners, LLC* (Sup Ct, NY County, Jan. 4, 2019, Nervo, J., index No. 108350/11), where Supreme Court held that the defendants failed to substantiate the invoices reflecting claimed IAIs performed by

[4] Contrary to the dissent, the review process referenced in *Wiggins* for filing of complaints references complaints filed before the DHCR, which is not the case here. Furthermore, the bathroom and kitchen upgradings to which 9 NYCRR § 2522.4(a)(2)(d)(11) and (12) refer are among those listed as "Major Capital Improvements," and do not apply to the IAIs performed in the kitchen and bathroom in this case.

the same contractors in a different apartment in the same building as in the instant case. *Rossman* is materially distinguishable from the instant case, however.

At the outset, the court in *Rossman* did not have before it the types of evidence presented in this case, including cancelled checks in payment of the related invoices and photographs of the recent renovations to the apartment corresponding to the work described in the invoices. Additionally, evidence in *Rossman* undermined the defendants' case, including discrepancies in Lorenz's plumbing invoices and expert testimony refuting the installation of new oak flooring and moldings. There was no such contradictory evidence in this case, however.

Furthermore, it makes no sense that defendants would incur more than $78,000.00 in contracting expenses if all that was needed was $21,972.00 in IAIs in order to qualify apartment 4K for exemption from rent stabilization, unless the expenses were necessary to address an emergency situation, such as water damage to the apartment. This scenario is consistent with Baigelman's testimony that there was extensive water damage to some of the apartments in the building prior to the 2009 renovations of those apartments, as well as Molen's testimony that some of the apartments in the building had to undergo a gut renovation, although he could not recall if apartment 4K was one of those

apartments.

3. Treble Damages

As we find that there was no rent overcharge in this case, we have no occasion to address the issue of whether plaintiff is entitled to treble damages due to defendants' willfulness in overcharging plaintiff.

Accordingly, the judgment of the Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017, in favor of plaintiff against defendants, should be reversed, on the law and the facts, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. The appeal from the order of the same court and Justice, entered October 18, 2017, which, following a nonjury trial, directed entry of judgment in favor of plaintiff, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Kapnick and Singh, JJ. who dissent in an Opinion by Singh, J.

SINGH, J. (dissenting)

I respectfully dissent for the following reasons. First, the majority usurps Supreme Court's authority to make factual findings. Second, contrary to our caselaw, in essence the majority has improperly placed the burden of proof on the tenant to establish that the apartment was illegally deregulated based on alleged individual apartment improvements made by the landlord. Accordingly, I would affirm Supreme Court's fact-intensive inquiry.

While we may review factual findings of the trial court, our power is not limitless. Where, as here, findings of fact are based on the credibility of witnesses, the Court of Appeals instructs as follows:

> "[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses"

(*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted]; *see Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006] ["Although this Court enjoys broad powers to review the facts, due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the

witnesses"]; *see also D.S. 53-16-F Assoc. v Groff Studios Corp.*, 168 AD3d 611 [1st Dept 2019] [internal quotation marks omitted]; *PSKW, LLC v McKesson Specialty Arizona, Inc.*, 159 AD3d 559 [1st Dept 2018]; *Rubin v George*, 136 AD3d 447, 448 [1st Dept 2016]; *Legrand v Ganich*, 122 AD3d 411 [1st Dept 2014]).

In 1984, 666 West End Avenue (the Windermere) in Manhattan was owned and registered by defendant Chateau with New York State Division of Housing and Community Renewal (DHCR). Apartment 4K (Apt 4K) was registered as rent stabilized until June 18, 2009, with a registered rent of $1,450.70. In 2009, defendants removed Apt 4K from rent stabilization.

Plaintiff Laura DiLorenzo entered into a one-year lease commencing on October 1, 2009 for Apt 4K at $2,300 per month. On July 1, 2010, Chateau filed a registration statement with DHCR asserting that Apt 4K was permanently exempt from rent stabilization due to high rent vacancy. In October 2010, Chateau renewed plaintiff's lease for an additional year, increasing plaintiff's rent to $2,415 per month. The lease was set to expire on September 30, 2011.

On November 18, 2010, the Windermere was sold to defendant Owners. Thereafter, on August 31, 2011, plaintiff commenced this action, alleging that the lawful stabilized rent for the Apt 4K

was $1,450.70. Plaintiff asserted she was overcharged by defendants who fraudulently represented that the apartment was not subject to rent stabilization. Plaintiff further averred that defendants' DHCR decontrol filing was fraudulent in that the legal rent did not exceed the $2,000 threshold for destabilization. In addition, she contended that defendants violated Administrative Code of the City of NY § 26-504.2, by not providing plaintiff with certified written notice of decontrol, despite her demand. Plaintiff sought a judgment against defendants for rent overcharges, treble damages, a declaratory judgment that she was a rent stabilized tenant and an injunction barring defendants from evicting her.

Defendants answered, stating, inter alia, that the premises qualified for permanent deregulation.

A nonjury trial was held in January 2016. The parties stipulated that defendants would have had to expend $21,972 on individual apartment improvements on Apt 4K in order to be entitled to the rent increase they charged plaintiff. Defendants claimed that in 2009 they spent $82,015.27 in improvements on Apt 4K.

In support of defendants' claims, Simon Baigelman (Baigelman), the building manager between 1986 and 2011 and part owner of Chateau, testified that he oversaw all aspects of

management including rentals, leasing, rent collection, and facility maintenance. The procedure for making repairs or improvements to apartments was for him to contact contractors to look at the proposed work, estimate the cost, and reach an agreement on the project.

Baigelman testified that he had hired HFM Company, Inc. (HFM) as the contractor. After work was performed, HFM would send Baigelman an invoice. Baigelman was shown a $60,000 invoice from HFM, dated October 14, 2009. The invoice stated that the "job location" was "Suite #4K." The invoice reflected that the flooring was ripped out and new subfloors, wood flooring, trim, door frames, a new kitchen, a new slab and tiles were installed in the bathroom.

Baigelman stated that he assumed that he had received the invoice in the ordinary course of business. However, he did not remember if it was filed with defendants' records contemporaneously to receipt of the invoice. He also assumed that the invoice was for work performed in Apt 4K but could not confirm that the work had actually been done. The court sustained plaintiff's objection to the admission of the invoice as a business record on the ground it lacked a proper foundation. The court noted that Baigelman was testifying based entirely on the invoice in front of him, which was not in evidence.

Baigelman stated that he did not recall the specific apartment but "assumed" that everything was ripped out back to the original and redone. He also testified that based on the review of the bill – which was not in evidence – he "assumed" there was a gut renovation of the kitchen and bathroom.

Baigelman also testified that it was "highly unlikely" that a gut renovation had also been done to Apt 4K earlier in 1995 or 1998, but he did not remember. He also could not "recall" whether or not he paid the invoice in front of him.

Defendants failed to produce DHCR forms that would have supported such improvements for the relevant years: 1995, 1998, and 2009. Defendants also failed to adduce any testimony from Baigelman verifying that plaintiff's photographs corroborated the 2009 improvements.

Baigelman identified a check signed by him on behalf of Chateau for $63,097.81 payable to HFM. There was no apartment number nor was there an invoice number on the check. The amount on the check issued by defendants did not match the amount on the invoice. Nonetheless, Baigelman testified that he believed that the check was for work in Apt 4K and other work that was possibly done at the Windermere.

Baigelman stated that after work was performed in the building, he walked through apartments with the job supervisor to

make sure everything was completed prior to paying an invoice. He explained that he would not have paid the invoice for $60,000 without an inspection because it was for a large sum of money.

However, in response to a question as to whether he approved the work reflected in the HFM invoice, Baigelman replied that he did not remember the specifics because it was a long time ago, but he "assumed" that he had inspected the apartment, reviewed HFM's work, and subsequently paid the invoice. He stated that he "ha[d] to believe" that the invoice was paid in full. The check for $63,097.81 was admitted into evidence.

Howard Molen (Molen), HFM's owner, testified that he received calls from Baigelman in 2009 to do work in the Windermere. He identified his invoice and testified that HFM performed the work reflected in the invoice. It was the business of HFM to prepare invoices contemporaneously with the services. He was not on the job site for the work reflected in the invoice, but he prepared the invoice based on what was told to him by his employees, who had a business duty to report the information to him accurately. The HFM invoice seeking the sum of $60,000 was admitted into evidence as a business record.

Molen stated that the invoice did not break down the price of individual items of the job, and there was no way to determine the cost of each component. Molen never saw the construction and

relied on information provided to him by his workers. He also did not conduct a final inspection of the job site. Again, defendants failed to have Molen verify that plaintiff's photographs corroborated the 2009 improvements HFM allegedly performed.

Molen stated that the check for $63,097.81 satisfied the invoice and additional outstanding invoices. The other alleged outstanding invoices were not introduced into evidence.

On cross-examination, Molen testified that in 1999 he and HFM pled guilty to a commercial bribery scheme where he kicked back 10% of his fees to employees of a management company in order to obtain work.

Molen no longer had invoices for the materials he used in the job because of a flood in his office. He did not file an insurance claim for the damage to his office.

The court also heard testimony regarding the alleged plumbing work done in Apt 4K. Baigelman testified that the work was performed by Mike Lorenz Corp. (Lorenz), the plumbing contractor used by the building.

While Baigelman identified his handwriting on a Lorenz invoice, he did not recall the nature of the work reflected in the invoice. He stated that it appeared to be a renovation of the bathroom and kitchen in Apt 4K. He assumed he paid the

invoice. Baigelman also identified a check payable to Lorenz from Chateau but did not know if the check was for the work reflected in the invoice. He stated that the check was dated October 2009, and the invoice was dated a month earlier. He paid bills in a timely manner but had no way to verify whether the invoice and the check were related. He noted that the check was for more than the invoice and stated that invoices were sometimes grouped for payment. Baigelman testified that the check "[m]ost likely . . . could have been" for the Lorenz invoice but he needed to see the other invoices that corresponded with the balance on the check. When Baigelman was shown a document to refresh his recollection, he stated that the check could have been for payment of the invoice for work in Apt 4K. However, the check did not reflect the apartment number where the work was done or an invoice number connecting the invoice to the check.

Annette Lorenz, owner of Lorenz, did not work for the company during the relevant time period (1995 – 2010), but worked there during an earlier time period. After her late husband, a master plumber, died in 2005, she began to play a greater role in the business to ensure it would continue. A secretary was involved in billing and reported to Annette until the secretary passed away in 2009. She recognized the secretary's handwriting and the signature of the master plumber on a certificate of

capital improvement form that was prepared when plumbing work was completed at the Windermere. However, she had no personal knowledge of the work reflected on the certificate.

Annette testified that the Lorenz invoice dated September 29, 2009 for $13,251.90 was prepared in the ordinary course of business and that it was part of the business to prepare such records. She testified that a check for $16,365.27 payable to Lorenz may have been payment of more than one invoice. A check dated October 8, 2009 for $16,365.27 payable to Lorenz was admitted into evidence.

The Lorenz invoice for $13,251.90 and another invoice dated July 28, 2009 for $3,113.32 were not admitted into evidence. The court found that Annette was not at the company at the time the invoices were prepared and was not qualified to testify as to the record keeping procedures of the secretary.

A certificate of capital improvement issued by Lorenz to Chateau, dated June 22, 2009, which was admitted into evidence, stated that the kitchen and bathroom renovations were "furnished and installed" in Apt 4K. The certificate did not state the costs for the improvements that had been performed or the final price of the work.

Baigelman testified that the registration with DHCR stating that Apt 4K was decontrolled had been prepared by him or under

his supervision. However, he did not remember if the improvements to Apt 4K in 1995 cost $19,785.60, which was the amount necessary in order to justify the increase in rent from $683.36 to $1,175. He also did not remember if the increase from $1,175 to $1,270 in 1997 or 1998 was justified by the expenditure of $3,800 or even the nature of the work completed at that time.

During the course of Baigelman's testimony, Supreme Court admonished him for not having a recollection of the alleged improvements made to Apt 4K. Instead, his testimony was based only on the documents shown to him on the stand.

Supreme Court found that the documentary evidence did not establish the claimed improvements. The court concluded that defendants were not entitled to a rent increase for the $60,000 billed by HFM as it failed to substantiate HFM's invoice for $60,000. Defendants did not produce a witness with personal knowledge substantiating that the work shown on the invoice was actually completed in Apt 4K. Nor did they present a witness confirming payment of the invoice. The court noted that Baigelman did not remember and did not actually inspect the work claimed on the invoice. Molen was never on the job site and did not perform a final inspection. Supreme Court observed that the $63,097.81 check to HFM did not indicate that it was for work in Apt 4K, and it was for an amount that was greater than the

invoice, casting doubt on what work the check covered.

Supreme Court further found that defendants failed to substantiate their claim for plumbing work by Lorenz. The Lorenz invoices were not admitted into evidence. The court noted that the check to Lorenz did not indicate that it was for work done in Apt 4K. The certificate of capital improvement did not list the final cost for the alleged improvements. The check for $16,365.27 tendered to Lorenz did not identify the apartment in which work was allegedly performed. Further, the court did not credit Baigelman's testimony as he could not remember which plumbing improvements, if any, were performed in Apt 4K. Nor did Baigelman know whether the check was specifically for work done in Apt 4K.

Similarly, Annette Lorenz did not work for Lorenz during the relevant time period and had no personal knowledge of the plumbing work in Apt 4K. She did not have a role in creating the certificate for capital improvement. Accordingly, the court concluded that defendants were not entitled to a rent increase based on the plumbing work in the apartment.[1]

---

[1] Supreme Court found that defendants only substantiated the claim for $5,650 in electrical work by Contractors Electrical Services (CES), since defendants (1) submitted an invoice for the work, (2) had the person who prepared the invoice confirm the work was completed in Apt 4K, and (3) that same person confirmed that the invoice was paid in full.

Supreme Court also found that defendants failed to show that the work claimed in 2009 was not duplicative of the improvements performed in 1995 and 1998, or that the earlier work had outlasted its useful life. The court noted that Baigelman did not remember what was done in 1995 and 1998. Defendants did not offer the DHCR registration forms describing the improvements.

Therefore, defendants were entitled to a monthly rent increase of 1/40th of the cost of this improvement, or $141.25. The court found that the legal rent for Apt 4K was thus $1,591.25, well below the $2,000 threshold necessary for rent destabilization on the ground of high rent vacancy decontrol.

Finally, the court determined that plaintiff was entitled to treble damages as defendants failed to rebut the presumption of willfulness. The court found that defendants did not substantiate the claimed improvements and offered no evidence of a good faith belief that the improvements were allowable or were actually performed.

Supreme Court directed entry of a judgment in favor of plaintiff and against defendants jointly and severally. Owners was directed to provide plaintiff with a rent stabilized lease. The court severed the issue of plaintiff's reasonable attorneys' fees and referred the matter to a special referee for a hearing.

Defendants appeal.

Improvements

In order to obtain a rent increase for a rent stabilized apartment, the owner must substantiate improvements with documentation demonstrating that the work was actually performed and that the money was spent on the improvements (9 NYCRR 2522.4; *see Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 440 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017]).

There must be sufficient proof that work has been performed (*see Altschuler*, 135 AD3d at 440 [the affidavit of a lease administrator stating the amount of improvements performed was insufficient as it was unsupported by "bills from a contractor, an agreement or contract for work in the apartment, or records of payments"] [internal quotation marks omitted]; *72 Realty Assoc. v Lucas,* 101 AD3d 401, 402-403 [1st Dept 2012] [the record does not contain anything to support landlord's renovation claim, including for example, bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations]; *Matter of 985 Fifth Ave., v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991] [an invoice provided by a landlord for air conditioners "did not match the serial numbers listed in the letter intended to prove that seven units had been installed in

the tenant's apartment"]).

Here, the trial court conducted a fact-intensive inquiry to determine whether defendants met their burden to establish that they made individual apartment improvements in a sum exceeding $21,972. Supreme Court was in the best position to assess the evidence and credibility of the witnesses. The trial court gave little weight to the testimony of Baigelman, Molen, and Lorenz as the witnesses lacked personal knowledge of the work performed in Apt 4K. The trial court properly found that defendants failed to establish that the general contractor and the plumbing contractor actually performed the work in Apt 4K that was referenced in their invoices, and that they were paid for the work. Nor did the documentary evidence verify that improvements were made in Apt 4K.

In short, it cannot be said that the trial court's findings are so contrary to the weight of the evidence that "it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson*, 80 NY2d at 495 [internal quotation marks omitted]).

The majority ignores Supreme Court's findings of fact and instead conducts a de novo review of the record citing to *Northern Westchester Professional Park Assoc. v Town of Bedford*, (60 NY2d 492, 499 [1983]) and *Green v William Penn Life Ins. Co.*

of N.Y. (74 AD3d 570, 572 [1st Dept 2010]). While an appellate court may render a judgment it finds warranted by the facts, "due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the witnesses" (*Horsford*, 32 AD3d at 310 [internal quotation marks omitted]; *see also Northern Westchester*, 60 NY2d at 499; *Green*, 74 AD3d at 571).

In any event, a de novo review also supports Supreme Court's findings. The majority reasons that by adding the HFM invoice for $60,000, the Lorenz invoice for $13,251.95 and the CES invoice for $5,650, a total of $78,901.95 of improvements were performed in Apt 4K. It argues that the checks, photographs and testimony "overwhelmingly support[s]" the amount of work done to the apartment. While the math is correct, this finding is not supported by the record, as no legal conclusions could be drawn from the documents in the record without witness testimony connecting them to the work allegedly performed in Apt 4K.

The HFM invoice for $60,000 notes that the job location is "Suite #4K." However, defendants failed to substantiate that the work on the invoice was performed or that the amount of $60,000 was paid for the improvements. Baigelman's testimony is built on a series of assumptions. He assumed that he received the invoice in the regular course of business, he assumed that there was a

gut renovation of a kitchen and bathroom, he assumed that he had inspected the apartment, he assumed that he had paid the invoice and he assumed that the check for $63,097.81 was for work done on Apt 4K and possibly for additional work that was done. In fact, the check to HFM for $63,097.81 does not reference that it was for work performed in Apt 4K, and is for an amount that is greater than the invoice. The majority connects the check with the invoice with Baigelman's testimony, which Supreme Court found to not be credible.[2]

Molen identified the invoice and testified that HFM performed the work reflected in the invoice. However, he conceded that he was not on the job site and did not perform a final inspection. He relied on information provided to him by his workers to prepare the invoice. He also admitted that in 1999, he and HFM pleaded guilty to commercial bribery based on a kickback scheme orchestrated by him. Except for Molen's testimony, which Supreme Court found to not be credible, we note that the majority has not pointed to evidence that proves that

[2] The majority contends that Supreme Court did not make credibility determinations simply because it did not reference the word credibility in its opinion. While it is correct the word "credible" is not used, the record reflects that Supreme Court consistently admonished Baigelman, Molen, and Annette Lorenz for not having any recollection of the work done in Apt 4K, and rejected in large part their testimony that the purported improvements were made to the apartment.

work was performed in Apt 4K.

Similarly, the alleged plumbing work performed by Lorenz was not substantiated by testimony or documentary evidence. The invoice for $13,251.90 was not admitted into evidence by the trial court. The majority credits Baigelman but ignores the inconsistency in his testimony and conflicting documentary evidence. In fact, Baigelman did not recall the nature of the plumbing work reflected on the invoice and merely identified his handwriting on the invoice. He could only speculate that he had paid the invoice. He also could not say if the check dated October 8, 2009 for $16,365.27 was for the work reflected on the invoice. The check was for more than the invoice and does not reference the invoice or apartment number where the work was allegedly performed.

Annette Lorenz, the only witness called to testify on the plumbing work, did not work for Lorenz at the time the work was allegedly performed on Apt 4K. She had no personal knowledge of the work reflected on the certificate of capital improvement and did not visit the job site. The certificate by Lorenz did not list the costs or final price for the work described in Apt 4K.

Contrary to the majority's factual findings, the photographs do not corroborate that work was performed by HFM and Lorenz on Apt 4K. The photographs, which were offered into evidence by

plaintiff, do not show what work was done or whether they depict improvements that are contemporaneous to the work actually performed in 2009. The majority attempts to use plaintiff's testimony that the photographs "fairly and accurately" depict the improved condition of Apt 4K in 2009. However, plaintiff stated that the photographs were taken in 2016, not in 2009. In fact, plaintiff submitted the photographs to show that *no* improvements were depicted. Defendants' counsel even initially objected to the introduction of the photographs into evidence and plaintiff's testimony regarding them, stating that "[t]he condition of the apartment today as opposed to what it was in 2009 . . . is irrelevant."

Only during closing arguments did defendants' counsel argue that the photographs depicted improvements and corroborated the invoices and checks defendants presented, even though the photographs were not shown to defendants' witnesses. Argument by defendants' counsel that the photographs show a renovated apartment, which is adopted by the majority, is not evidence (*Sperduti v Mezger*, 283 AD2d 1018, 1019 [4th Dept 2001]; *Merenda v Consolidated Rail Corp.*, 248 AD2d 684, 687 [2d Dept 1998]). In fact, the majority's uncertainty about what the photographs corroborate is reflected by its use of the words it "appears to be" and "probably." In sum, the photographs are of no

evidentiary value to the issues in this case.

The majority mischaracterizes Supreme Court's findings by stating that Supreme Court improperly imposed a "personal knowledge" requirement. To the contrary, Supreme Court correctly found that there must be adequate documentation of the improvements to remove plaintiff's apartment from rent stabilization. This finding is fully supported by DHCR Policy Statement 90-10 [1990], which requires that the costs of improvements must be established by adequate documentation, which should include at least one of the following: "(1) Cancelled checks contemporaneous with the completion of the work; (2) Invoice receipt marked paid in full contemporaneous with the completion of the work; (3) Signed contract agreement; (4) Contractor's affidavit indicating that the installation was completed and paid in full."

Here, the checks to HFM and Lorenz do not state that they were for improvements made to Apt 4K or that they were issued contemporaneously with the completion of the work. The invoices are not marked paid in full. Finally, there is no signed contract agreement or contractor's affidavit (*cf. Jemrock Realty Co. LLC v Krugman*, 64 AD3d 290, 296, 298 [1st Dept 2009] [where a "signed contract agreement" and "contractor's affidavit indicating that the installation was completed and paid in full"

was produced], *revd on other grounds,* 13 NY3d 924 [2010]). The inadequate documentation was not cured by the testimony of the witnesses produced by defendants. There is no reliable testimony that the invoices and checks were issued contemporaneously to the completion of the work in Apt 4K.

The majority states that the documentation submitted by defendants demonstrates that the improvements were performed in accordance with the 90-10 evidentiary standards and our precedent (*see Stulz v 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Matter of Kolinsky v Towns*, 137 AD3d 496 [1st Dept 2016]). However, in *Stulz*, the defendant landlord "provided a construction contract, cancelled checks, and the testimony of the contractor" as substantiation for the improvements, which Supreme Court there found to be credible (*Stulz*, 150 AD3d at 559). Here, Supreme Court found that the testimony of Molen and Lorenz did not substantiate the claimed improvements. Further, Supreme Court in *Kolinsky* deferred to the DHCR determination as it did not find it "arbitrary and capricious" (*Kolinsky,* 137 AD3d at 497). Accordingly, neither case supports the majority's contention that our precedent mandates a different result.

We note that this appeal was calendared together with *Smoke v Windermere Owners LLC* and *Chekowsky v Windermere Owners, LLC*

(Appeal Nos. 7932-7935)[3], which involve the same defendants sued by different tenants of the Windermere for unlawful high rent deregulation. In *Chekowsky v Windermere Owners, LLC* (114 AD3d 541 [1st Dept 2014]), we found in an earlier appeal that the defendants failed to provide adequate documentation for improvements which resulted in the removal of the apartment from rent stabilization. We rejected the defendants' employee's affidavit, finding that "the employee was not a person with knowledge of the facts, and her statement was unsupported by any admissible evidence, such as affidavits by the various vendors she claimed would testify to additional improvements at trial, and devoid of an explanation of why they are not now available" (*id.* at 542).

Similarly, in *Smoke v Windermere Owners LLC* (130 AD3d 522 [1st Dept 2015]), we found the defendants liable for rent overcharges based on their inability to provide adequate documentation for individual apartment improvements that was the basis for removing the apartment from rent stabilization.

The majority argues that both *Smoke* and *Chekowsky* may be

[3] We previously resolved the issue of whether the apartments were properly removed from rent stabilization. The current appeals involve the trial court's findings as to willfulness and treble damages. We decide these appeals simultaneously herewith and affirm Supreme Court's findings of willfulness and treble damages.

distinguishable, because the defendants proffered *no* documentation to support their claimed improvements in those cases. We disagree. In *Chekowsky* (114 AD3d at 542), we discussed the inadequacy of the evidence proffered and expressly stated that the evidence was inadequate. Similarly, in *Smoke* (130 AD3d at 522), we affirmed the trial court's finding that "defendant Windermere Owners LLC [was] liable for rent overcharges based on its inability to provide adequate documentation for the improvements." Here, defendants' alleged improvements are not supported by adequate documentation.

Accordingly, even a de novo review of the evidence fully supports Supreme Court's findings that defendants failed to establish individual apartment improvements to Apt 4K.

Useful Life

A landlord is entitled to a rent increase equal to 1/40th of the total cost of any qualifying improvements made or new furnishings to rent stabilized apartments (9 NYCRR 2522.4[a] [1]; Administrative Code § 26-511[c][3]), but is not entitled to an increase for improvements or replacements to furnishings and equipment that have not yet exceeded their useful life (9 NYCRR 2522.4[a][1]; Administrative Code § 26-511[c][13]). A useful life schedule is provided in 9 NYCRR 2522.4(a)(2)(i)(d), with periods ranging from 15 to 30 years based on the specified

improvement. In order to obtain a rent increase, a defendant bears the burden to demonstrate that the useful life was exceeded for the claimed improvement (*see 985 Fifth Ave.*, 171 AD2d at 574-575).

Defendants argue that Supreme Court should not have made a finding that the work in 1995 and 1998 had not outlasted its useful life, because plaintiff "waived" this issue, having failed to plead it as an "affirmative defense." They also contend that absent a showing of fraud, the trial court was precluded from reviewing events going back more than four years from the date of the filing of the complaint, August 30, 2007.

The majority adopts defendants' arguments that useful life was waived. Unable to cite a case for this proposition, the majority argues that the issue is not properly before us on appeal.

We disagree. Since plaintiff did not have the burden to establish useful life, she was not required to plead it in her complaint (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 86 [1st Dept 2015] [a defendant bears the burden of pleading and proving its affirmative defenses]). Accordingly, Supreme Court properly made findings with respect to useful life. The issue is squarely before us.

The majority argues that defendants were prejudiced because

plaintiff did not raise useful life in her complaint. Since defendants' answer should have interposed the affirmative defense of useful life, they cannot now on appeal claim prejudice for their own omission. Moreover, we note that the majority's concern that defendants were prejudiced was not raised by defendants at trial, in their posttrial submissions, or even on appeal.

Next, the majority contends that under *Matter of Rockaway One Co., LLC v Wiggins* (35 AD3d 36, 41-43 [2d Dept 2006]), defendants are not required to comply with the DHCR useful life schedule and improvement review process. This statement is correct only in part. In fact, the Second Department stated, "[T]he DHCR has declined to review [improvement] increases *except upon the complaint of a tenant who has actually been charged such an increase*" (*id.* at 42 [emphasis added]). Here, plaintiff has filed a complaint asserting that the increase she was charged is unlawful.

Contrary to the majority, the useful life schedule in 9 NYCRR 2522.4(a)(2)(d) applies to these improvements, as it references the need for review and compliance of both bathroom and kitchen upgrading, which were the improvements allegedly performed on Apt 4K (see 9 NYCRR 2522.4[a][2][d][11], [12]; *see also Kuzmich v 50 Murray St. Acquisition LLC*, 157 AD3d 556, 557

[1st Dept 2018] ["[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent"] [internal quotation marks omitted]).

Turning next to the issue of the look-back period, it is well settled that the court may disregard the four-year statute of limitations and examine the entire rental history of the apartment in order to determine the legality of the base rent where it has been found that the landlord has engaged in a fraudulent scheme (*see Thornton v Baron*, 5 NY3d 175, 181 [2005]; *see also Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. Of Rent Admin.*, 15 NY3d 358, 365 [2010]; *Matter of Regina Metro. Co., LLC v N.Y. State Div. of Hous. & Community Renewal*, 164 AD3d 420, 432 [1st Dept 2018], *appeal dismissed* 32 NY3d 1085 [2018]).

Here, plaintiff advanced a colorable claim of fraud within the meaning of *Grimm*. There was substantial evidence that defendants engaged in a scheme to set an illegal rent to remove Apt 4K from rent stabilization.

Accordingly, Supreme Court correctly found that defendants failed to demonstrate that the useful life of the improvements made to Apt 4K in 1995 and 1998 had been exceeded entitling them to a rent increase for the claimed 2009 improvements.

Treble Damages & Attorneys' Fees

Rent Stabilization Law § 26-516(a) provides that "[o]nce [an] owner is found to have charged an unlawful rent, it is presumed to have acted badly and the burden is placed upon it to establish by a preponderance of the credible evidence that it did not know the rent it was charging was unlawful" (*Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1st Dept 2007]). If the owner fails to make such a showing, treble damages must be imposed as a penalty (*id.*).

The record supports Supreme Court's finding that the rent overcharges by defendants were willful. Defendants failed to substantiate the improvements or that they paid the sums on the claimed invoices. No evidence was adduced as to defendants' good-faith belief that the rent overcharges were justified.

Based on my view that the overcharge was willful, plaintiff, as the prevailing party, should be entitled to an award of reasonable attorneys' fees (*see* 9 NYCRR 2526.1[d]; *Conason v Megan Holding, LLC*, 109 AD3d 724, 727 [1st Dept 2013], *affd in relevant part* 25 NY3d 1 [2015]). Accordingly, the matter should be remanded for a hearing on plaintiff's reasonable attorneys'

fees and costs in responding to the appeal (*see Duell v Condon*, 200 AD2d 549, 549-550 [1st Dept 1994], *affd* 84 NY2d 773 [1995]; *Washburn v 166 E. 96th St. Owners Corp.*, 166 AD2d 272, 273 [1st Dept 1990]).

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017, reversed, on the law and the facts, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered October 18, 2017, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Kahn, J. All concur except Kapnick and Singh, JJ. who dissent in an Opinion by Singh, J.

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, 2018

CLERK

CORRECTED OPINION - JUNE 24, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Barbara R. Kapnick
Marcy L. Kahn
Anil C. Singh JJ.

7930-7931
Index 110053/11

_____x

Laura DiLorenzo,
Plaintiff-Respondent,

-against-

Windermere Owners LLC, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the judgment of the Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017, in favor of plaintiff against them, and from the order of the same court and Justice, entered October 18, 2017, which, following a nonjury trial, directed entry of judgment in favor of plaintiff.

Rosenberg, Feldman, Smith, LLP, New York (Richard Bruce Feldman of counsel), and Cullen & Associates, P.C., New York (Kevin D. Cullen of counsel), for appellants.

Marc Bogatin, New York, for respondent.

KAHN, J.

On this appeal, we are asked to determine whether the record sufficiently demonstrates that defendants Windemere Chateau, Inc. (Chateau), the original owner of a residential building located at 666 West End Avenue in Manhattan, and Windermere Owners, LLC (Owners), the successor owner of the building, expended an amount in qualified individual apartment improvements (IAIs) to apartment 4K in that building sufficient to render that apartment exempt from rent stabilization. Should we answer that question in the negative and conclude that defendants imposed a rent overcharge on the apartment's tenant, plaintiff Laura DiLorenzo, we are then asked to determine whether there was evidence supporting a finding of willfulness on defendants' part in doing so, warranting an award of treble damages to plaintiff. Upon our de novo review of the record, we conclude that defendants have substantiated their claims that they have made sufficient expenditures for IAIs performed in the apartment to warrant an exemption from rent stabilization and did not impose a rent overcharge. Thus, we do not reach the issue of whether defendants willfully imposed a rent overcharge.

I. FACTUAL BACKGROUND

Beginning in 1984, Chateau registered apartment 4K with the New York State Division of Housing and Community Renewal (DHCR)

as rent stabilized. The apartment continued to be registered as rent stabilized until June 18, 2009. Prior to that date, the registered monthly rent had been $1,450.70.

According to defendants, sometime in 2009, renovations were made to apartment 4K, including general contracting, plumbing and electrical work.

On September 25, 2009, plaintiff and then-building owner Chateau entered into a one-year lease commencing on October 1, 2009, for apartment 4K. That lease provided for a monthly rent of $2,300.00, plus a monthly supplement for air conditioning.

On July 1, 2010, Chateau filed a registration statement with the DHCR declaring that apartment 4K was permanently exempt from rent stabilization due to high rent vacancy.

In October 2010, the lease of apartment 4K was renewed for an additional year for a monthly rent of $2,415.00, plus the supplement.

On November 18, 2010, Chateau sold the building to Owners and assigned the renewed lease of apartment 4K to Owners as part of its purchase of the building.

On August 31, 2011, plaintiff filed a complaint in which she alleged that she was overcharged, in that the lawful stabilized rent for apartment 4K was $1,450.70, and that the apartment was improperly removed from rent stabilization. She further alleged

that defendants' rent overcharge was willful, as demonstrated by defendants' July 2010 DHCR filing, which, according to plaintiff, was false and fraudulent.

II. THE TRIAL

A nonjury trial commenced on January 19, 2016. At trial, the parties stipulated that defendants would have to have expended $21,972.00 on in apartment 4K in order to be entitled to the rent increase they charged plaintiff. Defendants claimed that in 2009 they spent $82,015.27 in IAIs on the apartment, including $60,000.00 in renovations performed by general contractor HFM Company, Inc. (HFM), $16,365.27 in plumbing work performed by Mike Lorenz Corp. (Lorenz) and $5,650.00 in electrical work performed by Contractors Electrical Service, Inc. (CES).

By decision and order entered October 18, 2017, the trial court determined that defendants failed to substantiate general contractor HFM's invoice for $60,000.00 for work it performed in apartment 4K. The court found that there was no trial testimony from any witness, including defense witnesses Simon Baigelman, the property manager and part owner of the building in 2009, and Howard Molen, principal of HFM, with personal knowledge that the work described in the invoice was actually completed as claimed, and that neither Baigelman, who had no recollection of the work

set forth in the invoice, nor Molen, who had never visited the work site, had performed a personal inspection of the work performed at the apartment. The trial court also found that a check dated December 16, 2009 and drawn on Chateau's account for $63,097.81, payable to HFM, was insufficient to substantiate defendants' claims, in that there was no indication on the check itself that it was in payment for the work set forth in the invoice and the check was for an amount greater than $60,000.00. The court also determined that defendants failed to show that the IAIs they claimed were performed in apartment 4K in 2009 were not duplicative of IAIs performed in the same apartment in 1995 and 1998, or that the earlier work had outlasted its useful life.

The trial court also determined that defendants had failed to substantiate their claim that plumbing work had been performed by Lorenz in apartment 4K in 2009. The court, having previously declined to admit into evidence two Lorenz invoices proffered by defendants, including a Lorenz invoice dated September 29, 2009 for kitchen and bathroom renovation in apartment 4K, found that defendants failed to offer any invoices from Lorenz for plumbing work in the apartment. The court found that a check dated October 8, 2009 and drawn on Chateau's account in the amount of $16,365.27, payable to Lorenz, did not substantiate defendants' claim, in that the check itself did not indicate that it was in

payment for work done in apartment 4K. The court also found that a certificate of capital improvement dated June 22, 2009, describing plumbing work performed by Lorenz in apartment 4K, did not substantiate the claim in that it did not list the costs or final price for the work described. The court further observed that Baigelman had testified that he could not recall what plumbing work, if any, he had requisitioned from Lorenz for apartment 4K and did not know if the check for $16,365.27 was in payment solely for work performed in that apartment. The court also noted that defense witness Annette Lorenz, the widow of the original owner of Lorenz who worked at the company in 2009, but was not a licensed plumber, had testified that she had no personal knowledge of Lorenz's plumbing work in the apartment and had never visited the work site. The trial court, however, made no mention of the fact that Annette Lorenz authenticated the two Lorenz invoices for plumbing work.

Plaintiff introduced into evidence at trial a series of photographs she had taken of the apartment in 2016. These photographs clearly depict what appears to be new flooring, new tiling and a new bathtub and sink in the bathroom, as well as new appliances and cabinets in the kitchen. The trial court's decision made no mention of the photographs.

The sole IAI claim found by the trial court to be

substantiated was defendants' claim that $5,650.00 in electrical work had been performed in apartment 4K by CES. Based upon that claim only, the court concluded that defendants were entitled to a monthly rent increase of 1/40th of the cost of the electrical work, or $141.25. Adding this figure to the base rent, which, according to the court, was $1,450.00, the court found that the post-IAI legal rent was $1,591.25, which was below the $2,000.00 threshold required for lawful removal of the apartment from rent stabilization. The trial court found that plaintiff was entitled to a rent stabilized lease and damages for the overcharges paid in the amount of $77,700.00.

With regard to plaintiff's claim for treble damages, the trial court found that defendants failed to rebut the presumption that their overcharges were willful. Accordingly, the trial court awarded plaintiff treble damages of $233,100.00, along with reasonable attorneys' fees.

III. DISCUSSION

On appeal, defendants' principal argument is that the record supports a finding that IAIs were performed in apartment 4K in 2009 and that the apartment was properly declared exempt from rent stabilization. Plaintiff opposes, arguing that there is no reason to disturb the trial court's finding, which, according to plaintiff, rested in significant part on credibility

determinations.

A. Standard of Review

With regard to the appropriate scope of this Court's review on this appeal, it is well settled that as to the review of a judgment following a nonjury trial, this Court's "authority is as broad as that of the trial court" and that "as to a bench trial [the Appellate Division] may render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983] [internal quotation marks omitted]; *Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 571 [1st Dept 2010] [Saxe, J., concurring]). Put otherwise, in this case the appropriate standard of review is a de novo assessment of whether the weight of the evidence supports the determination, as set forth in *Northern Westchester Professional Park Assoc.* (*see Green*, 74 AD3d at 573 [Saxe, J., concurring]).

The dissent relies on *Thoresen v Penthouse Intl.* (80 NY2d 490 [1992]), and plaintiff relies on *Bubba's Bagels of Wesley Hills, Inc. v Bergstol* (18 AD3d 411, 412 [2d Dept 2005]), in support of the view that this Court should not disturb the trial court's findings of fact. Reliance on these cases is misplaced, however. The *Thoresen* decision instructs that a trial court's

determination should not be disturbed if that determination was based on a fair interpretation of the evidence, "especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (80 NY2d at 495 [internal quotation marks omitted]; *see also Bubba's Bagels*, 18 AD3d 412 [giving "appropriate regard" to trial judge's ability to assess credibility of witnesses, trial court's decision "could not have been reached on any fair interpretation of the evidence"]; *Cohen v Akabas & Cohen* (71 AD3d 419, 420 [1st Dept 2010] [citing *Thoresen* in applying "fair interpretation of the evidence" standard to uphold decision of special referee where findings of fact "largely rest upon considerations relating to the credibility of witnesses"]). As explained in *Green*, however,

> "Limiting appellate review to the fair interpretation of the evidence approach may be appropriate where the findings rest predominantly on credibility determinations, because such determinations are entitled to substantial deference. However, it is not appropriate where the trial court's findings rest largely on inferences drawn from established facts and verifiable assertions. In that case, there is no valid rationale for precluding the appellate court from finding facts, as indicated in *Northern Westchester Professional Park Assoc*."

(*Green*, 74 AD3d at 572 [Saxe, J., concurring]).

In this case, there is no statement in the trial court's decision and order to the effect that the court found any of the defendants' witnesses less than credible. Rather, the trial

court found the evidence to be legally insufficient, based on defendants' witnesses' lack of recall or lack of personal knowledge, not upon the witnesses' credibility. The evidentiary facts were undisputed, and the controversy was confined to what legal conclusions could be drawn from those facts. Thus, this is not a "close case" where there is any "valid rationale for precluding [this Court] from finding facts" based in part upon inferences drawn from facts established in the record and verifiable assertions (*id.; see Northern Westchester*).[1] Here, in contrast to *Thoresen*, given the absence of any mention of the credibility of the witnesses from the trial court determination, we are not limited to deciding whether that determination was based on a fair interpretation of the evidence. Indeed, in *Thoresen*, the Court "neither discussed nor mentioned the Appellate Division's well established broad authority to make its

[1], Moreover, contrary to the dissent's observation, in conducting a de novo review of the evidentiary facts, this Court is not ignoring the *Northern Westchester* Court's reference to taking the trial court's advantage of seeing the witnesses into account. The *Northern Westchester* Court specified that that factor is appropriately taken into account "in a close case" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d at 499). This is not such a case, however. Moreover, if this Court were to follow the dissent's apparent suggestion and defer to the trial court in all cases in which witnesses testified on the basis of the trial court's ability to personally assess the credibility of witnesses, this Court could never conduct a de novo review of any trial at which witnesses were called to testify.

own findings of fact, as recognized in *Northern Westchester Park Assoc.* (60 NY2d at 499)" (*Green*, 74 AD3d at 572 [Saxe, J., concurring]).

B. Standard of Proof

In a rent overcharge action, the defendant building owner has the "burden of proving the cost of the renovations made to the apartment to justify the rent it charged plaintiff" (*Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 683 [1st Dept 2011]). To meet that burden, the owner must present "documentary support therefor, [including] . . . all relevant invoices, bills, cancelled checks and/or other material" (*Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-575 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991]; *see* DHCR Policy Statement 90-10 [June 26, 1990] ["Any claimed . . . individual apartment improvement cost must be supported by adequate documentation which should include at least one of the following: 1) Cancelled check(s) contemporaneous with the completion of the work; 2) Invoice receipt marked paid in full contemporaneous with the completion of the work; 3) Signed contract agreement; 4) Contractor's affidavit indicating that the installation was completed and paid in full."] [90-10]).[2]

[2] On May 6, 2016, after commencement of the trial and prior to its conclusion, the DHCR issued Operational Bulletin 2016-1

C. Analysis

1. IAIs

Here, applying the *Northern Westchester* and 90-10 standards, the invoices and checks proffered by defendants at trial, when read together, and in conjunction with the testimony of the defense witnesses, more than sufficiently demonstrate that the costs of the 2009 IAIs well exceeded the $21,972.00 threshold needed for exemption of the apartment from rent stabilization. Specifically, with regard to the general contracting work performed by HFM in apartment 4K in 2009, defendants have presented documentary proof in the form of the HFM invoice, dated October 14, 2009, for $60,000.00 and the front and back of a cancelled check dated December 16, 2009 drawn on Chateau's

---

(2016-1), which "supersedes DHCR's Policy Statement 90-10 regarding the criteria which will be used when assessing an owner's substantiation for IAI expenditures." The 2016-1 criteria include:

> "1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
> "2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
> "3. Signed contract agreement; and
> "4. Contractor's affidavit indicating that the installation was completed and paid in full."

2016-1 further provides that "an owner should submit as many of the four listed forms of proof as the owner is able to provide . . . ." On this appeal, the parties appear to agree that 90-10 is the controlling standard, however.

account for $63,097.81 payable to HFM. The invoice sets forth in detail the work performed in "Suite #4K," including "installation of a new mica kitchen" and "construction of a new bathroom" with new "floor tiles."

The HFM invoice and Chateau check were both authenticated by the trial testimony of Molen and Baigelman. At trial, Molen laid a CPLR 4518 business record foundation for the invoice, and it was admitted into evidence. Molen further testified that HFM prepared its invoices contemporaneously with the performance of its services, and that the $63,097.81 check paid for the $60,000.00 invoice as well as other HFM invoices. This testimony is consistent with that of Baigelman, who testified that routinely, after work was performed by HFM, it sent him an invoice, which he reviewed and paid. He further testified that it was his common practice to pay all outstanding invoices in a single check. Further, Baigelman testified that he signed the $63,097.81 check on behalf of Chateau and that he believed that the HFM invoice was paid in full. Thus, the invoice and check have been authenticated by Molen's and Baigelman's testimony. Moreover, given Molen's testimony that he prepared invoices contemporaneously with the performance of services, as well as the temporal proximity of the invoice and the check, which are respectively dated in October and December of 2009, it is

reasonable to infer that the HFM invoice in question here was prepared contemporaneously with the completion of HFM's work in apartment 4K. Thus, the invoice and check, as authenticated by the testimony of Molen and Baigelman, whose credibility was not discounted by the trial court, satisfy the 90-10 requirements for substantiation of this IAI claim. Indeed, the HFM IAIs, in themselves, justify defendants' 2009 IAI rent increases.

The dissent's view that the $63,097.81 check does not substantiate that HFM performed the work in question because that check does not specifically reference apartment 4K and is in an amount greater than the HFM invoice takes into account neither Baigelman's testimony that it was his common practice to pay all outstanding invoices in a single check, nor the temporal proximity of the invoice to the payment.

Significantly, photographs of apartment 4K taken by plaintiff in January 2016 and admitted into evidence at trial depict what appears to be new flooring, new tiling and a new bathtub and sink in the bathroom, as well as new appliances and cabinets in the kitchen. As plaintiff testified, these photographs fairly and accurately reflected the condition of the apartment when plaintiff moved into it in 2009, and therefore corroborate the new kitchen and bathroom installation and other renovation work described in the invoice, as well as Baigelman's

testimony that the work performed probably involved a gut renovation of the kitchen and bathroom in apartment 4K. Thus, while not dispositive in themselves, the photographs, taken together with the documentary and testimonial evidence and all surrounding circumstances, establish HFM's work on the apartment and those IAIs.

The dissent completely discounts the photographs as being of no evidentiary value because they were taken in 2016 and therefore do not depict renovations performed in the kitchen and bathroom contemporaneously with the time they were performed. The record reflects, however, that the photographs were taken by plaintiff herself in apartment 4K after the 2009 renovations were performed, and, as plaintiff herself testified, fairly and accurately reflected the condition of the apartment at the time she moved in in 2009. Moreover, the photographs depict the kitchen, bathroom and flooring of the apartment as in a condition consistent with the relatively recent performance of the kinds of renovations described in the invoices that are included in the record. Thus, the photographs corroborate the 2009 renovation work described in the invoices, as well as Baigelman's and Molen's testimony. For purposes of this de novo review, it is sufficient that the record reflects that plaintiff took them in apartment 4K after the work in question was completed, and it is

of no moment that they were not shown to defendants' witnesses at trial.

Furthermore, Baigelman testified that his routine practice was to walk through an apartment after work was completed prior to paying an invoice, and that although he had no specific recollection of doing so in apartment 4K, he would not have paid an invoice for $60,000.00 without conducting a prior inspection to make certain that the work had been done. Thus, the weight of the evidence, including the invoice and check, as corroborated by the photographs of the apartment and the unchallenged testimony of Baigelman and Molen, amply substantiates defendants' claim that they paid $60,000.00 in general contracting expenses as set forth in the HFM invoice.

The dissent characterizes Baigelman's testimony as built on a series of assumptions based upon what he would do in the regular course of business, such as receiving an invoice for work performed in the apartment and performing an inspection of the apartment upon completion of the work. The dissent also refers to inconsistencies in Baigelman's testimony and conflicting documentary evidence, without providing any further explanation. Rather than considering Baigelman's testimony in conjunction with the testimony of Molen and Lorenz and the record documentary evidence and drawing reasonable inferences from such evidence,

the dissent discounts much of Baigelman's testimony on the ground that he could not recall specific aspects of his dealings with the contractors in regard to their work in apartment 4K.

In maintaining that defendants failed to submit documentation demonstrating that the IAIs were actually performed, however, the dissent fails to take into account that here, where defendants have submitted both invoices and checks, corroborated by Baigelman's and Molen's testimony, they have more than sufficiently substantiated their IAI claims in accordance with the 90-10 evidentiary standards and our Court's recent precedent (*see Stulz v 305 Riverside Corp.*, 150 AD3d 558, 558-559 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018] ["Defendant provided a construction contract, cancelled checks, and the testimony of the contractor to substantiate the IAIs"]; *Matter of Kolinsky v Towns*, 137 AD3d 496, 497 [1st Dept 2016] [DHCR finding that IAI claims substantiated by invoice, checks and owner's worksheet entitled to judicial deference]).

This case stands in stark contrast to the cases cited in the dissent, in which insufficient or no documentary proof was offered (*see Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017] [lack of documentation such as bills from contractor or records of payments]; *72A Realty Assoc. v Lucas*,

101 AD3d 401, 402-403 [1st Dept 2012] [absence of any record evidence in support of landlord's renovation claim, such as bills from contractor or records of payment for renovations]; *Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal*, 171 AD2d at 573-574 [landlord failed to provide invoices for stove, refrigerator and dishwasher and conceded that it had not paid for them; invoice for air conditioners proffered by landlord did not match serial numbers of those installed in apartment]). Moreover, this case is entirely different from *Smoke v Windermere Owners LLC* (130 AD3d 522 [1st Dept 2015]), and *Chekowsky v Windermere Owners* (114 AD3d 541 [1st Dept 2014]), both involving this same building, in that in both of those cases, the defendants' proffer was entirely devoid of adequate documentation in support of their IAI claims.

With respect to the plumbing IAIs, defendants submitted a copy of a check dated October 8, 2009, drawn on the Chateau account and made payable to Lorenz in the amount of $16,365.27, and a certificate of capital improvement stating that "kitchen and bathroom renovation" had been performed in "Apt. 4K," including "new waste, vent & water lines" and "new shower body, bathtub, toilet, basin & faucets." The record also includes two invoices from Lorenz, one dated September 29, 2009 in the amount of $13,251.95 for "Apt. 4K Kitchen & Bathroom - renovation" and

one dated July 28, 2009, in the amount of $3,113.32 for "replace[ment of] hot and cold water risers and valves in "Apt. 4K - 5K."

The trial court's decision erroneously excluded these two invoices from its consideration, however. Although the record reflects that plaintiff's counsel objected to their admission on the ground that he had not seen these invoices until their production in court by Annette Lorenz immediately prior to her testimony at trial on January 20, 2016, the record also indicates that copies of both invoices were attached as exhibits to defendants' motion for summary judgment dismissal dated August 7, 2012. This Court has the authority, on de novo review, to reconsider the evidentiary rulings of the trial court (*see Green*, 74 AD3d at 578-579 [Saxe, J., concurring] [ruling that expert testimony admitted by trial court should have been excluded]). Exercising that authority, we find that these two invoices should have been admitted into evidence, and we will now consider them on this de novo review.

Baigelman testified that the amount paid for plumbing work in apartment 4K was $13,251.95 and that the $16,365.27 check was in payment for both that invoice and the invoice for $3,113.32. Furthermore, Baigelman testified that the $16,365.27 check was probably in payment for work related to the gut renovation of the

kitchen and bathroom in apartment 4K noted previously. This testimony corroborates the documents proffered by defendants, including the two invoices referring to apartment 4K, the $16,365.27 check payable to Lorenz and the certificate of capital improvement, especially when the temporal proximity of these documents is considered. Moreover, Annette Lorenz authenticated the certificate of capital improvement by testifying that she recognized her secretary's handwriting and the signature of the licensed plumber for Lorenz on the document. Thus, the weight of the evidence supports the conclusion that defendants paid at least $13,251.95 for plumbing work performed in apartment 4K.

It is undisputed that defendants substantiated their claim that $5,650 in electrical work was performed by CES in the living room, bedroom, bathroom and kitchen in apartment 4K in 2009.

Added together, all three sets of charges, for general contracting, plumbing and electrical work, not including the $3,113.32 for plumbing work in both apartment 4K and apartment 5K, totals $78,901.95, which arithmetically is well in excess of the $21,972.00 stipulated threshold for defendants to have lawfully declared apartment 4K exempt from rent stabilization and to have legitimately charged plaintiff the monthly rent she paid in 2009 and thereafter, as the dissent concedes. Moreover, all three contractors' invoices refer to kitchen and bathroom work

performed in apartment 4K in 2009. Further, as already stated, the invoices and checks related to general contracting and plumbing work in the apartment were corroborated by the testimony of Baigelman, Molen and Annette Lorenz, and supported by the photographs of the recently renovated rooms in the apartment.

In sum, reading all three sets of invoices and checks together, in terms of the amounts spent on IAIs in apartment 4K in 2009 and the invoices' common references to bathroom and kitchen renovation in the apartment, as corroborated by the testimony of the defense witnesses, and the timing of the invoices, payments, and renovated condition of the apartment as of 2009 as shown by plaintiff's photographs, the weight of the evidence overwhelmingly supports the conclusion that defendants lawfully declared apartment 4K exempt from rent stabilization and therefore did not impose a rent overcharge on plaintiff.

Although the trial court found the testimony of Baigelman, Molen and Annette Lorenz insufficient to substantiate defendants' claims on the ground that all of those witnesses lacked personal knowledge that the 2009 IAIs in apartment 4K were performed, there is no requirement of such proof.[3] The cases cited by the

[3] Notwithstanding the dissent's position that we have mischaracterized the trial court's decision by describing it as imposing a personal knowledge requirement, the trial court's decision, in fact, found that "defendants failed to substantiate

trial court do not impose a personal knowledge requirement, however. Rather, consistent with 90-10, they require such documentary proof as "'bills from a contractor . . . or records of payments for the [claimed improvements]'" (*see Altschuler v Jobman 478/480, LLC*, 135 AD3d at 440, quoting *72A Realty Assoc. v Lucas*, 101 AD3d at 402). Here, defendants have supplied copies of invoices from three contractors describing IAIs performed in apartment 4K and copies of the front and back of cancelled checks in payment of those invoices, and have provided supporting testimony, and have therefore met both the *Altschuler* and 90-10 requirements for substantiation of their claims.

With respect to the circumstances under which a landlord is entitled to impose an IAI rent increase, the Rent Stabilization Code at 9 NYCRR 2522.4(a)(1), provides, in pertinent part:

> "An owner is entitled to a rent increase where there has been . . . installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In the case of

---

[HFM's] bill for $60,000.00 in general contracting work in plaintiff's apartment" because they "produced no witness with personal knowledge substantiating that the work shown on the invoice was completed in Apartment 4K" (*DiLorenzo v Windermere Owners LLC*, 2017 WL 9857178, *2 [Sup Ct, NY County Oct. 18, 2017]. Furthermore, in finding that "defendants failed to substantiate that the plumbing work claimed actually was completed in Apartment 4K," the trial court observed that "Annette Lorenz . . . had no personal knowledge of any plumbing work performed in Apartment 4K" (*id.*).

> vacant housing accommodations, tenant consent shall not be required."

Here, the IAIs in question were performed in 2009, when the apartment was vacant and prior to plaintiff's moving into the apartment later in 2009. Accordingly, defendants need not have, and, indeed, could not have, obtained her consent for her IAI rent increase.

2. Duplication/Useful Life

Plaintiff's argument that the 2009 IAIs do not qualify apartment 4K for exemption from rent stabilization because they are duplicative of, or were made during the useful life of, IAIs made to apartment 4K in 1995 and 1998 is unavailing on this record. In her complaint, plaintiff made no mention of the IAIs she now asserts were performed in 1995 and 1998. Moreover, plaintiff failed to amend her complaint to include her factual averments and legal claims in this regard or to make a motion before the trial court based upon them. Because this argument raises an issue that was "not asserted in the complaint or in [the one motion included in the record that was made] before the motion court, [it] is not properly before us in the context of this appeal" (*see Safka Holdings, LLC v 220 W. 57th St. L.P.*, 142 AD3d 865, 866 [1st Dept 2016]).

The dissent cites no pertinent authority in support of its

differing view that plaintiff had no obligation to plead that the 2009 IAIs were performed during the useful life of the 1995 and 1998 IAIs, and that defendants were obligated to raise the useful life issue as an affirmative defense. *Scholastic Inc. v Pace Plumbing Corp.* (129 AD3d 75 [1st Dept 2015]), cited in the dissent, pertains to a defendant's burden to plead a limitations period as an affirmative defense but has no bearing on whether defendants have the burden to plead and prove, as an affirmative defense, that the 2009 IAIs were not duplicative of, or not performed during the useful life of, the 1995 and 1998 IAIs in this case (*see id.* at 86). Moreover, in *Scholastic*, this Court reasoned that the defendant should plead the limitations period as an affirmative defense because the plaintiff was entitled to have notice of the defense and conduct discovery accordingly, explaining that "prejudice is the critical concern" (*id.*). Here, this Court is conducting a de novo review of the evidentiary facts before the trial court, not a review of a state agency determination, as in *Matter of 985 Fifth Ave. v State Division of Hous. & Community Renewal* (171 AD2d at 572). The record indicates that plaintiff did not raise the useful life issue until the filing of her pretrial memorandum of law on December 9, 2015, approximately 3½ years after filing her complaint on August 31, 2011 and only one month prior to the commencement of the

trial. Thus, in this case, it was defendants, not plaintiff, who were prejudiced by plaintiff's delay in raising this issue, although she could have done so by amending her complaint.

In any event, defendants were not required to include in their DHCR registration forms descriptions of any IAIs performed in 1995, 1998 or 2009 or to adhere to a useful life schedule in performing IAIs (*see* 9 NYCRR 2522.4[a][1] [no provision for DHCR application, review or approval process for IAIs]; *cf.* 9 NYCRR 2522.4[a][2][d], [e] [providing for DHCR application and review process and useful life schedule for "major capital improvements"]; *Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36, 42 [2d Dept 2006] [contrasting subdivisions 1 and 2 of 9 NYCRR 2522.4[a]).[4]

In her post-argument supplemental submission, plaintiff relies on the recent decision in *Rossman v Windermere Owners, LLC* (Sup Ct, NY County, Jan. 4, 2019, Nervo, J., index No. 108350/11), where Supreme Court held that the defendants failed to substantiate the invoices reflecting claimed IAIs performed by

[4] Contrary to the dissent, the review process referenced in *Wiggins* for filing of complaints references complaints filed before the DHCR, which is not the case here. Furthermore, the bathroom and kitchen upgradings to which 9 NYCRR § 2522.4(a)(2)(d)(11) and (12) refer are among those listed as "Major Capital Improvements," and do not apply to the IAIs performed in the kitchen and bathroom in this case.

the same contractors in a different apartment in the same building as in the instant case. *Rossman* is materially distinguishable from the instant case, however.

At the outset, the court in *Rossman* did not have before it the types of evidence presented in this case, including cancelled checks in payment of the related invoices and photographs of the recent renovations to the apartment corresponding to the work described in the invoices. Additionally, evidence in *Rossman* undermined the defendants' case, including discrepancies in Lorenz's plumbing invoices and expert testimony refuting the installation of new oak flooring and moldings. There was no such contradictory evidence in this case, however.

Furthermore, it makes no sense that defendants would incur more than $78,000.00 in contracting expenses if all that was needed was $21,972.00 in IAIs in order to qualify apartment 4K for exemption from rent stabilization, unless the expenses were necessary to address an emergency situation, such as water damage to the apartment. This scenario is consistent with Baigelman's testimony that there was extensive water damage to some of the apartments in the building prior to the 2009 renovations of those apartments, as well as Molen's testimony that some of the apartments in the building had to undergo a gut renovation, although he could not recall if apartment 4K was one of those

apartments.

3. Treble Damages

As we find that there was no rent overcharge in this case, we have no occasion to address the issue of whether plaintiff is entitled to treble damages due to defendants' willfulness in overcharging plaintiff.

Accordingly, the judgment of the Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017, in favor of plaintiff against defendants, should be reversed, on the law and the facts, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. The appeal from the order of the same court and Justice, entered October 18, 2017, which, following a nonjury trial, directed entry of judgment in favor of plaintiff, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Kapnick and Singh, JJ. who dissent in an Opinion by Singh, J.

SINGH, J. (dissenting)

I respectfully dissent for the following reasons. First, the majority usurps Supreme Court's authority to make factual findings. Second, contrary to our caselaw, in essence the majority has improperly placed the burden of proof on the tenant to establish that the apartment was illegally deregulated based on alleged individual apartment improvements made by the landlord. Accordingly, I would affirm Supreme Court's fact-intensive inquiry.

While we may review factual findings of the trial court, our power is not limitless. Where, as here, findings of fact are based on the credibility of witnesses, the Court of Appeals instructs as follows:

> "[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses"

(*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted]; *see Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006] ["Although this Court enjoys broad powers to review the facts, due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the

witnesses"]; *see also D.S. 53-16-F Assoc. v Groff Studios Corp.*, 168 AD3d 611 [1st Dept 2019] [internal quotation marks omitted]; *PSKW, LLC v McKesson Specialty Arizona, Inc.*, 159 AD3d 559 [1st Dept 2018]; *Rubin v George*, 136 AD3d 447, 448 [1st Dept 2016]; *Legrand v Ganich*, 122 AD3d 411 [1st Dept 2014]).

In 1984, 666 West End Avenue (the Windermere) in Manhattan was owned and registered by defendant Chateau with New York State Division of Housing and Community Renewal (DHCR). Apartment 4K (Apt 4K) was registered as rent stabilized until June 18, 2009, with a registered rent of $1,450.70. In 2009, defendants removed Apt 4K from rent stabilization.

Plaintiff Laura DiLorenzo entered into a one-year lease commencing on October 1, 2009 for Apt 4K at $2,300 per month. On July 1, 2010, Chateau filed a registration statement with DHCR asserting that Apt 4K was permanently exempt from rent stabilization due to high rent vacancy. In October 2010, Chateau renewed plaintiff's lease for an additional year, increasing plaintiff's rent to $2,415 per month. The lease was set to expire on September 30, 2011.

On November 18, 2010, the Windermere was sold to defendant Owners. Thereafter, on August 31, 2011, plaintiff commenced this action, alleging that the lawful stabilized rent for the Apt 4K

was $1,450.70. Plaintiff asserted she was overcharged by defendants who fraudulently represented that the apartment was not subject to rent stabilization. Plaintiff further averred that defendants' DHCR decontrol filing was fraudulent in that the legal rent did not exceed the $2,000 threshold for destabilization. In addition, she contended that defendants violated Administrative Code of the City of NY § 26-504.2, by not providing plaintiff with certified written notice of decontrol, despite her demand. Plaintiff sought a judgment against defendants for rent overcharges, treble damages, a declaratory judgment that she was a rent stabilized tenant and an injunction barring defendants from evicting her.

Defendants answered, stating, inter alia, that the premises qualified for permanent deregulation.

A nonjury trial was held in January 2016. The parties stipulated that defendants would have had to expend $21,972 on individual apartment improvements on Apt 4K in order to be entitled to the rent increase they charged plaintiff. Defendants claimed that in 2009 they spent $82,015.27 in improvements on Apt 4K.

In support of defendants' claims, Simon Baigelman (Baigelman), the building manager between 1986 and 2011 and part owner of Chateau, testified that he oversaw all aspects of

management including rentals, leasing, rent collection, and facility maintenance. The procedure for making repairs or improvements to apartments was for him to contact contractors to look at the proposed work, estimate the cost, and reach an agreement on the project.

Baigelman testified that he had hired HFM Company, Inc. (HFM) as the contractor. After work was performed, HFM would send Baigelman an invoice. Baigelman was shown a $60,000 invoice from HFM, dated October 14, 2009. The invoice stated that the "job location" was "Suite #4K." The invoice reflected that the flooring was ripped out and new subfloors, wood flooring, trim, door frames, a new kitchen, a new slab and tiles were installed in the bathroom.

Baigelman stated that he assumed that he had received the invoice in the ordinary course of business. However, he did not remember if it was filed with defendants' records contemporaneously to receipt of the invoice. He also assumed that the invoice was for work performed in Apt 4K but could not confirm that the work had actually been done. The court sustained plaintiff's objection to the admission of the invoice as a business record on the ground it lacked a proper foundation. The court noted that Baigelman was testifying based entirely on the invoice in front of him, which was not in evidence.

Baigelman stated that he did not recall the specific apartment but "assumed" that everything was ripped out back to the original and redone. He also testified that based on the review of the bill – which was not in evidence – he "assumed" there was a gut renovation of the kitchen and bathroom.

Baigelman also testified that it was "highly unlikely" that a gut renovation had also been done to Apt 4K earlier in 1995 or 1998, but he did not remember. He also could not "recall" whether or not he paid the invoice in front of him.

Defendants failed to produce DHCR forms that would have supported such improvements for the relevant years: 1995, 1998, and 2009. Defendants also failed to adduce any testimony from Baigelman verifying that plaintiff's photographs corroborated the 2009 improvements.

Baigelman identified a check signed by him on behalf of Chateau for $63,097.81 payable to HFM. There was no apartment number nor was there an invoice number on the check. The amount on the check issued by defendants did not match the amount on the invoice. Nonetheless, Baigelman testified that he believed that the check was for work in Apt 4K and other work that was possibly done at the Windermere.

Baigelman stated that after work was performed in the building, he walked through apartments with the job supervisor to

make sure everything was completed prior to paying an invoice. He explained that he would not have paid the invoice for $60,000 without an inspection because it was for a large sum of money.

However, in response to a question as to whether he approved the work reflected in the HFM invoice, Baigelman replied that he did not remember the specifics because it was a long time ago, but he "assumed" that he had inspected the apartment, reviewed HFM's work, and subsequently paid the invoice. He stated that he "ha[d] to believe" that the invoice was paid in full. The check for $63,097.81 was admitted into evidence.

Howard Molen (Molen), HFM's owner, testified that he received calls from Baigelman in 2009 to do work in the Windermere. He identified his invoice and testified that HFM performed the work reflected in the invoice. It was the business of HFM to prepare invoices contemporaneously with the services. He was not on the job site for the work reflected in the invoice, but he prepared the invoice based on what was told to him by his employees, who had a business duty to report the information to him accurately. The HFM invoice seeking the sum of $60,000 was admitted into evidence as a business record.

Molen stated that the invoice did not break down the price of individual items of the job, and there was no way to determine the cost of each component. Molen never saw the construction and

relied on information provided to him by his workers. He also did not conduct a final inspection of the job site. Again, defendants failed to have Molen verify that plaintiff's photographs corroborated the 2009 improvements HFM allegedly performed.

Molen stated that the check for $63,097.81 satisfied the invoice and additional outstanding invoices. The other alleged outstanding invoices were not introduced into evidence.

On cross-examination, Molen testified that in 1999 he and HFM pled guilty to a commercial bribery scheme where he kicked back 10% of his fees to employees of a management company in order to obtain work.

Molen no longer had invoices for the materials he used in the job because of a flood in his office. He did not file an insurance claim for the damage to his office.

The court also heard testimony regarding the alleged plumbing work done in Apt 4K. Baigelman testified that the work was performed by Mike Lorenz Corp. (Lorenz), the plumbing contractor used by the building.

While Baigelman identified his handwriting on a Lorenz invoice, he did not recall the nature of the work reflected in the invoice. He stated that it appeared to be a renovation of the bathroom and kitchen in Apt 4K. He assumed he paid the

invoice. Baigelman also identified a check payable to Lorenz from Chateau but did not know if the check was for the work reflected in the invoice. He stated that the check was dated October 2009, and the invoice was dated a month earlier. He paid bills in a timely manner but had no way to verify whether the invoice and the check were related. He noted that the check was for more than the invoice and stated that invoices were sometimes grouped for payment. Baigelman testified that the check "[m]ost likely . . . could have been" for the Lorenz invoice but he needed to see the other invoices that corresponded with the balance on the check. When Baigelman was shown a document to refresh his recollection, he stated that the check could have been for payment of the invoice for work in Apt 4K. However, the check did not reflect the apartment number where the work was done or an invoice number connecting the invoice to the check.

Annette Lorenz, owner of Lorenz, did not work for the company during the relevant time period (1995 – 2010), but worked there during an earlier time period. After her late husband, a master plumber, died in 2005, she began to play a greater role in the business to ensure it would continue. A secretary was involved in billing and reported to Annette until the secretary passed away in 2009. She recognized the secretary's handwriting and the signature of the master plumber on a certificate of

capital improvement form that was prepared when plumbing work was completed at the Windermere. However, she had no personal knowledge of the work reflected on the certificate.

Annette testified that the Lorenz invoice dated September 29, 2009 for $13,251.90 was prepared in the ordinary course of business and that it was part of the business to prepare such records. She testified that a check for $16,365.27 payable to Lorenz may have been payment of more than one invoice. A check dated October 8, 2009 for $16,365.27 payable to Lorenz was admitted into evidence.

The Lorenz invoice for $13,251.90 and another invoice dated July 28, 2009 for $3,113.32 were not admitted into evidence. The court found that Annette was not at the company at the time the invoices were prepared and was not qualified to testify as to the record keeping procedures of the secretary.

A certificate of capital improvement issued by Lorenz to Chateau, dated June 22, 2009, which was admitted into evidence, stated that the kitchen and bathroom renovations were "furnished and installed" in Apt 4K. The certificate did not state the costs for the improvements that had been performed or the final price of the work.

Baigelman testified that the registration with DHCR stating that Apt 4K was decontrolled had been prepared by him or under

his supervision. However, he did not remember if the improvements to Apt 4K in 1995 cost $19,785.60, which was the amount necessary in order to justify the increase in rent from $683.36 to $1,175. He also did not remember if the increase from $1,175 to $1,270 in 1997 or 1998 was justified by the expenditure of $3,800 or even the nature of the work completed at that time.

During the course of Baigelman's testimony, Supreme Court admonished him for not having a recollection of the alleged improvements made to Apt 4K. Instead, his testimony was based only on the documents shown to him on the stand.

Supreme Court found that the documentary evidence did not establish the claimed improvements. The court concluded that defendants were not entitled to a rent increase for the $60,000 billed by HFM as it failed to substantiate HFM's invoice for $60,000. Defendants did not produce a witness with personal knowledge substantiating that the work shown on the invoice was actually completed in Apt 4K. Nor did they present a witness confirming payment of the invoice. The court noted that Baigelman did not remember and did not actually inspect the work claimed on the invoice. Molen was never on the job site and did not perform a final inspection. Supreme Court observed that the $63,097.81 check to HFM did not indicate that it was for work in Apt 4K, and it was for an amount that was greater than the

invoice, casting doubt on what work the check covered.

Supreme Court further found that defendants failed to substantiate their claim for plumbing work by Lorenz. The Lorenz invoices were not admitted into evidence. The court noted that the check to Lorenz did not indicate that it was for work done in Apt 4K. The certificate of capital improvement did not list the final cost for the alleged improvements. The check for $16,365.27 tendered to Lorenz did not identify the apartment in which work was allegedly performed. Further, the court did not credit Baigelman's testimony as he could not remember which plumbing improvements, if any, were performed in Apt 4K. Nor did Baigelman know whether the check was specifically for work done in Apt 4K.

Similarly, Annette Lorenz did not work for Lorenz during the relevant time period and had no personal knowledge of the plumbing work in Apt 4K. She did not have a role in creating the certificate for capital improvement. Accordingly, the court concluded that defendants were not entitled to a rent increase based on the plumbing work in the apartment.[1]

---

[1] Supreme Court found that defendants only substantiated the claim for $5,650 in electrical work by Contractors Electrical Services (CES), since defendants (1) submitted an invoice for the work, (2) had the person who prepared the invoice confirm the work was completed in Apt 4K, and (3) that same person confirmed that the invoice was paid in full.

Supreme Court also found that defendants failed to show that the work claimed in 2009 was not duplicative of the improvements performed in 1995 and 1998, or that the earlier work had outlasted its useful life. The court noted that Baigelman did not remember what was done in 1995 and 1998. Defendants did not offer the DHCR registration forms describing the improvements.

Therefore, defendants were entitled to a monthly rent increase of 1/40th of the cost of this improvement, or $141.25. The court found that the legal rent for Apt 4K was thus $1,591.25, well below the $2,000 threshold necessary for rent destabilization on the ground of high rent vacancy decontrol.

Finally, the court determined that plaintiff was entitled to treble damages as defendants failed to rebut the presumption of willfulness. The court found that defendants did not substantiate the claimed improvements and offered no evidence of a good faith belief that the improvements were allowable or were actually performed.

Supreme Court directed entry of a judgment in favor of plaintiff and against defendants jointly and severally. Owners was directed to provide plaintiff with a rent stabilized lease. The court severed the issue of plaintiff's reasonable attorneys' fees and referred the matter to a special referee for a hearing.

Defendants appeal.

Improvements

In order to obtain a rent increase for a rent stabilized apartment, the owner must substantiate improvements with documentation demonstrating that the work was actually performed and that the money was spent on the improvements (9 NYCRR 2522.4; *see Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 440 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017]).

There must be sufficient proof that work has been performed (*see Altschuler*, 135 AD3d at 440 [the affidavit of a lease administrator stating the amount of improvements performed was insufficient as it was unsupported by "bills from a contractor, an agreement or contract for work in the apartment, or records of payments"] [internal quotation marks omitted]; *72 Realty Assoc. v Lucas,* 101 AD3d 401, 402-403 [1st Dept 2012] [the record does not contain anything to support landlord's renovation claim, including for example, bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations]; *Matter of 985 Fifth Ave., v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991] [an invoice provided by a landlord for air conditioners "did not match the serial numbers listed in the letter intended to prove that seven units had been installed in

the tenant's apartment"]).

Here, the trial court conducted a fact-intensive inquiry to determine whether defendants met their burden to establish that they made individual apartment improvements in a sum exceeding $21,972. Supreme Court was in the best position to assess the evidence and credibility of the witnesses. The trial court gave little weight to the testimony of Baigelman, Molen, and Lorenz as the witnesses lacked personal knowledge of the work performed in Apt 4K. The trial court properly found that defendants failed to establish that the general contractor and the plumbing contractor actually performed the work in Apt 4K that was referenced in their invoices, and that they were paid for the work. Nor did the documentary evidence verify that improvements were made in Apt 4K.

In short, it cannot be said that the trial court's findings are so contrary to the weight of the evidence that "it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson*, 80 NY2d at 495 [internal quotation marks omitted]).

The majority ignores Supreme Court's findings of fact and instead conducts a de novo review of the record citing to *Northern Westchester Professional Park Assoc. v Town of Bedford*, (60 NY2d 492, 499 [1983]) and *Green v William Penn Life Ins. Co.*

of N.Y. (74 AD3d 570, 572 [1st Dept 2010]). While an appellate court may render a judgment it finds warranted by the facts, "due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the witnesses" (*Horsford*, 32 AD3d at 310 [internal quotation marks omitted]; *see also Northern Westchester*, 60 NY2d at 499; *Green*, 74 AD3d at 571).

In any event, a de novo review also supports Supreme Court's findings. The majority reasons that by adding the HFM invoice for $60,000, the Lorenz invoice for $13,251.95 and the CES invoice for $5,650, a total of $78,901.95 of improvements were performed in Apt 4K. It argues that the checks, photographs and testimony "overwhelmingly support[s]" the amount of work done to the apartment. While the math is correct, this finding is not supported by the record, as no legal conclusions could be drawn from the documents in the record without witness testimony connecting them to the work allegedly performed in Apt 4K.

The HFM invoice for $60,000 notes that the job location is "Suite #4K." However, defendants failed to substantiate that the work on the invoice was performed or that the amount of $60,000 was paid for the improvements. Baigelman's testimony is built on a series of assumptions. He assumed that he received the invoice in the regular course of business, he assumed that there was a

gut renovation of a kitchen and bathroom, he assumed that he had inspected the apartment, he assumed that he had paid the invoice and he assumed that the check for $63,097.81 was for work done on Apt 4K and possibly for additional work that was done. In fact, the check to HFM for $63,097.81 does not reference that it was for work performed in Apt 4K, and is for an amount that is greater than the invoice. The majority connects the check with the invoice with Baigelman's testimony, which Supreme Court found to not be credible.[2]

Molen identified the invoice and testified that HFM performed the work reflected in the invoice. However, he conceded that he was not on the job site and did not perform a final inspection. He relied on information provided to him by his workers to prepare the invoice. He also admitted that in 1999, he and HFM pleaded guilty to commercial bribery based on a kickback scheme orchestrated by him. Except for Molen's testimony, which Supreme Court found to not be credible, we note that the majority has not pointed to evidence that proves that

[2] The majority contends that Supreme Court did not make credibility determinations simply because it did not reference the word credibility in its opinion. While it is correct the word "credible" is not used, the record reflects that Supreme Court consistently admonished Baigelman, Molen, and Annette Lorenz for not having any recollection of the work done in Apt 4K, and rejected in large part their testimony that the purported improvements were made to the apartment.

work was performed in Apt 4K.

Similarly, the alleged plumbing work performed by Lorenz was not substantiated by testimony or documentary evidence. The invoice for $13,251.90 was not admitted into evidence by the trial court. The majority credits Baigelman but ignores the inconsistency in his testimony and conflicting documentary evidence. In fact, Baigelman did not recall the nature of the plumbing work reflected on the invoice and merely identified his handwriting on the invoice. He could only speculate that he had paid the invoice. He also could not say if the check dated October 8, 2009 for $16,365.27 was for the work reflected on the invoice. The check was for more than the invoice and does not reference the invoice or apartment number where the work was allegedly performed.

Annette Lorenz, the only witness called to testify on the plumbing work, did not work for Lorenz at the time the work was allegedly performed on Apt 4K. She had no personal knowledge of the work reflected on the certificate of capital improvement and did not visit the job site. The certificate by Lorenz did not list the costs or final price for the work described in Apt 4K.

Contrary to the majority's factual findings, the photographs do not corroborate that work was performed by HFM and Lorenz on Apt 4K. The photographs, which were offered into evidence by

plaintiff, do not show what work was done or whether they depict improvements that are contemporaneous to the work actually performed in 2009. The majority attempts to use plaintiff's testimony that the photographs "fairly and accurately" depict the improved condition of Apt 4K in 2009. However, plaintiff stated that the photographs were taken in 2016, not in 2009. In fact, plaintiff submitted the photographs to show that *no* improvements were depicted. Defendants' counsel even initially objected to the introduction of the photographs into evidence and plaintiff's testimony regarding them, stating that "[t]he condition of the apartment today as opposed to what it was in 2009 . . . is irrelevant."

Only during closing arguments did defendants' counsel argue that the photographs depicted improvements and corroborated the invoices and checks defendants presented, even though the photographs were not shown to defendants' witnesses. Argument by defendants' counsel that the photographs show a renovated apartment, which is adopted by the majority, is not evidence (*Sperduti v Mezger*, 283 AD2d 1018, 1019 [4th Dept 2001]; *Merenda v Consolidated Rail Corp.*, 248 AD2d 684, 687 [2d Dept 1998]). In fact, the majority's uncertainty about what the photographs corroborate is reflected by its use of the words it "appears to be" and "probably." In sum, the photographs are of no

evidentiary value to the issues in this case.

The majority mischaracterizes Supreme Court's findings by stating that Supreme Court improperly imposed a "personal knowledge" requirement. To the contrary, Supreme Court correctly found that there must be adequate documentation of the improvements to remove plaintiff's apartment from rent stabilization. This finding is fully supported by DHCR Policy Statement 90-10 [1990], which requires that the costs of improvements must be established by adequate documentation, which should include at least one of the following: "(1) Cancelled checks contemporaneous with the completion of the work; (2) Invoice receipt marked paid in full contemporaneous with the completion of the work; (3) Signed contract agreement; (4) Contractor's affidavit indicating that the installation was completed and paid in full."

Here, the checks to HFM and Lorenz do not state that they were for improvements made to Apt 4K or that they were issued contemporaneously with the completion of the work. The invoices are not marked paid in full. Finally, there is no signed contract agreement or contractor's affidavit (*cf. Jemrock Realty Co. LLC v Krugman*, 64 AD3d 290, 296, 298 [1st Dept 2009] [where a "signed contract agreement" and "contractor's affidavit indicating that the installation was completed and paid in full"

was produced], *revd on other grounds,* 13 NY3d 924 [2010]). The inadequate documentation was not cured by the testimony of the witnesses produced by defendants. There is no reliable testimony that the invoices and checks were issued contemporaneously to the completion of the work in Apt 4K.

The majority states that the documentation submitted by defendants demonstrates that the improvements were performed in accordance with the 90-10 evidentiary standards and our precedent (*see Stulz v 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Matter of Kolinsky v Towns*, 137 AD3d 496 [1st Dept 2016]). However, in *Stulz*, the defendant landlord "provided a construction contract, cancelled checks, and the testimony of the contractor" as substantiation for the improvements, which Supreme Court there found to be credible (*Stulz*, 150 AD3d at 559). Here, Supreme Court found that the testimony of Molen and Lorenz did not substantiate the claimed improvements. Further, Supreme Court in *Kolinsky* deferred to the DHCR determination as it did not find it "arbitrary and capricious" (*Kolinsky,* 137 AD3d at 497). Accordingly, neither case supports the majority's contention that our precedent mandates a different result.

We note that this appeal was calendared together with *Smoke v Windermere Owners LLC* and *Chekowsky v Windermere Owners, LLC*

(Appeal Nos. 7932-7935)[3], which involve the same defendants sued by different tenants of the Windermere for unlawful high rent deregulation. In *Chekowsky v Windermere Owners, LLC* (114 AD3d 541 [1st Dept 2014]), we found in an earlier appeal that the defendants failed to provide adequate documentation for improvements which resulted in the removal of the apartment from rent stabilization. We rejected the defendants' employee's affidavit, finding that "the employee was not a person with knowledge of the facts, and her statement was unsupported by any admissible evidence, such as affidavits by the various vendors she claimed would testify to additional improvements at trial, and devoid of an explanation of why they are not now available" (*id.* at 542).

Similarly, in *Smoke v Windermere Owners LLC* (130 AD3d 522 [1st Dept 2015]), we found the defendants liable for rent overcharges based on their inability to provide adequate documentation for individual apartment improvements that was the basis for removing the apartment from rent stabilization.

The majority argues that both *Smoke* and *Chekowsky* may be

[3] We previously resolved the issue of whether the apartments were properly removed from rent stabilization. The current appeals involve the trial court's findings as to willfulness and treble damages. We decide these appeals simultaneously herewith and affirm Supreme Court's findings of willfulness and treble damages.

distinguishable, because the defendants proffered *no* documentation to support their claimed improvements in those cases. We disagree. In *Chekowsky* (114 AD3d at 542), we discussed the inadequacy of the evidence proffered and expressly stated that the evidence was inadequate. Similarly, in *Smoke* (130 AD3d at 522), we affirmed the trial court's finding that "defendant Windermere Owners LLC [was] liable for rent overcharges based on its inability to provide adequate documentation for the improvements." Here, defendants' alleged improvements are not supported by adequate documentation.

Accordingly, even a de novo review of the evidence fully supports Supreme Court's findings that defendants failed to establish individual apartment improvements to Apt 4K.

Useful Life

A landlord is entitled to a rent increase equal to 1/40th of the total cost of any qualifying improvements made or new furnishings to rent stabilized apartments (9 NYCRR 2522.4[a] [1]; Administrative Code § 26-511[c][3]), but is not entitled to an increase for improvements or replacements to furnishings and equipment that have not yet exceeded their useful life (9 NYCRR 2522.4[a][1]; Administrative Code § 26-511[c][13]). A useful life schedule is provided in 9 NYCRR 2522.4(a)(2)(i)(d), with periods ranging from 15 to 30 years based on the specified

improvement. In order to obtain a rent increase, a defendant bears the burden to demonstrate that the useful life was exceeded for the claimed improvement (*see 985 Fifth Ave.*, 171 AD2d at 574-575).

Defendants argue that Supreme Court should not have made a finding that the work in 1995 and 1998 had not outlasted its useful life, because plaintiff "waived" this issue, having failed to plead it as an "affirmative defense." They also contend that absent a showing of fraud, the trial court was precluded from reviewing events going back more than four years from the date of the filing of the complaint, August 30, 2007.

The majority adopts defendants' arguments that useful life was waived. Unable to cite a case for this proposition, the majority argues that the issue is not properly before us on appeal.

We disagree. Since plaintiff did not have the burden to establish useful life, she was not required to plead it in her complaint (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 86 [1st Dept 2015] [a defendant bears the burden of pleading and proving its affirmative defenses]). Accordingly, Supreme Court properly made findings with respect to useful life. The issue is squarely before us.

The majority argues that defendants were prejudiced because

plaintiff did not raise useful life in her complaint. Since defendants' answer should have interposed the affirmative defense of useful life, they cannot now on appeal claim prejudice for their own omission. Moreover, we note that the majority's concern that defendants were prejudiced was not raised by defendants at trial, in their posttrial submissions, or even on appeal.

Next, the majority contends that under *Matter of Rockaway One Co., LLC v Wiggins* (35 AD3d 36, 41-43 [2d Dept 2006]), defendants are not required to comply with the DHCR useful life schedule and improvement review process. This statement is correct only in part. In fact, the Second Department stated, "[T]he DHCR has declined to review [improvement] increases *except upon the complaint of a tenant who has actually been charged such an increase*" (*id.* at 42 [emphasis added]). Here, plaintiff has filed a complaint asserting that the increase she was charged is unlawful.

Contrary to the majority, the useful life schedule in 9 NYCRR 2522.4(a)(2)(d) applies to these improvements, as it references the need for review and compliance of both bathroom and kitchen upgrading, which were the improvements allegedly performed on Apt 4K (see 9 NYCRR 2522.4[a][2][d][11], [12]; *see also Kuzmich v 50 Murray St. Acquisition LLC*, 157 AD3d 556, 557

[1st Dept 2018] ["[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent"] [internal quotation marks omitted]).

Turning next to the issue of the look-back period, it is well settled that the court may disregard the four-year statute of limitations and examine the entire rental history of the apartment in order to determine the legality of the base rent where it has been found that the landlord has engaged in a fraudulent scheme (*see Thornton v Baron*, 5 NY3d 175, 181 [2005]; *see also Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. Of Rent Admin.*, 15 NY3d 358, 365 [2010]; *Matter of Regina Metro. Co., LLC v N.Y. State Div. of Hous. & Community Renewal*, 164 AD3d 420, 432 [1st Dept 2018], *appeal dismissed* 32 NY3d 1085 [2018]).

Here, plaintiff advanced a colorable claim of fraud within the meaning of *Grimm*. There was substantial evidence that defendants engaged in a scheme to set an illegal rent to remove Apt 4K from rent stabilization.

Accordingly, Supreme Court correctly found that defendants failed to demonstrate that the useful life of the improvements made to Apt 4K in 1995 and 1998 had been exceeded entitling them to a rent increase for the claimed 2009 improvements.

Treble Damages & Attorneys' Fees

Rent Stabilization Law § 26-516(a) provides that "[o]nce [an] owner is found to have charged an unlawful rent, it is presumed to have acted badly and the burden is placed upon it to establish by a preponderance of the credible evidence that it did not know the rent it was charging was unlawful" (*Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1st Dept 2007]). If the owner fails to make such a showing, treble damages must be imposed as a penalty (*id.*).

The record supports Supreme Court's finding that the rent overcharges by defendants were willful. Defendants failed to substantiate the improvements or that they paid the sums on the claimed invoices. No evidence was adduced as to defendants' good-faith belief that the rent overcharges were justified.

Based on my view that the overcharge was willful, plaintiff, as the prevailing party, should be entitled to an award of reasonable attorneys' fees (*see* 9 NYCRR 2526.1[d]; *Conason v Megan Holding, LLC*, 109 AD3d 724, 727 [1st Dept 2013], *affd in relevant part* 25 NY3d 1 [2015]). Accordingly, the matter should be remanded for a hearing on plaintiff's reasonable attorneys'

fees and costs in responding to the appeal (*see Duell v Condon*, 200 AD2d 549, 549-550 [1st Dept 1994], *affd* 84 NY2d 773 [1995]; *Washburn v 166 E. 96th St. Owners Corp.*, 166 AD2d 272, 273 [1st Dept 1990]).

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered October 26, 2017, reversed, on the law and the facts, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered October 18, 2017, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Kahn, J. All concur except Kapnick and Singh, JJ. who dissent in an Opinion by Singh, J.

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 13, **2019**

CLERK