New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
TUESDAY, MAY 5, 2020

RENT STABILIZATION

'Regina' Goes Beyond 'Roberts'-Type Overcharge Cases


By **Warren A. Estis** And **Jeffrey Turkel**

On April 2, the Court of Appeals issued its landmark decision in Regina Metropolitan Co. v. New York State Div. of Hous. & Community Renewal where it held that retroactive application of Part F of the 2019 HSTPA violated the Due Process Clause of the U.S. Constitution. The majority and dissenting opinions are not easily summarized, however, in this article, Warren Estis and Jeffrey Turkel explain what the majority did, and did not, primarily hold.

On April 2, 2020, the Court of Appeals issued its landmark decision in *Regina Metropolitan Co., LLC v. New York State Div. of Hous. & Community Renewal*. In its 4-3 ruling, the court held that retroactive application of Part F of the 2019 HSTPA violated the Due Process Clause of the U.S. Constitution.

The majority and dissenting opinions run 109 pages, and are not easily summarized. This article will explain what the majority did, and did not, primarily hold.

'Regina' Goes Beyond 'Roberts'-Type Overcharge Cases

The Court of Appeals majority phrased the issue before it as follows: "[w]hat is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J-51 benefits prior to our 2009 decision in *Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009)"? *Regina* at *1. The four cases consolidated for decision in *Regina* all concerned this classic *Roberts*-type situation.

Although one may be tempted to read *Regina* as applying only in *Robert* scenarios, the majority opinion reveals that it applies to all rent overcharge cases. *Regina* concerned the retroactive application of the Part F amendments to the HSTPA, which amendments altered the pre-HSTPA "method for determining legal regulated rent for overcharge purposes." *Regina* at *1. The majority made two key findings relating to those amendments. The first was that:

> The overcharge calculation amendments apply to all overcharge claims—not merely those flowing from an improper deregulation, much less a *Roberts* deregulation.
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> *Regina* at *21.

The second, for reasons beyond the scope of this article, was that retroactive application of the Part F amendments was unconstitutional.

Given these two findings regarding Part F—its applicability to all overcharge cases and the categorical constitutional prohibition on its retroactive application—it is clear that *Regina* applies to any pending overcharge complaint.

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Application of 'Regina' Not Based on Date Complaint is Made

The majority made clear that the new rule is that overcharge claims must be resolved "pursuant to the law in effect when the purported overcharges actually occurred." *Regina* at *1. Put another way, the majority held that "[w]e conclude that the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to [Part F's] enactment." *Regina* at *9 (material in brackets supplied).

How Pre-HSTPA Rents and Overcharges Are To Be Calculated

The *Roberts* decision confirmed that the apartments therein had been wrongfully deregulated, but did not set forth a methodology for recalculating rents and overcharges. From 2009 through 2020, courts sharply differed on the proper methodology. Having held that pre-HSTPA rents and overcharges must be calculated under the unamended version of the statute, the majority in *Regina* set forth the categorical rule under the pre-HSTPA regime, as follows:

> Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme for calculating overcharges based on a closed universe of records pertaining only to the apartment's rental history in the four years preceding the filing of the complaint.
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> * * *
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> Under the pre-HSTPA law, the base date was therefore the rent actually charged on the base date—*i.e.*, four years prior to the overcharge complaint even if no registration statement had been filed reflecting that rent.

Regina at *4.

To further clarify matters, the court, relying on its earlier decision in *Boyd v. New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 (2014), held that the rent actually charged four years prior to the filing of the complaint was to be used, even where "the rent charged on the 'base date' was [an erroneous] free market rent that had not been registered." *Regina* at *6 (material in brackets supplied).

The Sole Exception to the Categorical Rule: Mere "Fraud" is Not Enough

Having discussed the categorical rule, the Court of Appeals turned its attention to the sole exception thereto:

> In a series of cases, we confirmed that reviewing rental history outside the four-year lookback period was inappropriate for purposes of calculating an overcharge, but we recognized a limited common-law exception to the otherwise-categorical evidentiary bar, permitting tenants to use such evidence *only to prove that the owner engaged in a fraudulent scheme to deregulate the apartment*.
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> * * *
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> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted *only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate* and, even then, solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations.

Regina at *4, *5 (emphasis supplied).

That very phrase—"fraudulent scheme to deregulate," or *de minimis* variations thereof—appears in *Grimm v. New York State Div. of Hous. & Community Renewal*, 15 NY 358, 367 (2009); and *Todres v. W 7879, LLC*, 137 AD3d 597, 598 (1st Dept 2016), both of which *Regina* favorably cites. *Regina* at *5, *6. The phrase also appears

in *Raden v. W7879, LLC*, 164 AD3d 440, 441 (1st Dept 2018), which *Regina* affirmed.

Application of the categorical rule to pre-HSTPA overcharges, will, compared with more restrictive methodologies employed in some pre-*Roberts* scenarios, will in most cases, sharply increase rents and decrease refunds. Tenants seeking to avoid the rule will no doubt allege "fraud," but the Court of Appeals has made clear that the fraud must be in service of deregulating apartment, not merely raising the rent past legal limits.

How are post-HSTPA Overcharge Complaints to be Determined?

Overcharge complaints filed after June 14, 2019, the HSTPA effective date, will most likely concern overcharges potentially collected both before and after the HSTPA's enactment. Although *Regina* clarifies that overcharges are to be computed pursuant to the law in effect when the overcharge is collected, the court did not expressly discuss how such hybrid complaints, embracing two incompatible methodologies, were to be adjudicated. Nevertheless, a close reading of the decision indicates a way forward.

In the course of examining the pre-HSTPA statute, the court observed that the four-year look back period was "complemented" by RSL §26-516(g), which provided that "'[a]n owner shall not be required to produce any records in connection with (overcharge) proceedings…relating to a period that is prior to the base date.'" That provision "permitted owners to dispose of records outside the four-year period." *Regina* at *4. HSTPA's expansion of the record retention requirements from four to six years was key to the court's finding that retroactive application of the Part F amendments would be unconstitutional:

> This retroactive effect becomes even more pronounced when considered in tandem with the HSTPA amendments to the record retention requirements. Those amendments expand the retention period by two years and, although the provision still nominally permits an owner to destroy some records–now after six years—the new law states that 'an owner's election not maintain records shall not limit the authority of [DHCR] and the courts to examine the rental history and determine legal regulated rents' (RSL § 26-516[g]). Thus, the HSTPA effectively provides that an owner can be penalized indirectly for disposal of records that was legal under the prior law but will now hinder the owner's ability to establish the legality of (and non-willfulness of any illegal) rent increases outside the lookback period…
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> *Regina* at *12.

The earliest the landlord could be required to retain records was four years before the HSTPA was enacted, on June 14, 2019. Thus, for a post-HSTPA complaint, any demand for records before that date would penalize a landlord for exercising its right to retain only four years' worth of records.

Accordingly, for a post-HSTPA complaint, the rule is simple. The base rent is the rent charged and paid on June 14, 2015, irrespective of whether that rent was legal, or was registered. The only exception to this rule is where the tenant raises a colorable claim of a fraudulent scheme to deregulate an apartment.