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RENT STABILIZATION

'Regina'—The Landmark Ruling, One Year Later


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More than a year has passed since the Court of Appeals' landmark ruling in *Matter of Regina Metro. Co., LLC v. New York State Div. of Housing & Community Renewal*, 35 NY3d 332 (2020). In *Regina*, the court held that Part F of the HSTPA, relating to rent overcharge claims, could not be applied retroactively to pre-HSTPA overcharges.

The First Department has since issued various decisions interpreting the scope of *Regina*. Although the Court of Appeals will have the final say as to what *Regina* means, the First Department's interpretations thereof constitute controlling authority in Manhattan and the Bronx. This article will discuss two lines of cases, both relating to the issue of fraud as it impacts the four-year look-back rule.

A Fraudulent Scheme To Do What, Exactly?

Regina is largely concerned with when the four-year look-back period in pre-HSTPA overcharge cases can be breached, a topic the Court of Appeals had considered four times in the past. *See Conason v. Megan Holding LLC*, 25 NY3d 1 (2015); *Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 (2014); *Matter of Grimm v. New York State Div. of Hous. & Community Renewal*, 15 NY3d 358 (2010); *Thornton v. Baron*, 5 NY3d 175 (2005). In *Regina*, the Court of Appeals summarized these holdings as follows:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside a 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.
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> 35 NY3d at 355.

The focus on a fraudulent scheme to *deregulate* comes from *Grimm*, where the Court of Appeals discussed what does and does not constitute a colorable claim of fraud:

> Generally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization.
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> 15 NY 3d at 367.

Despite *Regina's* reference to the limited category of cases where the four-year look-back period could be breached—"evidence of a fraudulent deregulation scheme"—less than two months later, the First Department expanded this category to encompass *any* purported fraudulent scheme. In *435 Cent. Park W. Tenant Assn. v. Park Front Apts., LLC*, 183 AD3d 509, 510 (1st Dept. 2020), the First Department wrote:

> Although the Court of Appeals will have the final say as to what 'Regina' means, the First Department's interpretations thereof constitute controlling authority in Manhattan and the Bronx.

> We reject defendant landlord's argument that the fraudulent exception to the four-year lookback period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of rent on the base date, then the lawful rent on the base date for each

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apartment must be determined using the default formula devised by DHCR.

The First Department cited to *Regina*, *Grimm*, and *Thornton* for this proposition, but did not quote from those cases or provide a pinpoint site. The precise source of the "fraudulent rent overcharge scheme" exception to the four-year look-back period remains unclear.

In *Montera v. KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept. 2021), the majority reinforced its finding that the concept of fraud under *Regina* and its predecessors is broad indeed:

> The dissent ignores our recent decision in *435 Cent. Park W. Tenant Assn. v. Park Front Apts., LLC* (183 AD3d 509 [1st Dept. 2020]). Citing to *Regina*, we stated that the fraud exception to the four-year look back period applied both to a fraudulent scheme to deregulate and to a fraudulent overcharge scheme.

See also Similis Mgt. LLC v. Dzganiya, 71 Misc 3d 129(A) (App Term, 1st Dept. 2021); *Chernett v. Spruce 1209*, LLC, 2021 WL 1253807 (Sup Ct, NY County); *Quinatoa v. Hewlett Assoc., LP*, 2021 WL 1144031 (Sup Ct, NY County).

The landlord in *Montera* has moved the First Department for leave to appeal to the Court of Appeals. That motion remains pending. Irrespective of whether leave is granted, the Court of Appeals will eventually have to decide whether to endorse a "fraudulent rent overcharge scheme" exception to the four-year look-back period.

Post-Base Date Fraud?

In *Nolte v. Bridgestone Assoc. LLC*, 167 AD3d 498 (1st Dept. 2018), the First Department ruled that landlords who ignored *Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), and thereafter failed to register erroneously "deregulated" J-51 apartments, were guilty of a fraudulent scheme to deregulate, such that the four-year look-back period could be breached. Following *Regina*, however, the question arose as to whether *Nolte* was still viable. In *Schrader v. Lichter Real Estate Number One, L.L.C.*, 2020 WL 4365389 (Sup Ct, NY County), Justice Barbara Jaffe wrote:

> *Nolte v. Bridgestone Assoc. LLC and Kreisler v. B-U Realty Corp.*, may retain no viability post-*Matter of Regina*, and in any event, they contradict other caselaw in this department holding that an owner's post-*Roberts* conduct is irrelevant to determining whether it engaged in fraud in de-regulating an apartment during its receipt of J-51 benefits. (internal citations omitted).

The issue came to head in *Montera*, *supra*. Justice Anil C. Singh, writing for the majority, held that *Nolte* had survived *Regina* intact:

> We disagree with the dissent that the *Kreisler* and *Nolte* line of cases is no longer good law in light of *Regina*. This reading of *Regina* is overly broad and does not comport with this State's public policy recognizing the serious emergency in the residential housing market exacerbated by the deregulation of housing stock. Moreover, unlike *Kreisler* and *Nolte*, the four cases decided in *Regina* are model pre-*Roberts* cases. In fact, the issue framed by the *Regina* majority was 'what 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*.'
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> *Regina* itself does not grant an owner carte blanche in post-*Roberts*/*Gersten* cases to willfully disregard the law, by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme was uncovered. (internal citations omitted).

Justice Judith Gische, in a lone dissent, held that although ignoring *Roberts* mandated a penalties penalty, the penalty was not to use the default rent formula to establish the base date rent:

> I fully recognize that an owner's failure to register the premises with DHCR is a violation of the rent stabilization laws and code, but there is an independent statutory remedy for such transgressions:
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> 'The failure to properly and timely comply, on or after the base date, with the rent registration requirements … shall, until such time as registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register' (Rent Stabilization Code [RSC] [9 NYCCR] § 2528.4[a]).
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> Once the late registration is filed this 'shall result in the elimination, prospectively, of such penalty' (*id.*) Where the increases in rent were lawful but for the failure to timely register, the rent collected in excess of the LRR at any time prior to the filing of the late registration is not an overcharge (*id.*) RSL § 26-517(e) specifies the remedy. It provides that '[t]he failure to file a proper and timely … registration statement' precludes an owner from collecting rent increases until the registration is filed.' Defendant's failure to register in itself does not permit a court's review of the rent history of this apartment prior to November 29, 2013 … Since there is already a statutory remedy for non-registration, there is no reason to devise an alternative method of relief.

It remains to be seen whether leave to appeal will be granted in *Montera*, which would allow the Court of Appeals to determine the viability of *Nolte* and whether a "fraudulent rent overcharge scheme" exception to the four-year look-back rule exists. Prompt Court of Appeals review will provide critical guidance to lower Courts and DHCR in hundreds of pending and future rent overcharge cases.