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'Regina,' Fraud, and Its Evolving Interpretations

A continuation of the discussion of 'Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal,' relating to how fraud is to be interpreted in relation to rent overcharge claims.

By **Nativ Winiarsky** | October 13, 2020

Nativ Winiarsky. Courtesy photo

In an article published on these pages on July 2, 2002 entitled "*Regina* and Fraud—a Much Needed Clarification" I wrote about the groundbreaking 4-3 decision of *Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal*, 2020 N.Y. LEXIS 779 (April 2, 2020) (*Regina*) which among other things centered on how fraud was to be interpreted in relation to rent overcharge claims.

By way of brief background, prior to the enactment of the Housing Stability and Tenant Protection Act (HSTPA), a tenant's rent overcharge claim was limited to a four-year lookback period and statute of limitations ("4-Year Interrelated Rule") as far as filing of overcharge claims, retention of records, establishment of the base date rent, and calculation of rental overcharges.

It is this author's contention that in *Regina*, the Court of Appeals (COA) insisted that courts employ the common law fraud definition in its application to the 4-Year Interrelated Rule and thus clarified that in order to utilize the "fraud" exception to the 4-Year Interrelated Rule, the tenant must meet the criteria of a common law fraud claim whereby a fictitious (i.e., fraudulent) rent event is manufactured to artificially inflate the rent history to deregulate an apartment thereby corrupting the reliability of the base date rent.

Supporting this conclusion was the COA's continued reliance and emphasis in *Regina* on *Thornton v. Baron*, 5 N.Y.3d 175 (2005) (*Thornton*) and *Conason v. Megan Holding*, 25 N.Y.3d 1 (2015) (*Conason*) as being the only two COA decisions to have properly found that a rent event was both fictitious (i.e., never existed or as if it never existed) and used to artificially deregulate an apartment. In both cases, the base date rent event's connection to a reliable rent event was severed to the point that only a default formula was available to determine the base date rent, because in essence the true base date rent event never existed since the artificially inflated rent was entirely fabricated and had no basis in reality.

Notwithstanding what many in the landlord-tenant bar believed to be a now clear understanding of the proper application of fraud, courts have still seemingly struggled with adopting a uniform approach.

Thus, for example in *Sandlow v. 305 Riverside Corp.*, 2020 NYLJ LEXIS 959 (Sup. Ct., N.Y. Cty 2020) (*Sandlow*), the tenant brought a residential rent overcharge action against the landlord, claiming that his apartment was rent stabilized since before his tenancy began, but the landlord unlawfully removed it from coverage under the rent stabilization law, resulting in a rent overcharge. The tenant partly based his claim on the (in)famous *Roberts v. Tishman Speyer Props. L.P.*, 13 N.Y.3d 270 (2009) (*Roberts*) case which ruled that apartments in buildings that participated in the J-51 real estate tax abatement program must be treated as rent stabilized for as long as the buildings received the tax abatement.

The court in *Sandlow* found that the landlord had engaged in fraud thus allowing the court to look past the four year statute of limitation since the landlord "fail[ed] to register rents for apartment 7A, fail[ed] to provide rent stabilization riders to leases, and setting of rents in derogation of the J-51 tax abatement requirement to treat the apartment as rent stabilized throughout the abatement" *Supra*, *6-7

Of course, what is particularly problematic about the *Sandlow* decision was that in *Regina*, the COA had before them four cases in which the landlord similarly failed to register rents, failed to provide rent stabilization riders to leases, and set the rents in derogation of the J-51 tax abatement but yet the COA in *Regina* still found that the rent overcharge claim was limited to a four-year lookback period and statute of limitations.

Another decision that at first glance seemed to simply ignore the import of *Regina* was *Vendaval Realty, LLC v. Felder*, 67 Misc. 3d 145(A) (App. Term, 1st Dept.) (*Vendaval*) where the Appellate Term held that the tenant established that landlord engaged in a fraudulent scheme to remove the subject apartment from rent stabilization since "neither tenant nor her predecessor were informed that the apartment was rent stabilized nor offered a stabilized lease, and landlord persisted in charging illegal rents."

Yet again, all of these factors were present in the cases before the COA in *Regina* and yet the COA refused to find that the landlord engaged in fraudulent scheme. Perhaps what triggered the Appellate Term to making a finding of fraud was the finding by the lower court in *Vendaval* that the landlord also registered inconsistent rents with the DHCR which were not reflected in leases. So the landlord in *Vendaval* apparently simply made

up and registered certain rents that had absolutely no factual basis and were merely concocted out of thin air which therefore, consistent with *Thornton* and *Conason*, severed the link of reliability thereby necessitating the need for a default formula.

In a recent decision that certainly came closer to the intentions of *Regina,* but still materially departed in an important respect, was *Meyers v. Four Thirty Realty LLC*, 2020 N.Y. Misc. LEXIS 4190, (Sup. Ct., N.Y. Cty 2020). There, the Honorable Francis A. Kahn III, J.S.C, relied upon *Regina* in finding that the tenant was unable to look beyond the four year lookback period but he did so only because the defendant/landlord was able to "prove, in the first instance, it did not engage in a fraudulent scheme to deregulate the apartment." *Supra* *3.

However, *Regina* was clear that it is the *tenant* (and not the landlord) who has the burden of a) alleging a fraudulent scheme to deregulate a premises; b) actually identify substantial indicia and provide actual evidence of such a scheme; and then c) prevail in a hearing that establishes such a fraudulent scheme.

As stated by the COA in *Regina*, "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." *Regina*, *supra*, *13 (Emphasis added).

Fortunately, for purposes of sharpening matters, we do have the Appellate Division First Department decision of *Corcoran v. Narrows Bayview Co., LLC*, 2020 N.Y. App. Div. LEXIS 3176, 2020 NY Slip Op 03061 (1st Dept. 2020) (*Corcoran*) which further strengthens the point that the default methodology is not used except in cases of a fabricated event.

In that case, the Appellate Division found that the landlord, like the landlord in both *Sandlow* and *Vendaval*, failed to register rents, failed to provide rent stabilization riders to leases, failed to inform the tenant that the apartment was rent stabilized, and persisted in charging the illegal rents. Yet, the Appellate Division still ruled, citing to *Regina*, that that the plaintiff-tenants were precluded from looking back beyond the 4 year prior to the interposition of the complaint since such acts do not, and in of themselves, constitute a fraudulent scheme since, unlike the cases in *Thornton* and *Conason*, there did not exist some fabricated rental event like an invented lease or tenant and therefore there is no wholly fictional rent event.

In response to my last article on this issue, one well-known tenant firm which specializes in commencing class action overcharge cases against landlords, stated that *Corcoran* is readily distinguishable because "the *Corcoran* landlord deregulated units in reliance on DHCR guidance…before appellate authority required re-regulation of units that had been deregulated pre-Roberts." (*See*, "Article Misses the Mark on 'Regina,'" N.Y.L.J., July 27, 2020, by Lucas A. Ferrara and Roger A. Sacher).

Indeed there were some ***pre***-*Regina* Appellate Division First Department cases like *Nolte v. Bridgestone Assoc. LLC*, 167 A.D.3d 498, 90 N.Y.S.3d 159 (1st Dept. 2018) ("*Nolte*") and *Kreisler v. B-U Realty Corp.*, 164 A.D.3d 1117, 83 N.Y.S.3d 442 (1st Dept. 2018), *lv dismissed* 30 N.Y.3d 1090 (2018) ("*Kreisler*") that seemed to suggest that if the landlord waited too long to correct its actions after appellate authority had required re-regulation of units, that such inaction would lend itself towards a finding of fraud.

However, most recently, on July 29, 2020, and in a decision that truly reflected the will of both *Regina* and *Corcoran* in finding a need for a fictitious rental event, the Honorable Barbara Jaffe, J.SC., in the case of *Schrader v. Lichter Real Estate No. One, LLC*, 2020 N.Y. Misc. LEXIS 3901, 2020 NY Slip Op 32501 (U) (Sup. Ct., N.Y. Cty. 2020), ruled that "the failure to offer rent-stabilized leases, lease renewals, and lease riders, and to register the apartment annually" (*supra* at *20) (all of which were central factors that led the courts in *Sandlow* and *Vendaval* to reach a finding of fraud) "are insufficient to establish fraud where an apartment was de-regulated pre-*Roberts*. Rather, defendant's conduct is referable to its belief that it was entitled to de-regulate the apartment based on the then-existing DHCR guidance and regulations. (*See eg, Matter of Regina*, 2020 NY Slip Op 02127, *5 [fraud exception to lookback rule generally does not apply in *Roberts* overcharge cases])." (*Id.*)

Thereafter, Judge Jaffe spotlights *Thornton* and *Conason* and the COA focus on same in its *Regina* decision and held "[n]either of the two cases cited in *Matter of Regina*, in each of which there was evidence of a fraudulent scheme to de-regulate was found, is apposite here. In *Conason*..., the owner created a *fictitious tenant* and renovation to justify its illegal rent increase (*citation omitted*), and in *Thornton v. Baron*, the owner and tenants engaged in a conspiracy to remove apartments from rent stabilization by falsely representing that the apartments were not being used as primary residences in order to rent them at market rates and then sublet them at even higher rates and share in the illegal profits." *Supra* at *20-21.

Thus, Judge Jaffe makes it absolutely clear that it was the fictitious rental event in both *Thornton* and *Conason* that made them the particular exceptions to the rule established in Regina.

As to the objection made by Messrs. Ferrara and Sacher that *Corcoran* could be distinguished because the landlord deregulated the units in reliance on DHCR guidance before there existed appellate authority to the contrary, Judge Jaffe immediately notes that cases like *Nolte* and *Kreisler* "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*. (*Stulz v. 305 Riverside Corp.*, 150 AD3d 558, 56 N.Y.S.3d 46 [1st Dept 2017], *lv denied* 30 N.Y.3d 909, 71 N.Y.S.3d 2, 94 N.E.3d 484 [2018])." Supra at *21 (Emphasis added).

Needless to say, while there seems to be a swing of directions as to how to interpret *Regina* and specifically its application of the default formula upon a finding of fraud, the more recent authority is clearly in accord with the proposition that even an intentional overcharge is not fraud absent a fabricated rental event and in the absence of fraud, an intentionally-inflated illegal rent still does not warrant going beyond the four-year lookback rule

Nativ Winiarsky *is the senior litigation partner at Kucker Marino Winiarsky & Bittens. He argued 'Raden v. W7879' before the Court of Appeals which was one of the other three cases argued with 'Regina' and decided in conjunction with 'Regina' in one consolidated decision.*