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Pre- and Post-HSTPA Analysis of Rent Overcharge Claims

The cases and language of 'Regina' make it rather clear that where an overcharge complaint was filed prior to the HSTPA, a court should only apply a pre-HSTPA analysis.

By **Nativ Winiarsky** | March 05, 2021

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On June 14, 2019, in one of the most recent ground breaking pieces of legislation, the Housing Stability and Tenant Protection Act (HSTPA) was passed into law, which significantly altered, to tenants' benefit, many aspects of long standing decisional and statutory law.

Prior to the HSTPA, rental overcharge claims were generally limited to a four-year look back period for purposes of both determining the existence of an overcharge claim and the legal regulated rent. With the passing of the HSTPA, and specifically the changes introduced in Part F of the legislation, there was now,

among many other changes, a six-year statute of limitations on calculation of overcharge claims with no imitation on the look back period to determine the legal rent. Rather, the courts were now required to consider all available rent history which was reasonably necessary to investigate overcharge claims and determine legal regulate rents. The HSTPA applied to all pending claims and thus courts began immediately applying the HSTPA retroactively to all cases.

But less than a year after the HSTPA was enacted into law, the real estate world was shaken again by an earthquake of a decision. On April 2, 2020, the Court of Appeals issued a 4-3 decision in regard to four interrelated cases under the heading of *Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal*, 2020 N.Y. LEXIS 779, 2020 NY Slip Op 02127 (April 2, 2020) (*Regina*), which among other things found that the retroactive application of Part F of HSTPA was unconstitutional on due process grounds. *Regina*'s far-reaching implications continue to be felt daily. (To date, in a period of only nine months since *Regina* was issued, it has been cited by various courts on over eighty occasions.)

Among the many questions generated by *Regina* was whether and how HSTPA should be applied on to post-HSTPA and/or pending overcharge claims first made pre-June 14, 2019 (HSTPA effective date). An illustration will best define the issue facing many courts today. Assume for example that a tenant interposed a rent overcharge claim in May 2019 and as of May 2019, that unit had a regulated rent of $2,000. Assume for purposes of this example that if one were to review (in accordance with pre-HSTPA law) the rental history of the unit for the four-year period prior to the interposition of the claim, the rent of $2,000 is legal in all respects. However, in this post-HSTPA day and age, if the court were to go back more than four years, and review the entire rental history of the unit in accordance with HSTPA, let's assume that the court would find an irregular and unaccounted for rental increase such that there was an overcharge. Would it be proper for the court to analyze the case pursuant to the law in effect when the alleged overcharges were first imposed or should the court provide for the prospective application of HSTPA and merely limit the overcharge award for the period of July 2019 (post the HSTPA effective date) to the date of the court's decision?

There have been a limited number of decisions available to guide the Bar, which implicates a rather large number of pending overcharge cases. However, the few cases that have addressed it directly, and those that addressed it indirectly (including *Regina*), all come out on the side that the law must be analyzed pursuant to the law in effect when the alleged overcharge was first imposed.

In the first case to directly address the issue entitled *Schrader v. Lichter Real Estate No. One*, 2020 N.Y. Misc. LEXIS 3901, 2020 NY Slip Op 32501(U) 2020 N.Y. Misc. LEXIS 3901 (Sup. Ct., N.Y. Cty. July 29, 2020) (*Schrader*), the attorneys for the tenants argued for the prospective application of the HSTPA and made the argument that the majority in *Regina* stated, at 4, "[W]e opine in no way on the vast majority of that legislation [Part F of the HSTPA] or it is prospective application" and stated again, at 23, "[W]e have no occasion to address the prospective application of any portion of the HSTPA, including Part F." Based thereon, they argued that with regard to the methodology by which the amount of tenants' legal regulated rent, and the amount of tenants' overcharges must be calculated, that while the prior RSL and RSC applies to the overcharges collected through June 2019, the provisions of Part F of the HSTPA nonetheless apply to the calculation of the amount of the legal regulated rent, as well as the amount of the overcharges, from July 2019 to the date of the court's decision. Therefore, they believed that the holding in *Regina* did not apply to a calculation of tenants' rent post-HSTPA, and that the HSTPA must be applied with respect to the calculation of tenants' rent and overcharge amount from June 2019 to date.

In rejecting the tenants' argument, the *Schrader* court held:

> Absent retroactive application of the HSTPA, the cases before the Court in *Matter of Regina*, were thus *analyzed pursuant to the law in effect when alleged overcharges were imposed*. When the cases at issue in *Matter of Regina* were on appeal, the RSL required that, absent a finding of fraud, a rent overcharge be calculated by considering the rent charged on the date four years before the

> filing of the overcharge complaint, the "lookback period," as the "base date rent," and computing the difference between that rent and the rent actually charged to determine if the tenant was overcharged. *An examination of the apartment's rental history before the lookback period was prohibited* (emphasis added).

In similar fashion, in *699 Venture v. Zuniga*, 2020 N.Y. Misc. LEXIS 6427, 2020 NY Slip Op 20241 (Civ. Ct., Bx. Cty. Sept. 24, 2020), the tenant again argued for the necessity for the prospective application of the HSTPA to any post-HSTPA overcharges despite the fact that claim was filed pre-HSTPA arguing that *Regina* did not decide upon the application of Part F to any rent collected or charged from June 14, 2019 forward and that landlords have no constitutional entitlement to charge certain rents or to receive a certain return prospectively and that by allowing tenants to bring claims that will result in their rent being adjusted to the accurate legal regulated rent for their unit going forward, Part F helps to correct the under enforcement of the Rent Stabilization Laws and maintain the affordability of the rent stabilized housing stock going forward.

In spurning the prospective application of the HSTPA to a pre-HSTPA overcharge claim, the court in *699 Venture* ruled at *15-16 as follows:

> Finally, the court is not persuaded by Respondent's argument that "the Court of Appeals specifically affirmed that Part F of the [HSTPA] can be applied prospectively ... [and thus] discovery is still necessary to show whether Petitioner can prove that it is collecting a lawful rent from June 14, 2019 (the effective date of the HSTPA) forward." (Affirmation of Respondent's counsel at 3.) In fact, the *Regina* Court stated that it had "no occasion to address the prospective application of any portion of the HSTPA, including Part F." (*Regina Metropolitan*, 2020 NY Slip Op 02127, *8-9.) Respondent's amended answer comprising her overcharge claim was interposed as of April 22, 2019. *Thus, pre-HSTPA law, as delineated by the Regina Court, applies to Respondent's claims of overcharge and there is no occasion herein to address the application of the HSTPA to Respondent's claims which pre-date its passage in June 2019* (emphasis added).

Correspondingly in *Rossman v. Windermere Owners*, 2020 N.Y. App. Div. LEXIS 6057, 2020 NY Slip Op 05705 (1st Dept. Oct. 13, 2020), the Appellate Division of this Department recently held, "The Court of Appeals recently determined in *Matter of Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal* ... that the HSTPA's overcharge provisions do not apply to cases filed before its enactment (id. at *9), and that the law at time of the overcharge must be applied. Therefore, we rely on the pre-HSTPA law to decide this question."

It is this author's opinion that these decisions are entirely consistent with the intentions and reasoning of the Court of Appeals in *Regina*. In analyzing the relevant statutes that made overcharge claims subject to a four-year statute of limitations and directed that no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the initiation of the claim (see former RSL §26-516[a] [2] and former CPLR 213-a), the Court of Appeals in *Regina* held that those statues provided for a:

> categorical temporal limitation on reviewable records—the "lookback" rule—[and same] was complemented by a record retention provision directing that certain owners "shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation" (former RSL §26-516[g]; see RSC §2523.7[b] ["An owner shall not be required to produce any rent records in connection with (overcharge) proceedings ... relating to a period that is prior to the base date"]). The record retention provision permitted owners to dispose of records outside the four-year period (former RSL §26-516[g]), further evincing the Legislature's intent that records predating the recovery period not be used to calculate overcharges. 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.

Thus, the Court of Appeals made clear in *Regina* that to allow a court to apply HSTPA prospectively on pre-HSTPA claims would simply ignore the pre-HSTPA four-year statute of limitations and lookback period. Furthermore, to adopt a position that a court may attempt to reconstruct the rent and look at the rent history prior to four years from the interposition of the pre-HSTPA complaint would allow "an owner [to] be penalized indirectly for a 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, which—under the new legislation—impact recovery even in the absence of fraud" (*Regina*, supra, at *33) which is exactly what *Regina* sought to avoid and led to a finding of that the retroactive application of the HSTPA would be unconstitutional. To do so, would allow tenants to achieve what *Regina* specifically disavowed.

The cases and language of *Regina* make it rather clear that where an overcharge complaint was filed prior to the HSTPA, a court should only apply a pre-HSTPA analysis. This not only brings consistency with the determination and rational of *Regina*, but it provides for an all-important certainly to the Bar as to how these overcharge claims are to be determined with the understanding that there is no dual track retroactive and prospective analysis. Rather pre-HSTPA claims will be decided solely in accordance with pre-HSTPA law and post-HSTPA claims will be determined solely in accordance with post-HSTPA law.

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