Rediscovering Discovery in Eviction Proceedings After *Regina Metro*

By Miles F. Altarac

Tenants do not have an automatic right to discovery in housing court.[1] Thus, they must seek permission of the court to perform discovery. Generally, in non-payment, and even holdover proceedings, in Housing Court, it is very common for a tenant to interpose a defense or counterclaim of rent overcharge. When a tenant makes such a claim, the next step is to make a motion seeking the rent history of the apartment in order for the tenant to attempt to bolster the claim of rent overcharge. Following the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) on June 14, 2019, the rules regarding discovery in summary eviction proceedings were vastly altered.[2]

Miles F. Altarac

Prior to the enactment of the HSTPA, discovery was limited to four years prior to the date that the tenant made a claim of rent overcharge.[3] In order to warrant consideration of the rental history beyond this four-year statutory period, the tenant was required to make a colorable claim of fraud by identifying substantial evidence of a fraudulent scheme to deregulate and remove an apartment from rent stabilization,[4] a somewhat difficult standard. Furthermore, landlords were allowed to dispose of their rent records after four years.[5]

Then, on June 14, 2019, the HSTPA made profound changes to this process.[6] The HSTPA eliminated the four-year statutory lookback period, and instead imposed no time limit on how far back the courts could look in order to determine whether an overcharge has occurred.[7] Under the HSTPA, the courts were instructed to consider all available rent history "reasonably necessary" to determine the legal rent and any overcharge that may have occurred.[8] In addition, landlords were no longer able to dispose of rent records after four years, but rather, were suddenly required to have kept records in perpetuity in order to satisfy any potential inquiry into the validity of the apartment's rent.[9] Since all rental histories became subject to review under the HSTPA, the increased potential for rent overcharge liability was alarming for landlords. A building that may have once been safe from the great economic threat of a rent overcharge claim was now open to nearly unlimited review and questioning of the landlord's record keeping and reliability of the rent.

These changes resulted in tenants' attorneys taking full advantage of their newfound ability to challenge the rent of an apartment based on the most minor discrepancy in an apartment's rent registrations. Tenants' attorneys began making motions seeking to conduct discovery going back to 1984, simply because the apartment's DHCR registrations indicated a considerable rent increase at some point in time.[10] In many situations, the DHCR registrations showed a significant rent increase after a tenant vacated an apartment. It is common knowledge that when a tenant who lived in an apartment for a number of years vacates the apartment, the landlord is going to make improvements to the apartment, both in an effort to increase the rent and to keep up with the standards of the housing market in New York City. However, these improvements after vacancy are usually not indicated on DHCR registrations. Tenants' attorneys began arguing that any increase in the rent that was greater than the Rent Guidelines Board allowable increase was grounds for a rent overcharge claim and an examination of the apartment's full rental history.

However, on April 2, 2020, the Court of Appeals issued a landmark determination in *Matter of Regina Metro. Co., LLC v. New York State Division of Housing and Community Renewal*, ruling that the retroactive application of the changes to the rent overcharge provisions made by the HSTPA is improper.[11] The Court of Appeals ruled that the harsh changes of the HSTPA cannot be applied to cases where the alleged rent overcharge occurred prior to June 14, 2019, and that such cases must be decided based on the law that was in effect at the time the overcharge occurred.[12] Specifically, the

Miles Altarac is an associate at Sidrane, Schwartz-Sidrane, Perinbasekar & Littman LLP. His practice is focused on all types of litigation and disputes between landlords and tenants, including Housing Court matters and matters before various administrative agencies including the Division of Housing and Community Renewal (DHCR). Miles earned his doctorate of law from Albany Law School and a bachelor's degree in political science from the State University of New York at Buffalo.

court held that "the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment," reasoning that "rather than serving any of the policy goals of rent stabilization (which it would not), retroactive application of the overcharge calculation amendments would merely punish owners more severely for past conduct they cannot change—an objective the Court of Appeals has deemed illegitimate as a justification for retroactivity."[13]

"Essentially, the Court of Appeals decision in *Regina Metro* reversed the course of the discovery process in summary eviction proceedings."

While *Regina Metro* did not concern a motion for discovery, the Court of Appeals indirectly addressed the effect of the changes made by the HSTPA, stating that

> 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.[14]

Essentially, the Court of Appeals decision in *Regina Metro* reversed the course of the discovery process in summary eviction proceedings. No longer do tenants have free rein to challenge the validity of an apartment's rent. Rather, rent overcharge claims are again governed by the pre-HSTPA standard that requires the tenant to put forth some evidence to establish a colorable claim of fraud.[15] In that regard, conclusory allegations of fraud are insufficient to trigger an inquiry into the legitimacy of a base date rent and allow the court to disregard the four-year lookback period. The courts have found that an increase in rent alone is not sufficient to establish a colorable claim of fraud. Skepticism about the quality and extent of improvements, failures to indicate reasons for a rent increase and even incorrect or missing registrations are also insufficient to raise a colorable claim of fraud.

Based on all of the foregoing, the effect of the Court of Appeals decision in *Regina Metro* is twofold. Firstly, in cases where a tenant's motion for discovery was already granted prior to April 2, 2020, a Motion to Renew the court's decision is necessary. Such a motion is generally granted where a change in the law would have an effect on the outcome of the earlier motion. Clearly the change in the law made by *Regina Metro* would have had a profound effect on any motion seeking discovery based on the HSTPA. Secondly, in cases where a tenant made a motion for discovery under the HSTPA prior to April 2, 2020, but a decision has not yet been made by the court, submissions need to be filed that address the changes made by the *Regina Metro* decision. If opposition papers were already filed prior to April 2, 2020, a request must be made to the court for permission to file a sur-reply in order to address the changes made by *Regina Metro*.[16]

For landlords defending against a tenant's claim of rent overcharge in housing court proceedings, the Court of Appeals decision in *Regina Metro* has positively changed the course of the discovery process.

Endnotes

1. *See* Andrew Scherer & Hon. Fern Fisher, Residential Landlord-Tenant Law in New York § 13:46 (25th ed. 2019).
2. S. 6458, 2019 N.Y. State S., Leg. Sess., (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6458.
3. *See* CPLR 213-a.
4. *See Grimm v. State Div. of Hous. & Cmty*. Renewal Office of Rent Admin., 15 N.Y.3d 358, 367, 912 N.Y.S.2d 491, 496 (2010).
5. *See* Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, NYSBA Journal 35, 38 (2019).
6. *See id*.
7. *See* N.Y. Unconsol. Laws § 8632.
8. *Id.*
9. *See* N.Y.C. Admin. Code § 26-516(g); CPLR 213-a.
10. *See BPE Realty Owner LLC v. Garrick*, 045677/2019, 2020 NYLJ LEXIS 617, at *1-2 (Civ. Ct., Bronx Co. 2020); *517 W. 161 Realty LLC v. Vega*, 52851/19, 2020 NYLJ LEXIS 917, at *1 (Civ. Ct., N.Y. Co. 2020).
11. *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, No. 1, 2020 N.Y. Slip Op. 02127, at *1 (2020).
12. *Id*. at *21.
13. *See id*. at *17.
14. *See id*. at *5.
15. *See id*. at *7.
16. *See id*. at *9.

Reprinted with permission from: *N.Y. Real Property Law Journal*, Fall 2020, Vol. 48, No. 3, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.