RENT STABILIZATION "MASTER CLASS"

HIGH RENT VACANCY DEREGULATION AND RENT OVERCHARGE ISSUES IN RENT STABILIZED APARTMENTS

A PRESENTATION PREPARED FOR LAWLINE

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This is a booklet produced for a Lawline CLE in May 2021. As I was sprucing up my website in May 2022, I thought about how much has happened in the courts with Rent Stabilization in the last year. Therefore, I updated the booklet.

As I said in May 2021 on the last page of the booklet, *"The lecture accompanying this booklet is scheduled for May 21, 2021. If you pick up this booklet on May 22, 2021, it may well be obsolete."* That is all the truer in May 2022. I remind the reader again that this area of law changes daily. That is what makes it fun.

Michelle Itkowitz

RENT STABILIZATION "MASTER CLASS" – High Rent Vacancy Deregulation and Rent Overcharge Issues in Rent Stabilized Apartments

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I. INTRODUCTION

This continuing legal education class assumes that the student has a basic familiarity with Rent Stabilization in New York City.

II. WHAT LANDLORDS AND TENANTS FIGHT ABOUT IN THE REALM OF RENT STABILIZATION – ILLEGAL DEREGULATION AND RENT OVERCHARGE

Most of the epic battles in Rent Stabilization are over illegally deregulated apartments and rent overcharges. That is what we will be concentrating on in this booklet.

A. Infinite Look Back for Deregulation Issues

It is very important to keep in mind that a court or the New York State Division of Housing and Community Renewal ("**DHCR**") can look back in time endlessly to determine whether an apartment is subject to Rent Stabilization. *Gersten v 56 7th Avenue LLC,* 88 AD3d 189 [1st Dept 2013], *appeal withdrawn* 18 NY3d 954 [2012]. Upon such a challenge, "consideration of events beyond the four-year [damage determination] period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated" *East W. Renovating Co. v DHCR,* 16 AD3d 166, 167 [1st Dept 2005]; *150 E. Third St. LLC v Ryan*, 201 AD3d 582 [1st Dept 2022]. *See also* Rent Stabilization Code ("**RSC**") § 26-516(h) (applicable after June 14, 2019), which allows a court or DHCR, "in investigating complaints of overcharge and in determining legal regulated rents, [to] consider all available rent history which is reasonably necessary to make such determinations…"

B. The High Rent Vacancy Deregulation Exception to Rent Stabilization

One of the few exceptions that would take an apartment out of Rent Stabilization is High Rent Vacancy Deregulation. Therefore, most fights about illegal deregulation from Rent Stabilization are about whether a unit has been High Rent Vacancy Deregulated.

1. *The High Rent Vacancy Deregulation Exception to Rent Stabilization*

High Rent Vacancy Deregulation occurred when an apartment's *legal* regulated rent had, upon the apartment becoming vacant (see *Altman v 285 West Fourth LLC*, 31 NY3d 178 [2018]), reached a prescribed deregulation threshold. Rent Stabilization Law ("**RSL**") § 26-504.2(a). The High Rent Vacancy Deregulation Thresholds in New York City were as follows[1]:

7/7/1993 – 3/31/1997	$2,000 (but check statutes for window periods)
4/1/1997 – 6/23/2011	$2,000
6/24/2011 – 6/14/2015	$2,500
6/15/2015 – 12/31/2017	$2,700
1/1/2018 – 12/31/2018	$2,733.75
1/1/2019 – 6/13/2019	$2,774.76
6/14/2019 - present	No HRVD

On June 14, 2019, High Rent Vacancy Deregulation was abolished by the Housing Stability and Tenant Projection Act of 2019 ("**HSTPA**"). Although High Rent Vacancy Deregulation was abolished, as per the HSTPA, past deregulations are still valid. RSL § 26-504.2.

2. *High Rent Vacancy Deregulation Burden*

The burden is on the owner to show that an apartment is properly deregulated. *Matter of Kostic v DHCR*, 188 AD3d 569, 569 [1st Dept 2020]; *Connors v Kushner Companies LLC*, 2021 WL 3468142 [Supreme Court, Kings County 2021]; *341 West 19th Street Partners 2 LLC v DHCR*, 2022 WL 1266402 [Supreme Court, New York County, 2022].

3. *Effect of DHCR Rent (Freeze) Reduction Order on High Rent Vacancy Deregulation*

Often Rent Stabilized tenants file with DHCR an "Application for a Rent Reduction Based Upon Decreased Services in an Individual Apartment". If the evidence indicates that the landlord failed to maintain required services, the DHCR can issue a written order that directs the

[1] https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-36-02-2020.pdf

landlord to restore services and reduces the rent for the apartment "to the level in effect prior to the most recent guidelines adjustment", a "**Rent Reduction Order**". RSC § 2523.4.

The Rent Reduction Order will stay in effect until the landlord applies to DHCR and receives a "**Rent Restoration Order**" that finds that services have been restored. The Rent Reduction Order generally bars further rent increases for Rent Stabilized tenants until DHCR issues a Rent Restoration Order. *Cintron v Calogero*, 15 NY3d 347 [2010]. The Rent Stabilization Code further prohibits the collection of vacancy lease rent increases and the collection of the portion of a major capital improvement rent increase that becomes collectible after the Rent Reduction Order is issued. Such increases will become collectible, prospectively only, from the effective date of the DHCR Rent Restoration Order. "[T]he order reducing the rent shall further bar the owner from applying for or collecting any further increases in rent including such increases pursuant to section 2522.8 of this Title until such services are restored or no longer required pursuant to an order of the DHCR." RSC § 2523.4.

Thus, Rent Reduction Orders are a big deal in High Rent Vacancy Deregulation scenarios because they can freeze the rent in place for years, thus negating any alleged rent increases, and defeating a claim of deregulation. Here is a recent example of these types of cases. In *Re Guialdo*, LVT No. 30404 [DHCR Adm. Rev. Docket No. HQ410006RT, 8/8/19], tenants complained of rent overcharge. The District Rent Administrator ruled for tenants and found a total overcharge of $179,550 with triple damages and interest. The reason for the overcharge finding was that, due to an outstanding Rent Reduction Order, the rent was long frozen at $288.49 per month.

4. J-51 Tax Abatements and High Rent Vacancy Deregulation

New York City's "**J-51**" program was a tax exemption and/or abatement program for multi-family property owners. Real Property Tax Law § 489. Rental units in buildings receiving J-51 must be registered with the DHCR and are generally subject to Rent Stabilization for at least as long as the J-51 benefits are in force. 28 RCNY 5-03 [f]. Deregulation may occur upon the expiration of a tenant's lease after the tax benefits expire, provided the tenant's initial lease and each renewal thereof contained a notice in at least 12-point type informing the tenant that the unit's protected status would eventually lapse. New York City Administrative Code §§ 11-243, 11-244 (former § J-51).

In 2009, in *Roberts v Tishman Speyer,* 13 NY3d 270 [2009], the Court of Appeals held that a Rent Stabilized apartment in a building for which the owner receives J–51 tax benefits is

NOT subject to the Luxury Deregulation provisions of the Rent Stabilization Law until the tax benefit expires or, if the lease contained a notice that the unit would be deregulated upon expiration of the tax benefit, until the apartment becomes vacant after expiration of the tax benefit. This was a huge deal because landlords had spent years High Rent Vacancy Deregulating thousands of Rent Stabilized apartments in buildings receiving J-51 benefits.

In 2011, the Supreme Court, Appellate Division First Department, held (in another case with the same name as the first *Roberts* case; so we will call this case *"Roberts 2"*) that the Court of Appeals decision in *Roberts* could have retrospective effect. *Roberts v Tishman Speyer Properties*, 89 AD3d 444 [1st Dept 2011]. *Roberts 2* was actually more devastating than the first Roberts case, because it made every apartment ever wrongly deregulated under J-51 a potential litigation.

Then *Gersten v 56 7th Avenue LLC,* 88 AD3d 189 [1st Dept. 2013], was a dispute between tenants and a new building owner. The owner took over the subject property in 2009, *a decade* after the former owner had deregulated the apartment pursuant to a 1999 DHCR High Rent Vacancy Deregulation order. Tenants commenced the action seeking a declaration that the 1999 High Rent Vacancy Deregulation order was void *ab initio* (from the beginning) pursuant to *Roberts*. Among other things, the *Gersten* Court totally rejected the statute of limitations defense for landlords where an apartment was improperly deregulated during J-51, even if it happened many years ago.

If a unit was subject to Rent Stabilization in the absence of J-51 benefits, upon the termination of those benefits, the unit continues to be regulated. *72A Realty Associates v Lucas*, 101 A.D.3d 401 [1st Dept 2012].

5. ***Getting to the Deregulation Threshold with Individual Apartment Improvements***

a. *Individual Apartment Improvements*

Before the HSTPA in 2019 eliminated High Rent Vacancy Deregulation, landlords were always eager to get to the deregulation threshold. One way to hasten getting there was to do Individual Apartment Improvements ("**IAIs**"). A landlord may secure a rent increase based on a substantial modification or enlargement of dwelling space and/or upon provision of additional services, improvements, equipment, furniture, or furnishings to a Rent Stabilized unit. RSL § 26-

511(c)(13); RSC § 2522.4(a)(1). No tenant consent is required when the IAI is made during a vacancy. RSC § 2522.4(a)(1). DHCR distinguishes between "improvements" and "repairs" or "maintenance" in determining whether the work qualifies for the increase.[2] *Rockaway One Co., LLC v Wiggins*, 9 Misc. 3d 12 [App Term 2d 2004], *order rev'd on other grounds*, 35 AD3d 36 [2d Dept 2006].

Before the HSTPA in 2019, in a building with 35 or fewer apartments, a landlord was allowed to add to a Rent Stabilized tenant's rent the equivalent of one-fortieth (1/40) of the cost of the new service or equipment, including installation costs, but not finance charges. RSL § 26-511(c)(13); RSC § 2522.4(a)(4). For example, if a new refrigerator was installed in an apartment and the landlord's expense was $400.00, then the tenant's monthly rent was increased by $10.00 (1/40 x $400). This kind of IAI was often used to juice the rent to the deregulation threshold.

IAI's receive scrutiny by courts or DHCR. See Operational Bulletin 2016-1[3] "Individual Apartment Improvements", which deals extensively with the types of proof the DHCR requires of a landlord who wants to substantiate IAI's, and which states:

> Claimed individual apartment improvements are required to be supported by adequate and specific documentation, which should include:
>
> 1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
>
> 2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
>
> 3. Signed contract agreement; and
>
> 4. Contractor's affidavit indicating that the installation was completed and paid in full.

[2] Do NOT confuse, as many people do, IAI's with MCI's (major capital improvements). MCI's require the prior consent of DHCR. MCI's are for building-wide systems that directly or indirectly benefit ALL tenants.

[3] https://hcr.ny.gov/system/files/documents/2020/02/operational-bulletin-2016-1_0.pdf

Here are some examples of how landlords mess up substantiation of IAI's:

- The invoices do not contain an address or apartment number, or contain multiple apartment numbers.
- The cancelled checks do not indicate what invoices were being paid.
- There are no invoices marked "paid".
- The amounts of certain expenditures do not match up with the invoices.
- The invoices are chronologically discordant with the alleged work.
- Landlord does not provide signed contracts; they have paper, but not contracts.
- Landlord does not provide contractors' affidavits.
- Landlord does not provide before and after pictures of the apartment.

b. Achieving (or Not Achieving) the Deregulation Threshold Via IAI's, a Sometimes Subjective Analysis

So far, we have established that a court or DHCR will look back endlessly at an apartment's history to answer the question – *"Was this apartment properly deregulated?"* We have also learned that the burden of proving the deregulation belongs squarely to landlord. If a court or DHCR looks back in time to an alleged deregulation and sees an objective reason why that deregulation did not happen, then surly the apartment will be pushed back into Rent Stabilization. A very common example of this phenomena is when a High Rent Vacancy Deregulation occurred when the building was receiving J-51 tax benefits, as in *Gersten above.* The court or DHCR will force the unit back into Rent Stabilization decades after such wrongful deregulation. *See EMA Realty, LLC v Leyva*, 64 Misc. 3d 11 [App Term 2nd 2019]. Another example would be if there was a DHCR Rent Reduction Order in effect, effectively freezing the rent below the deregulation threshold, and landlord availed herself of High Rent Vacancy Deregulation before she applied for a Rent Restoration Order, as we saw above in *Cintron v Calogero*, 15 NY3d 347 [2010].

It gets a little trickier when the deregulating factor concerns whether IAI's happened. The analysis can become more subjective, based upon several factors. Here are some of the factors that come in to play when a court or DHCR is scrutinizing IAI's for the purposes of evaluating the efficacy of a Deregulation.

(1) Sufficiency of IAI Records

Some landlords have sufficient records available to substantiate IAI's. Suffice it to say, the more records a landlord has, the better it is for landlord. If the records exist, then there are a series of other questions which must be answered:

(a) Do the records substantiate the dollar amount of IAI's needed to reach the deregulation threshold?

See 150 E. Third St., LLC v Ryan, 2020 WL 9396600 [New York City Civil Court, New York County, 2020], *modified and remanded*, 71 Misc.3d 1 [App Term 1st 2021], *affirmed as modified*, 201 AD3d 582 [1st Dept 2022]. ("In this case, rent for the premises jumped in 2006 from $508.89 to $3,000.00, an approximate 600% increase. The petitioner allegedly spent $67,240.00 on improvements to a 500 square feet apartment. This expenditure was barely sufficient to support an increase which removed the premises from regulation. The premises are located in the East Village neighborhood of New York City…As detailed in the court's March 9, 2020 analyses, petitioner failed to provide documentation to support purported $67,240.00 in Individual Apartment Increases ("IAIs"). It also failed to proffer reasons why documentation was not available. Those records produced included affidavits from contractors which were created approximately a decade after work was done in the premises. No evidence was provided to substantiate the costs, alleged. The affidavits are silent as to how those executing same recalled the specifics of the renovation. A careful analysis revealed that only $37,040.00 of the $67,240,00 improvements alleged supported a rent increase.")

Contrast *Ryan* with *Sandlow v 305 Riverside Corp.*, 201 AD3d 418 [1st Dept 2022] ("[Landlord] sufficiently documented the apartment improvements by proffering the estimate, invoices, checks showing payment of all the sums charged, and testimony from its own agents and the general contractor that the work was done [citations omitted]. [Tenant's] expert's credible testimony as to the amount the contractor should have charged, how much of the renovation would have qualified as individual apartment improvements, and the contractor's subpar work or failure to install crown molding does not prove that the work was not performed…")

(**b**) **Does the work substantiated constitute improvements or just repairs?** *See Rockaway One Co., LLC v Wiggins*, 9 Misc. 3d 12 [App Term 2d 2004], *order rev'd on other grounds*, 35 AD3d 36 [2d Dept 2006] ("…DHCR commonly allows increases for the installation of new stoves and refrigerators when these are installed as part of an overall remodeling of the kitchen…")

(**c**) **Did the useful life of the current fixtures in the apartment justify "improvements"?** RSL 26-511(c)(13); RSC 2522.4(a)(11); *Dilorenzo v Windermere Owners LLC*, 36 NY3d 965 [2020].

(**2**) **Age of the Deregulation**

The older the deregulation, the less scrutiny a court or DHCR is likely to subject the deregulation to. The more recent the deregulation, the more scrutiny a court or DHCR is likely to subject the deregulation to.

See Gun Hill Associates LLC v Martinez, [New York City Civil Court, Bronx County, 2021] (No amendment of answer allowed where tenant alleged that, in 2010, the rent went from $955.47 to an unexplained $1,911.53, ten years after the alleged deregulation.)

See 150 W. 82nd St. Realty Assoc., LLC v Linde, 36 Misc.3d 155(A) [App Term 2d 2012], where summary judgment was denied to landlord where there was an unexplained $1,061 rent increase in 1997 (at the time of the decision, that was 15 years earlier).

(**3**) **Dollar Amount of IAI's**

The less expensive the deregulation, the less scrutiny a court or DHCR is likely to subject the deregulation to. The more expensive the deregulation, the more scrutiny a court or DHCR is likely to subject the deregulation to.

See Widsam Realty Corp. v Joyner, 66 Misc.3d 132(A) [App Term 2d 2019], where a tenant was granted discovery in a summary proceeding when IAI's from 1989 were at issue and the amount the landlord needed to spend to improve the apartment in 1989 was over $50k.

(4) **Proximity of Owner to the Deregulation**

If the current owner was not the owner when the deregulation occurred, the less scrutiny a court or DHCR is likely to subject the deregulation to. If the current owner was the owner when the deregulation occurred, the more scrutiny a court or DHCR is likely to subject the deregulation to.

See 3225 Holdings LLC v Imeraj, 65 Misc.3d 1219(A) [New York City Civil Court, Bronx County, 2019], where the court held:

> The court also finds the rent increases in 1996 and 2001 are not inherently unreliable and, as they predate [landlord]'s ownership by five and 10 years respectively, and pre-date [tenant]'s claims by 18 and 23 years respectively, it would be highly prejudicial to [landlord] to have to justify those relatively small increases. [Footnote omitted.] Those records, were they available, are not "*reasonably necessary*" for this court to determine the central issues here—whether [tenant] has been overcharged in the last six years or whether the premises were improperly deregulated. (*see Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968] (what is discoverable is left to the sound discretion of the court and the court must determine what information is material and necessary measured against usefulness and reason); *Andon v. 302-304 Mott Street Associates*, 94 NY2d 740, 747, 709 NYS2d 873 [2000] ("[u]nder our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party.")…

In *Imerag*, however, the court *was* willing to look back to 2002-2005, when the rent in that case jumped from $789.10 to $1,226.94, a 70% increase, with no explanation offered from landlord.

(5) Proximity of Tenant to the Deregulation

If the current tenant was not the tenant when the deregulation occurred, the less scrutiny a court or DHCR is likely to subject the deregulation to. If the current tenant was the tenant when the deregulation occurred, the more scrutiny a court or DHCR is likely to subject the deregulation to.

See Haskin v DHCR, 203 AD3d 603 [1st Dept 2022] ("Even though the law required the landlord to maintain records of individual apartment improvements (IAIs) for only four years, the landlord nonetheless submitted an affidavit from its managing agent, along with invoices, all of which demonstrated that work was done [citations omitted]. Given these submissions, and given [tenant]'s own statement in her complaint that renovations were done before a prior tenant moved in, it was not arbitrary and capricious for DHCR to draw upon its own expertise and resources in concluding that $28,126.80 was not an inordinate expenditure to renovate an apartment that had become vacant for the first time in at least 21 years.")

See 486 Bklyn Realty, LLC v Charles, 70 Misc.3d 142(A) [App Term 2d 2021] ("It is undisputed that, in addition to a vacancy increase and a long-term prior tenant increase, landlord relied upon a $1,300 individual apartment improvement (IAI) increase to bring the rent above the threshold. Tenant argues that, in order to justify an IAI increase of $1,300, landlord would have had to have made approximately $50,000 worth of repairs to the apartment. In opposition to landlord's motion, tenant described conditions in the apartment, seeking to demonstrate that any repairs and updates that may have been made could not have cost $50,000. Upon a review of the motion papers, we find that tenant has not demonstrated that her defense has potential merit.")

(6) Other Factors – Such as Large Gaps in DHCR Records

The court and DHCR will scrutinize IAI's more closely if there are other suspicious facts afoot, such as when DHCR records have unexplained gaps.

See Thompson Assets LLC v Raffèlo, [App Term 1st 2018] ("Nor does the DHCR rent registration history, which contained unexplained time gaps over ten years and indicated neither the initial legal rent nor the amount of rent collected for more than twenty years, support landlord's claim of high rent deregulation.")

C. Rent Overcharge Claims

Rent overcharges are governed by RSC § 2526.1.

There are currently two aspects to calculating a landlord's rent overcharge liability. The first aspect is calculating the Legal Rent. The second aspect concerns the amount of damages allowed.

OVERCHARGE BEGAN	HOW TO ESTABLISH THE LEGAL RENT	HOW TO CALCULATE THE AMOUNT OF DAMAGES
overcharge of tenant began **on or before** June 14, 2019	whatever the tenant was paying four years before the date the tenant makes the claim	up to four years before the date of the claim; if the overcharge is found to be willful, the most recent two years of damages can be tripled
	in the event of fraud or pref rent , court or DHCR can look back as far as it needs to in order to find a reliable rent	
overcharge of tenant began **after** June 15, 2019	court or DHCR can look back as far as it needs to in order to find a reliable rent	up to six years before the date of the claim; if the overcharge is found to be willful, all six years of damages can be tripled

1. *The Four-Year Rule*

Prior to June 14, 2019 and the HSTPA[4] (defined below), CPLR § 213-a stated:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge **may be based upon an overcharge having occurred more than four years before the action is commenced**. **This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action**.

[4] On June 14, 2019 the language of CPLR § 213-a was changed to:

"No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, however, an overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges."

[Emphasis supplied.]

Prior to June 14, 2019 and the HSTPA (defined below), RSL § 26–516(a)(2), in relevant part, stated:

> …a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged and 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 complaint is filed**. **… This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four–year period preceding the filing of a complaint pursuant to this subdivision**.
>
> [Emphasis supplied.]

2. The Four–Year Rule Overcome by Preferential Rent

There is heightened scrutiny of a rent roll when there are preferential rents as per RSC § 2521.2 (Preferential rents):

> (a) Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation such rent shall be known as the "preferential rent." The amount of rent for such housing accommodation which may be charged upon renewal or vacancy thereof may, at the option of the owner, be based upon either such preferential rent or an amount not more than the previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law.
> (b) Such legal regulated rent as well as preferential rent shall be set forth in the vacancy lease or renewal lease pursuant to which the preferential rent is charged.

> (**c**) **Where the amount of the legal regulated rent is set forth either in a vacancy lease or renewal lease where a preferential rent is charged**, **the owner shall be required to maintain**, **and submit where required to by DHCR**, **the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four–year period preceding the filing of a complaint**.
>
> [Emphasis supplied.]

This statute is in place because many landlords have abused preferential rents. A landlord illegally raised legal rents, with the intention of hastening an illegal deregulation. But because the tenant was only being charged the preferential rent, the tenant did not feel the pain of the unlawful legal rent and, therefore, did not report it to DHCR. The years go by, and then the former four-year look back period (see above) dissuades a future tenant from looking back to question the progression of the legal rents and the subsequent deregulation. Thus, the legislature made the statute, so that courts and the DHCR could examine a landlord's records immediately preceding a preferential rent.

3. The Four–Year Rule Overcome by Landlord Fraud

There is an exception to the former four-year look-back period on a rent overcharge damages assessment when there is "colorable claim of fraud." *Matter of Grimm v DHCR*, 15 NY3d 358 [2010] ("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.")

Fraud has been found where there were illusory prime tenancies (*Conason v Megan Holding*, LLC, 25 NY3d 1 [2015]), where there was no proof of recent apartment improvements that were alleged to lead to rent increases (*Bogatin v Windermere Owners LLC*, 98 AD3d 896 [1st Dept 2012]), where landlord asked tenant to agree to things that were void against public policy (*Pehrson v DHCR*, 34 Misc.3d 1220(A) (Sup Ct New York County 2011]).

III. THE HSTPA AND *REGINA*

A. HSTPA

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 ("**HSTPA**") was enacted, making sweeping changes to many laws affecting residential landlord and tenant relationships. The HSTPA had a huge impact on the Rent Stabilization Law. Among many other things, the HSTPA abolished High Rent Vacancy Deregulation.

B. *Regina v. DHCR*

On April 2, 2020, the New York State Court of Appeals, decided four cases grouped together for one decision, *Regina v DHCR*, 35 NY3d 332 [2020]. *Regina*'s main holding is that the new Rent Stabilization overcharge calculation of damages provisions of the HSTPA cannot be retroactively applied to overcharges that began before the new law was enacted. In addition, *Regina* articulated clearer rules about the four-year look back period.

C. *Regina* and Rent Stabilization coverage

Regina reinforces that a court or DHCR will look back forever if a deregulation claim is NOT based on a landlord's records.

In *Diagonal Realty, LLC v Linares*, 70 Misc.3d 133(A) [App Term 1st Dept 2020], the Term held:

> Contrary to landlord's contention, the trial court properly considered the apartment's rental history beyond four years from the commencement of the proceeding, since it was not done for the purpose of calculating a rent overcharge, but rather to determine whether the apartment is regulated [citations omitted throughout]. Nor was tenant required to allege any colorable claim of fraud in order to challenge the change in the apartment's status from rent-stabilized to unregulated, even if the change occurred beyond the four-year statute of limitations for rent overcharge claims…

> *[Regina]*, relied upon by landlord, does not mandate a different result since, as the *Regina* Court noted, "there is a distinction between an overcharge claim and a challenge to the deregulated status of an apartment"…
>
> Turning to the merits, a fair interpretation of the evidence supports the determination that landlord failed to meet its burden of proving that the apartment at issue was exempt from rent stabilization based upon a high rent vacancy said to have occurred before tenant commenced occupancy in April 2014. The record shows that the last legal, registered rent for the apartment was $1,116.34 paid by the then-stabilized tenant (Michel) **in 2006**. Following Michel's vacatur, the apartment was registered **in July 2007** as permanently exempt due to a high rent vacancy, and rented to one Bernardo Gonzalez. As the trial court correctly found, however, **landlord** "**offered no evidence whatsoever to support its claim that the legal rent for the apartment exceeded $2,000 in 2007**," which was the then-applicable deregulation threshold… **No documentation of apartment improvements was offered**, **nor was there any witness testimony demonstrating the nature and scope of the work performed**.
>
> Nor did landlord establish that the legal regulated rent exceeded the then-applicable $2,500 deregulation threshold after Gonzalez vacated and tenant commenced occupancy in April 2014…
>
> [Emphasis supplied.]

D. *Regina* and Rent Stabilization damages

Regina synthesizes the Court's precedent and clearly states the operative rule regarding fraud and the former four-year damage look-back limitation. The tenants in *Regina* conflated the Court's willingness to look back beyond four years when answering the regulatory coverage questions, with the Court's willingness to look back more than four-years when calculating the rent on the base date. The Court in Regina corrected them:

> [T]enants who commenced a claim more than four years later and could not show fraud would be entitled, by virtue of the interrelated four-year statute of limitations and lookback rule, to recover only the increases added to the market base date rent that were over the legal limits during the recovery period…That *Roberts* revealed particular conduct to be illegal does not mean that tenants must be able to recover a certain measure of monetary damages for associated rent increases despite their failure to seek recovery within the limitations and lookback periods…While the statute of limitations and lookback period preclude tenants in those apartments from recovering certain damages they could have recovered if their claims had been initiated earlier, as a result of *Roberts* they may now enjoy rent stabilization protection…
>
> 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 …(*Grimm*…)…")"

See Grimm v DHCR, 15 NY3d 358 [2010]:

> 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…the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

It was beyond the scope of the *Regina* case for the Court to provide us with a working definition for "fraud" in this context because the Court found there was no fraud committed by the *Regina* landlords. Nevertheless, the Court of Appeals in *Regina* provides us with just such a

definition, and I think we would be doing ourselves a disservice to ignore this gift. Here is what *Regina* had to say about fraud, at footnote 7:

> Fraud consists of "evidence [of] a representation of material fact, falsity, scienter, reliance and injury" (*Vermeer Owners v. Guterman,* [citations omitted]. In this context, willfulness means "consciously and knowingly charg[ing] … improper rent" (interpreting "willful" in a regulatory context to mean "intentional and deliberate").

IV. INSIGHT SINCE *REGINA*

A. Clarification about Whether *Roberts* Deregulations Can Ever be Fraud for Purposes of Looking Back Beyond Four Years

Previous appellate decisions have held that a wrongful deregulation during J-51 could not be considered a fraudulent scheme to deregulate for purposes of looking back beyond four years, nor could it be considered willful for purposes of assessing treble damages, because landlords were replying on DHCR's wrongful interpretation of the statute. *Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021] clarifies that, while the foregoing is true, it will not always apply to landlords who, *after Roberts* in 2010, continued to deregulate apartments in J-51 buildings or who did not re-regulate apartments when J-51 was still present.

In *Montera* the court finds fraud and is willing to look back beyond the four-year statute of limitations where it found:

> The hallmarks of a fraudulent scheme to deregulate are present here. Defendant deregulated the apartment after *Roberts* was decided and did not re-register with DHCR, despite receiving J–51 tax benefits after *Gersten* applied *Roberts* retroactively. During the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-stabilized lease. Unlike in *Park*, where the owner promptly registered the apartment, defendant waited until 2018 to re-register the apartment, one year after the complaint in this case was filed alleging that defendant unlawfully deregulated the building's apartments – more than a decade after *Roberts* was

> decided and eight years after our decision in *Gersten*. Defendant's actions cannot be deemed to be prompt compliance. Rather, at this stage, plaintiff has sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building.

B. A distinction is made between willfulness for purposes of treble damages and fraud for purposes of looking back beyond four years.

A distinction is made between willfulness for purposes of treble damages and fraud for purposes of looking back beyond four years. In *Rossman v Windermere Owners LLC*, 187 AD3d 527 [1st Dept 2020], the court held:

> *Regina* cautioned that nothing short of fraud warranted the application of the default formula: "In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period ... we never suggested that an alternative method of setting the base date rent could apply to a less blameworthy owner where not authorized by the statutory scheme" [citations omitted].
>
> Here, although the trial court found that defendants illegally deregulated the apartment and did so willfully, it did not specifically make a finding that fraud took place. We therefore remand the matter to the trial court for a specific finding of whether defendants' conduct constituted a fraudulent scheme to deregulate the apartment, and, if warranted, to recalculate the legal, regulated rent based on such findings (*Matter of Grimm v. State of N.Y. Div. of Hous. and Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 367, 912 N.Y.S.2d 491, 938 N.E.2d 924 [2010]).

C. **The four–year look back period will be overcome not only by a fraudulent scheme to deregulate but also by a fraudulent scheme to overcharge**.

The four–year look back period will be overcome not only by a fraudulent scheme to deregulate but also by a fraudulent scheme to overcharge. In *435 Central Park West Tenant Association v Park Front Apartments*, 183 AD3d 509 [1st Dept 2020], the court held:

> Applying pre–HSTPA law, plaintiffs' overcharge claims fail unless they can prove fraud because, as indicated, the RSL imposed a four–year statute of limitations and lookback period on overcharge claims [citations omitted throughout]. Plaintiffs, however, claim that the HUD rent in effect on the last day of federal oversight, April 11, 2011, was an illegal rent and thus could not be used as the initial legal regulated rent (base rent) to determine whether defendant engaged in a fraudulent rent overcharge scheme to raise the pre–stabilization rent of each apartment. We find that plaintiffs have submitted sufficient evidence to raise an issue of fact of whether defendant tampered with a recertification process provided for under the Use Agreement, and pressured and misled tenants, for the purpose of improperly raising rents at Use Agreement "Market" rates far higher than the Use Agreement "Contract" rates.
>
> 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 the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR…and plaintiffs' recovery would be limited to those overcharges occurring during the four–year period immediately preceding plaintiffs' rent challenge.

D. The lower courts and DHCR still grappling with the definition and utilization of "base date" for purposes of damages, although the First Department is pretty clear.

The lower courts still grappling with the definition and utilization of "base date" for purposes of damages, although the First Department is pretty clear.

In *Corcoran v Narrows Bayview Company, LLC*, 183 AD3d 511 [1st Dept 2020], the court held:

> The parties agree that the applicable base date is April 2006, four years prior to the April 2010 date of the complaint, and we reject plaintiffs' suggestion that the lack of DHCR filings contemporaneous with the base date requires one to look beyond the four-year period to an earlier legal regulated rent reported in a DHCR filing. This Court has held that "rental history," as that term is used in CPLR 213–a, is not restrained to DHCR records and may include the records of the landlord and the tenant [*Regina*]…

In *West v BCRE 90 W. St. LLC*, NYLJ No. 1592242011NY157031201 [6/17/2020 Supreme Court, New York County] the court held:

> …where plaintiffs have not alleged a fraudulent scheme, under the principles recently established by the Court of Appeals in *Matter of Regina Metro. Co.*, in order to determine rent overcharges, if any, the base date is the rent in effect four years prior to the filing of this action, plus any increases legally available under the formulas established by the Rent Stabilization Law and regulations. This formula must apply, even if the base date rent was a market rent.

In *Gold Rivka 2 LLC v Rodriguez*, 68 Misc.3d 1210(A) [NYC Civ Ct Bronx County 2020], the court found a fraudulent scheme to deregulate where:

> …there are numerous inconsistencies between registered rents and the leases produced by Petitioner, there is evidence of apartment

> swapping, missing leases, an increase taken during a vacancy without any documented tenancy, missing deregulation riders, and riders annexed to the first deregulated lease in 2010 as well as to Respondent's 2012 lease which purport to waive the tenants' rights under the Rent Stabilization Law and threaten the tenants with severe monetary damages if the negotiations for the lease and the lease terms are disclosed.

Yet the court in *Gold Rivka* would not look back to 2006 to determine the legal rent. The court further held that:

> …the court does not accept Respondent's position that the rent should be frozen at what the parties formerly agreed was the last most reliable registered rent of $646.77 in 2006. As the relevant appellate authority provides, RSL 26-517(e) may only be applied to freeze the rent as of the base date and, after *Regina*, the base date rent is no longer defined as that reflected in the most "most recent reliable annual registration." While the 2006 registration is properly considered for the limited purpose of determining the fraud extant here, it falls outside the four-year look-back period and, cannot be utilized to determine the base date rent or calculate the overcharge award.

Contrast this with *Loran, L.P. v Cruz*, 69 Misc.3d 1207(A) [NYC Civ Ct Bronx County 2020], which is ironically in the same borough during the same year, but which still applies the pre-Regina rule for calculating damages. The court in *Loran* states:

> The mechanics for calculating the lookback period were well laid out in *HO Realty Corp v. [DHCR],* (46 AD3d 103, 106-110, 844 NYS2d 204, 207-209 [1st Dep't 2007]), where the court explained, [w]hen an overcharge complaint is filed, DHCR initially examines the relevant rental history of the premises to determine its lawful rent. It first determines the base rent for the premises, which ordinarily would be the rent listed on the annual rent registration statement filed four years prior to the most recent registration statement for the premises. It will then examine the rental history of

> the premises during the next four years, apply any appropriate increases or adjustments to the base rent, and arrive at a calculation representing the lawful rent that ought to be charged for the premises at the time the claim of a rent overcharge was made by the tenant.
>
> In other words, the process requires, after identifying "the most recent registration statement", first a looking backward and then a looking forward:…First, to determine the base date rent, looking backward to the rent "listed on the annual rent registration statement filed four years prior to the most recent registration statement for the premises".

Matter of AEJ 534 E. 88th, LLC v DHCR, 194 AD3d 464 [1st Dept 2021] held that the "reconstruction method" is no longer a thing:

> We do find, however, that DHCR's determination was affected by an error of law to the extent that it applied its own policy of "bridging the gap" to determine the base date rent of the apartment using the last filed registration statement, which was in 1990 when the legal regulated rent was $398.15. This methodology is wholly inconsistent with how a rent overcharge should be calculated, leading us to modify Supreme Court and vacate the Deputy Commissioner's determination of what the legal rent was on the base date. Although regardless of its age, an apartment's rent history is always subject to review to determine whether the apartment is rent regulated (*Kostic*, 188 AD3d at 569), *Regina* also instructs, that an overcharge claim is subject to a limited four-year lookback to determine the base rent. The absence of contemporaneous DHCR filings does not allow for a lookback beyond the four-year period to an earlier legal regulated rent reported to DHCR (*see Corcoran v Narrows Bayview Co., LLC*, 183 AD3d 511, 512 [1st Dept 2020]). Furthermore, in the absence of fraud, "for overcharge calculation purposes, the base date rent [is] the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges [are] to be calculated by adding the rent increases legally available to the

> owner under the RSL during the four-year recovery period." (*Regina* at 355-356.)

E. Post-*Regina* Examples of Where the Court Does and Does Not Find Fraud

Bazan v DHCR, 189 AD3d 495 [1st Dept 2020] held that landlord's failure to comply with certain Department of Buildings requirements when renovation work was performed was not sufficient indicia of fraud.

Kostic v DHCR, 188 AD3d 569 [1st Dept 2020] held that:

> …failure to prove that J–51 riders were included in all of the tenant's renewal leases was not proof of a fraudulent scheme to deregulate the apartment. Under the circumstances, the fact that the owner filed an erroneous exit registration on the ground of high-rent vacancy, does not compel a finding of fraud. The error was plain on its face, since [tenant] never vacated the apartment. Therefore, she could not have reasonably relied on the exit registration. Reasonable reliance is an element of fraud for purposes of evading the four-year lookback restriction for pre-HSTPA overcharge claims

Similis Mgmt LLC v Dzganiya, NYLJ No. 1617083926NY57025420 3/31/2021 [App Term 1st Dept] held that:

> In this case, landlord's motion for summary judgment on the nonpayment petition was properly denied because triable issues of fact are raised as to whether landlord engaged in a fraudulent overcharge scheme. While neither an increase in rent, standing alone, nor tenant's skepticism about apartment improvements suffice to establish indicia of fraud [citations omitted throughout], here, there is considerably more. In addition to the large rent increases and the paucity of evidence substantiating the claimed apartment improvements, the DHCR rent registrations filed by landlord raise triable issues of fact as to whether landlord falsely registered the legal rent to make a single 73 percent increase in rent (in 2011) appear to have occurred over a multi-year period …In addition, landlord

> failed to provide tenant and his predecessors with lease riders indicating how the legal rent was computed, which, in view of the other indica of fraud, "may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold.

In *Townsend v B-U Realty Corp.*, 67 Misc.3d 1228(A) [Sup Ct New York County 2020], the court found fraud where there were many J-51 wrongful deregulation cases brought in the subject building, none of the DHCR registrations for the multiple tenants in the case matched up with what was filed at DHCR, and the rent calculations listed in the initial and belated DHCR filings by landlord were self-serving calculations. Because there was no reliable rent, the Court referred the matter to a judicial hearing office to calculate the legal rent, and suggested that the hearing officer could utilize the DHCR default method[5] to determine the legal rent.

[5] RSL § 2522.6. (Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed), in relevant part, states:

(a) Where the legal regulated rent or any fact necessary to the determination of the legal regulated rent, … is in dispute between the owner and the tenant, or is in doubt, or is not known, the DHCR at any time upon written request of either party, or on its own initiative, may issue an order in accordance with the applicable provisions of this Code determining the facts, including the legal regulated rent, …

(b)…(2) Where either:
(i) the rent charged on the base date cannot be determined; or
(ii) a full rental history from the base date is not provided; or
(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or
(iv) a rental practice proscribed under section 2525.3(b), (c) and (d) [failure to provide services or renew a lease] of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.

(3) These amounts are:
(i) the lowest rent registered pursuant to section 2528.3 of this Title [annual registration] for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or
(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title [vacancy increase]; or
(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or
(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.

F. Some lower courts are allowing discovery to aid tenant in showing indicia of fraud

Some lower courts are allowing discovery to aid tenant in showing indicia of fraud.

See *57 Elmhurst LLC v Williams*, NYLJ 1588609375NY5729319 [4/20/2020 Queens Housing Ct.] Based upon *Regina*, court will not look back beyond base date, not even to allow for discovery, unless tenant alleges fraud (which it did not); an irregular DHCR Rent roll alone is not enough.

Contrast *Williams* with *381 E. 160th LLC v Fana*, NYLJ 1588006674NY01304118 [4/13/2020, Bronx Housing Court], where court allowed discovery of material before four-year base data but emphasized it would only consider such material if tenant could prove fraud.

Also contrast *Williams* with *Reilly v 5504-301 East 21st Street Manhattan LLC*, 2021 WL 1374258 [Sup Ct New York County 2021], which held that:

> DHCR records show the last registered tenant was in the year 2000 and that there have been no further tenants registered since that date. The record further reveals that from 2001 through 2008 the apartment was registered as "Vacant" at a rent of $474.47, and since 2009 there has been no registration at all. However, during this same period, the landlord appears to assert that the apartment was not vacant, but rather, occupied by a family member giving rise to rent deregulation. This apparent conflict between the documents filed with DHCR and landlord's assertions, along with other alleged facts, give rise to at least a colorable claim of fraud at this stage of the litigation sufficient to permit plaintiff to at least explore the basis upon which defendant claims to have lawfully (and not fraudulently) deregulated the apartment. Such information and documents would logically include all documents and information related to defendant's assertions that the apartment was lawfully deregulated "by virtue of a) the complete renovation of the Premises, b) due to the Premises being owner-occupied and when vacated, c) a first rent charged after such time in accordance with the law then in effect, d) in accordance with the material representations made by

> Defendant's predecessor at the time Defendant acquired the Building." … However, consistent with *Regina*, the Court does not order discovery specifically regarding rent history beyond the applicable four-year look back period.

G. Lack of a HRVD Rider

In *Sierra v DHCR*, 2020 WL 7315540 [Sup Ct New York County 2020], the court agreed with the DHCR in this Article 78 proceeding that the lack of a vacancy deregulation rider did not impair deregulation because "[t]he agency has never determined that an apartment should be regulated solely based on the absence of a such a rider." But see *Matter of AEJ 534 E. 88th, LLC v DHCR*, 194 AD3d 464 [1st Dept 2021] ("Furthermore, high-rent vacancy increase of an apartment was never automatic, even before the HTSPA. An owner had to comply with the requirements of RSL § 26-504.2 (a), among them providing the new vacancy tenant with written notice disclosing what the last regulated rent was, the reason the apartment was no longer rent regulated, and a calculation of how the rent had reached the applicable deregulation threshold in effect.")

V. CONCLUSION

I updated this booklet on May 22, 2022. If you pick up this booklet on May 23, 2022, it may well be obsolete. You have to keycite all the cases and check all the statutes. This area changes quickly.

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Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for twenty-five years. Michelle represents BOTH tenants and landlords and her core competencies include: Commercial Landlord and Tenant Representation (including Pandemic-defenses to the payment of rent); Rent Stabilization and DHCR Matters; Rent Stabilization and Regulatory Due Diligence for Multifamily Properties; Rent Stabilization Coverage Analysis for Tenants; Sublet, Assignment, and Short-Term Leasing Cases (like Airbnb!); Good Guy Guaranty Litigation; Co-op Landlord and Tenant Matters; Loft Law Matters; De-Leasing Buildings for Major Construction Projects; Emotional Support Animals in No-Pets Buildings; and Co-Living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com; Lorman Education Services; Rossedale CLE; The New York State Bar Association, Real Property Section; Women Attorneys in Real Estate; The New York Women's Bar Association; The National Law Institute; The Long Island Chapter of the National Appraisal Institute; The Columbia Society of Real Estate Appraisers; The NYS Society of Certified Public Accountants LandlordsNY; The Association of the Bar of the City of New York; Thompson Reuter;, The Cooperator; and Argo U.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, blogs, videos, and live presentations. Michelle developed and regularly updates a multi-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Tens of thousands of lawyers have purchased Michelle's CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle co-authors a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee's treatise. Michelle co-authored the upcoming 2021 version of the New York State Bar Association's treatise "New York Residential Landlord-Tenant Law and Procedure". As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle is also an instructor and blogger on the Tenant Learning Platform, www.tenantlearningplatform.com.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle's eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

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