

New York City Tenants Can Still Uncover Landlord Fraud in Residential Landlord-Tenant Litigation

A Lexis Practice Advisor® Practice Note by
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Historically, few topics in residential real estate litigation have caused more excitement or confusion than rent overcharges. For tenants litigating overcharge claims in New York City, discovery is one of the most important tools in their arsenal. The Housing Stability and Tenant Protection Act of 2019 (2019 N.Y. SB 6458) (HSTPA) dramatically expanded the scope of overcharge claims and the attendant discovery available to tenants. Then, less than one year later, the Court of Appeals limited that scope in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2020 NY Slip Op. 02127 (2020) (*Regina Metro*). Though *Regina Metro* undeniably curtails some of the rights established in the HSTPA, every Civil Court order dealing with discovery since the case came down suggests that discovery in overcharge cases remains robust and broad. This article explains how *Regina Metro* impacts discovery and highlights key cases that have been decided in its wake.

Regina Metro

Part F of the HSTPA marked a sea change in the way that rent overcharge cases are litigated and decided. In short, it gave tenants additional procedural tools to root out overcharges and significantly expanded owners' liability for charging rent above the legal limit. When it comes to disclosure, the law dramatically expanded the scope of documents available to tenants who allege rent overcharge. As amended by the HSTPA, the Rent Stabilization Law now states that when adjudicating rent overcharge claims, the courts "shall consider all available rent history which is reasonably necessary," including, *inter alia*, any rent registration "regardless of the date to which the information on such registration refers," and "any records maintained by the owner or tenants." NYC Admin. Code § 26-516(a). This differs dramatically from the pre-HSTPA law, which generally, and in the absence of fraud, precluded examination of the rental history for periods beyond the four-year statute of limitations.

Interpreting the HSTPA amendments, multiple courts concluded that the law expanded the scope of discovery available to tenants. For example, in *699 Venture Corp. v. Zuniga*, the Civil Court ruled that "[f]ormerly, a tenant was required to demonstrate a colorable claim of a fraudulent scheme to deregulate the apartment that would warrant granting discovery beyond the statute of limitations," but the HSTPA "profoundly alters the scope of what tenants may seek from a landlord through discovery." 64 Misc. 3d 847, 852 (Civ. Ct. Bronx Cty. 2019). Specifically, the court continued, "[g]one is the precept that a significant increase

in rent alone is insufficient to warrant examination of rent history beyond the statute of limitations,” and “[g]lone is the requirement that sufficient indicia of fraud must be established for a court to grant discovery beyond the statute of limitations. . . . Now, a landlord’s purported fraudulent scheme to deregulate an apartment is simply a factor that may be established in the alternative to an unexplained increase which alone renders the registered rent unreliable.” *Id.*

Although the Legislature clearly stated that Part F of the HSTPA applied “to any claims pending or filed on and after” the effective date, the majority in *Regina Metro* found that provision to be constitutionally infirm. It held that, as a matter of due process, “the overcharge calculation and treble damages provisions in Part F may not be applied retroactively” and should instead be governed by pre-HSTPA law. *Regina Metro*, 2020 NY Slip Op. 02127, at *18. Critically, the court also held that where there is evidence of fraud, discovery is still available to tenants beyond the four-year lookback period, but only to prove fraud, not to calculate the base-date rent, which would be “the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date.” *Regina Metro*, 2020 NY Slip Op. 02127, at *5 (internal quotation marks and citation omitted).

While the Court of Appeals clearly limited the retroactive effective of the HSTPA, it did not specifically address how these limitations would apply to discovery in cases where tenants allege the existence of a fraudulent scheme. Five recent Civil Court decisions, however, do provide some guidance in this area. They demonstrate that discovery in overcharge cases remains alive and well to uncover fraud—perhaps even more so than before the HSTPA.

Post-Regina Metro Case Law

The landlord bar is understandably enthusiastic about the *Regina Metro* decision. That enthusiasm should be tempered, at least somewhat. While the Court of Appeals limited the retroactive effect of the HSTPA, the overall policy thrust of the law remains in effect, and this policy favors broad discovery for tenants. As one court commented in granting a tenant’s motion seeking discovery, “it is clear that current public policy favors an expansion of tenants’ rights with regard to deregulation and J-51 benefits. . . . and in keeping with current public policy, this Court finds discovery is appropriate under the circumstances herein.” 327-333 E. 90 Realty LLC v. Weinstein, 2020 NYLJ LEXIS 844, at *11 (Civ. Ct. N.Y. Cty. 2020) (Katz, J.H.C.). Tenant advocates should pay close attention to the decisions that have been issued

since *Regina Metro*, which provide guidance on how to frame pleadings, motions for discovery, and discovery requests.

Regina Metro reanimated the discovery framework that existed under *Matter of Grimm v. State of New York Div. of Hous. & Community Renewal*, 15 N.Y.3d 358 (2010) and its progeny. Specifically, landlords can be compelled to disclose documents and information beyond the four-year lookback when tenants allege a fraudulent scheme to deregulate a unit. Given the new tenant-friendly policy environment inaugurated by the HSTPA, civil courts have addressed the Grimm framework in interesting ways.

For example, while fraud must be appropriately alleged in the pleadings and motion papers, it need not be proven conclusively to obtain discovery. Accordingly, in 381 E. 160th LLC v. Fana, 2020 NY Slip Op. 20089 (Civ. Ct. Bronx Cty. 2020) (Weissman, J.H.C.), the court held that the tenant was entitled to discovery based on an improper rental increase, but that the issue of overcharge would be a factual one reserved for trial, not summary disposition. The court held:

Thus, though this Court finds that respondent has met the ample needs test for discovery, and to lookback beyond the four year limitation, the caveat to this decision is that such discovery is governed by old law, not by the HSTPA. . . . [Accordingly], the existence of an apparent improper rental increase in the past is not, in and of itself, proof of an overcharge; but . . . if respondent can convince a court that there was a scheme by petitioner to defraud and illegally raise rents beyond the permissible increases under Rent Stabilization, then such court could find an overcharge, and, possibly, treble damages. These issues are for trial.

381 E. 160th LLC, 2020 NY Slip Op. 20089, at * 7.

Tenants should be sure to raise issues of public policy. In 327-333 E. 90 Realty LLC v. Weinstein, the court granted the Respondent’s motion for discovery going back 15 years. As noted above, the court reasoned that *Regina Metro* notwithstanding, current public policy favors an expansion of tenants’ rights. The court continued, “since respondent meets the six-prong test as set forth in *Farkas*, supra., and in keeping with current public policy, this Court finds discovery is appropriate under the circumstances herein.” 327-333 E. 90 Realty LLC, 2020 NYLJ LEXIS 844, at *11.

If there is some evidence of a fraudulent scheme, tenants must allege that in the pleadings and motion papers. In 57 Elmhurst LLC v. Williams, 2020 NYLJ LEXIS 866 (Civ. Ct. Queens Cty. 2020) (Guthrie, J.H.C.), the court declined to grant the tenant’s motion for pre-base-date documents. The

court held, “Respondent seeks discovery for the 2011–2013 period solely on the basis of irregularities in the DHCR rent registration history for the subject apartment. Respondent does not specifically allege that a fraudulent scheme to deregulate the apartment occurred.” 57 Elmhurst, 2020 NYLJ LEXIS 866, at * 7. Notably, the court did not hold that irregularities in a rent registration are insufficient evidence of fraud. Rather, the court noted that the tenant did “not specifically allege” the existence of a fraudulent scheme.

In a similar ruling, the court in 517 W. 161 Realty LLC v. Vega, 2020 NYLJ LEXIS 917 (Civ. Ct. N.Y. Cty. 2020) (Ortiz, J.H.C.) denied a tenant’s request for discovery, but did so without prejudice, reasoning that because the tenant moved prior to the ruling in *Regina Metro*, “she did not address possible fraudulent conduct that would allow the court to look past the four-year period.” Vega, 2020 NYLJ LEXIS 917, at *5. The court ruled that “[i]f respondent believes that she would be entitled to discovery under the pre-HSTPA legal framework, respondent is entitled to make her motion with arguments addressing any possible fraudulent behavior on behalf of petitioner or the prior owner.” *Id.* Accordingly, courts are appropriately open to entertaining motions to renew discovery motions based on the change in law. Advocates should be sure to examine the facts of their case to determine whether they can make the required showing of fraud upon renewal.

Finally, tenants should ensure the documents sought are sufficient to establish what the base-date rent is if there is evidence of a fraudulent scheme. In *Vendaval Realty LLC v.*

Felder, Index No. 79778/17 (Civ. Ct. N.Y. Cty. April 3, 2020) (Schneider, J.H.C.), the court stated that in a long-running overcharge case, “[t]he facts that would be necessary to determine the legal rent using the default formula approved by the Court of Appeals are not a part of the available record here.” Tenants must be aware that it will be their burden to establish the base-date rent and to obtain rent rolls, rent registrations, and other relevant documents to help them in that endeavor.

Looking Ahead

So, what exactly is the pre-HSTPA overcharge law, as clarified by the Court of Appeals? In our reading of the decision, there are two categories: (1) absent a colorable claim of fraud, a tenant may not “look back” beyond four years from the date the overcharge is asserted; and (2) if a tenant makes a colorable allegation of fraud, the court should order the landlord to produce documents and information relevant to the issue of fraud beyond the four-year lookback period so that the issue of fraud can be litigated at trial. If the tenant can establish a fraudulent scheme to deregulate the apartment, then the Court should use the default formula set forth in 9 NYCRR § 2526.1(g), which is the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date. Tenants should be guided by the decisions granting discovery since *Regina Metro*, which are grounded in the text of the relevant statutes as well as the clear public policy favoring an expansion of tenants’ rights in New York City.

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