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RENT STABILIZATION

Two Wins for Landlords in 'Harris' and 'Kreloff'


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Other than the Court of Appeal's 4-3 ruling in *Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020), landlords have had little to cheer about since the Legislature enacted the HSTPA in 2019. In February, however, the Appellate Division, First Department issued favorable rulings to landlords in *Harris v. Israel* and *Kreloff v. New York State Div. of Hous. & Community Renewal*, both of which are analyzed below.

'Harris v. Israel'

In a *Harris v. Israel*, petitioner-landlord Matthew Harris purchased two adjacent brownstones on East 92nd Street in Manhattan. The landlord then set about reclaiming occupied units in the buildings with the goal of creating a single-family home.

In 2016, the landlord declined to renew the lease of respondent-tenant Woodrina Israel based on owner-occupancy. On July 11, 2018, following a trial on the merits, Housing Court (Stoler, J.) held that landlord had demonstrated a good faith basis to occupy the subject apartment for his own use. After awarding the landlord a judgment of possession, the court granted the tenant a stay pending her appeal to Appellate Term.

In the meantime, the Legislature enacted the HSTPA. Part I of the HSTPA amended the owner occupancy provisions of the RSL, providing for the first time that (1) owners could only recover one apartment for owner use; and (2) the owner must establish at trial an "immediate and compelling necessity" for the apartment.

On Dec. 4, 2019, Appellate Term reversed Housing Court's decision, stating:

> The HSTPA provides that these particular amendments were to 'take effect immediately' and were expressly made applicable to 'any tenant in possession at or after the time it takes effect' (HSTPA Part I §5). The inference to be drawn from this language is that if at any stage of the appeal process a tenant is lawfully in possession, he is entitled to the beneficial aspects of the statute. Because the legislature has made changes to the law that directly impact this case, and has made those changes applicable to this pending litigation, a remand is appropriate. (internal citations and quotation marks omitted).

Harris v. Israel, 15 Misc 3d 155(A) (App Term, 1st Dept 2009).

Accordingly, Appellate Term remanded the matter "to Civil Court for such further proceedings as may be necessary to determine landlord's claim in accordance with the HSTPA. If that is an undesirable result, the problem is one to be addressed by the Legislature."

On April 2, 2020, the Court of Appeals ruled in *Regina* that retroactive application of Part F of the HSTPA, relating to rent overcharge claims, would violate due process. Thus, the question in *Harris v. Israel*, which had been appealed to the Appellate Division, First Department, was whether Part I of the HSTPA could be retroactively applied, as Appellate Term had ruled.

> DHCR and the courts decided there is a difference between a fraudulent scheme to deregulate and a landlord's error that turns a deregulated apartment into one subject to the Rent Stabilization Law.

On Feb. 9, 2021, the First Department reversed Appellate Term, holding that the Part I amendments could not be applied retroactively. Citing *Regina*, the First Department wrote:

> We conclude that the same reasoning applies with equal measure to

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HSTPA Part I. Like the amendments in *Regina Metro*, this amendment impairs rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed. Therefore, a presumption against retroactivity applies. The pre-*Regina Metro* cases notwithstanding, the determination of the Court of Appeals that an owner's increased liability and the disruption of relied-upon repose are impairments to his or her substantive rights precludes any retroactive application of HSTPA Part I to this proceeding, where petitioner had spent several years reclaiming all other units at the property and was ultimately awarded a judgment of possession to the premises before HSTPA's enactment. There is no indication here that the legislature considered this harsh and destabilizing effect on petitioner's settled expectations, much less had a rational justification for that result. (internal citations, brackets, and quotation marks omitted).

The question now arises as to whether there are other HSTPA provisions that cannot be applied retroactively. One possible candidate is Part K, which added, among other things, new restrictions on rent increases for major capital improvements and individual apartment improvements.

'Kreloff'

Matter of Kreloff, DHCR Adm. Rev. Dckt. No. ER-410014-RP, issued Sept. 27, 2017, concerned the landlord of a J-51 building who believed that a tenant's apartment had become deregulated once J-51 benefits expired on June 30, 1991. In fact, the apartment remained stabilized because the landlord, in contravention of RSL §26-504(c), had failed to include a J-51 rider in each and every one of the tenant's leases.

The tenant alleged that the landlord's erroneous treatment of the unit as deregulated constituted a fraudulent scheme to deregulate the apartment, thus warranting a breach of the four-year look-back period pursuant to *Grimm v. New York State Div. of Hous. & Community Renewal*, 15 NY3d 358 (2010). In its 2017 decision, however, DHCR disagreed:

> The omission of the J-51 rider in the 1985 renewal lease cannot be fraudulent and cannot be deemed in furtherance of a fraudulent scheme to deregulate the apartment. The apartment would have been automatically deregulated as a matter of law had the owner included the J-51 notices in all of petitioner's leases. Once realizing its error, the owner included the notice in the 1989 renewal lease, not in an attempt to deceive petitioner, but in a failed attempt to preserve the automatic deregulation of the apartment in two years once the J-51 benefits expired. Given that the 1984 vacancy lease was executed prior to the J-51 notice provisions enacted in 1985, the owner's actions, while incorrect, do not rise to fraudulent conduct. The owner's fate had already been sealed and the apartment was going to remain rent stabilized through petitioner's occupancy based on the failure to include the notices in all prior leases. The Commissioner finds that the owner's failure to file apartment registrations from 1992-2009 was also not in furtherance of a fraudulent scheme to deregulate the apartment, but instead based on the owner's mistaken belief that the apartment was not stabilized when the J-51 benefits expired in 1991.

Supreme Court (Goetz, J.) thereafter affirmed DHCR's order. On appeal, the First Department also affirmed, writing:

> Though Supreme Court, in a previous CPLR Article 78 proceeding, found sufficient indicia of a fraudulent scheme to require DHCR to consider the rental history beyond the applicable four-year look back period, it did not require DHCR to find, upon such consideration, that a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date. It was not irrational for DHCR to distinguish the facts of this case from those in other cases finding such a scheme … as petitioner's apartment would have been deregulated by operation of law, but for her previous landlord's failure to provide notice in all renewal leases that its J-51 benefits were set to expire. (internal citations and quotation marks omitted).

Practitioners are cautioned that *Kreloff* was an Article 78 proceeding, such that the courts on judicial review were required to defer to DHCR's ruling unless it was irrational. It is difficult to say how the First Department would have ruled had this case started as an action for rent overcharge in Supreme Court.

Notwithstanding, there is a certain logic to DHCR's ruling. But for the landlord's failure to attach the J-51 rider, the unit would have been permanently deregulated. DHCR and the courts apparently decided there is a difference between a fraudulent scheme to deregulate and a landlord's error that turns a deregulated apartment into one subject to the Rent Stabilization Law.