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RENT STABILIZATION

When the Apartment Is Vacant On the Base Date: Now What?

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The base date rent for purposes of determining a rent overcharge complaint under the pre-HSTPA version of the RSL is generally the rent charged to and paid by the tenant on the date four years prior to the tenant's overcharge claim. But what happens if the apartment was temporarily exempt or vacant on the base date?

The answer to this question has taken various twists and turns over the years, including a new twist introduced in *Connors v. Kushner Companies, LLC*, 2021 WL 3468142 (Sup Ct, Kings County, August 6, 2021), which is discussed below.

DHCR's Initial Policy

As of 1997, RSL §26-516(a) provided as follows:

> …no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be used 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.

Because the statute did not state what happens when an apartment is vacant or temporarily exempt on the base date, DHCR stepped into the breach. In an Oct. 14, 1998 prior opinion letter, DHCR's counsel wrote:

> With reference to the 'renovated' unit, you state that the unit was last rented through March 31, 1992 at $700 per month. Thereafter, it has been registered as exempt due to owner occupancy. Where the period of temporary exemption has been four years or more, a 'first rent,' negotiated between owner and tenant, subject to subsequent guidelines and other lawful increases (in compliance with registration requirements), would be recognized by DHCR. The former rent, statutory vacancy increase, and cost of new equipment and improvements are not relevant. Based on a 'first rent' of $2,000 or more per month, *the apartment would be considered deregulated under high-rent vacancy decontrol*. Because of the length of the period of temporary exemption, DHCR would be precluded, in the event of an overcharge complaint filed by the new tenant, from examining the rental history prior thereto. Rent Stabilization Law Section 26-516a, as amended by the Rent Regulation Reform Act of 1997, 'RRRA-97,' precludes examination by the DHCR of the rental history of the housing accommodation for the period prior to four years preceding the filing of an overcharge complaint. (italics supplied).

In 2000, DHCR codified this policy in RSC §2526.1(a)(3)(iii). That section, in effect until January of 2014, stated in relevant part:

> The answer to this question has taken various twists and turns over the years, including a new twist introduced in 'Connors v. Kushner Companies.'

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner *and the first rent stabilized tenant* taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement… (italics supplied).

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The words "first rent stabilized tenant" in the regulation, as discussed below, would later prove highly significant.

In accord with its 1998 prior opinion letter, DHCR began issuing orders holding that where an apartment was vacant or temporarily exempt on the base date, the apartment would be deemed deregulated where the rent charged to the first tenant thereafter exceeded the statutory threshold. DHCR issued its first such order on Jan. 15, 2003, which was thereafter challenged in *Petit-Smith v. New York State Div. of Hous. & Community Renewal*, Sup Ct, NY County Index No. 104795/03 [n.o.r.].

In *Petit-Smith*, the apartment was vacant on the base date, and the incoming tenant paid a market rent of $2,050 per month. Citing RSC §2526.1(a)(3)(iii), DHCR ruled that the apartment was luxury deregulated. In an Oct. 7, 2003 decision, Justice Sheila Abdus-Salaam, thereafter an Associate Judge of the Court of Appeals, affirmed DHCR's ruling in all respects.

DHCR next implemented this policy in *Matter of Bryk*, DHCR Adm. Rev. Dckt. No. RK-210057-RT, issued Dec. 29, 2003:

> Section 2526.1(a)(3)(iii) of the Rent Stabilization Code provides in pertinent part that where a housing accommodation is vacant on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy, and reserved in a lease or rental agreement.
>
> In the instant case, the record reflects that the tenant filed the subject complaint on December 23, 2002 so that the base date is December 23, 1998. The record, including the affidavit from prior occupant Collora, reflects that the subject apartment was vacant on the base rent date. The record further reflects that the tenant herein was the first tenant to occupy the subject apartment after Collora vacated. Accordingly, the legal rent is the first rent charged the tenant herein or $2,500.00. *Since that amount is over $2,000.00, the Rent Administrator correctly concluded that the subject apartment is exempt from rent regulation pursuant to Section 2520.11(r)(4) of the Rent Stabilization Code*. (italics supplied).

DHCR thereafter issued several similar orders, the last being *Matter of Montesinos*, DHCR Adm. Rev. Dckt. No. XG-410078-RT, issued Jan. 22, 2000.

The Courts Intervene

In 2012, the First Department overruled DHCR's policy in *Gordon v. 305 Riverside Drive Corp.*, 93 AD3d 590 (1st Dept 2012). The court held that although RSC 2526.1(a)(3)(iii) authorized a landlord to charge a 'first rent' to the incoming tenant after four or more years of vacancy or temporary exemption, the regulation, contrary to DHCR's interpretation, required that the apartment remain stabilized:

> Defendant argues that even if the base date is March 11, 2006, the legal regulated rent should still be $3,095 because the apartment was vacant on that date. In support, defendant points to Rent Stabilization Code (9 NYCRR) section 2526.1(a)(3) (iii), which provides that '[w]here the housing accommodation is vacant… on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent-stabilized tenant taking occupancy after such vacancy…, and reserved in a lease or rental agreement.' This section has no applicability here because it requires that the 'legal regulated rent' after a vacancy be 'agreed to' by the owner and the *first stabilized tenant*.' (*id*. [emphasis added]).
>
> 93 AD3d at 592.

DHCR Amends its Regulation

Following *Gordon*, DHCR amended RSC §2526.1(a)(3)(iii) in January of 2014. The amended regulation states:

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under section 2522.8 of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this Code.

Notably, the amended provision excluded the language in the former provision which set forth the rent that the "first rent stabilized tenant" would pay upon taking occupancy.

'Connors'

Connors was a class-action overcharge case concerning a building that was temporarily exempt on the base date because it had been owned by Brooklyn Law School, which used most of the apartments as student housing. In opposition to the tenants' overcharge claims, the landlord argued that any apartment initially rented after the transfer of title for more than the deregulation threshold should be deemed luxury deregulated. Supreme Court (Walker, J.), agreed:

> While the amended…regulation contemplates that the unit returns to rent stabilization following

the temporary exemption, and provides a formula to determine the 'legal regulated rent' chargeable to the first tenant based on guidelines, vacancy and other increases which would otherwise be allowable under the RSC for a rent-stabilized unit, the amended regulation must be read in conjunction with the applicable version of RSC §2520.11(r)(5), which exempts from rent stabilization housing accommodations which 'became or become vacant on or after January 24, 2011, with a *legal regulated rent* of $2,500 or more per month' (emphasis added). Thus, where the legal regulated rent of a vacant formerly exempt unit, properly calculated in accordance with amended RSC §2526.1(a)(3)(iii), does not exceed the high-rent vacancy threshold…it is unequivocal that the first tenant must be offered a rent-stabilized lease based on such legal regulated rent. However, there is no language in either the amended RSC §2526.1(a)(3)(iii) or RSC §2520.11(r), nor have plaintiffs submitted, nor has this Court located any pertinent case law expressly prohibiting the high-rental vacancy deregulation of an apartment following the expiration of a temporary exemption where the legal regulated rent (properly determined under amended RSC §2526.1[a][3][iii]) surpasses the relevant threshold.

The court next addressed the tenants' argument that the landlord had engaged in a fraudulent scheme to deregulate:

The subject units in this matter were exempt from rent stabilization on base date, requiring determination of the legal regulated rent under RSC §2526.1(a)(3)(iii) based on the last registered rent for each unit.

* * *

Because a reliable legal regulated rent may be established using the formula set forth in RSC §2526.1(a)(3)(iii) based on the undisputed last registered rents prior to the temporary exemption, and there is no allegation that defendants alleged fraudulent conduct was geared toward tainting the reliability of the last registered rents, there is no need to apply a default formula to calculate same notwithstanding plaintiffs' allegations of fraud. In other words, because neither the nonexistent base date rent nor the undisputed legal rents of the apartments in 2014 were 'the product of a fraudulent scheme to deregulate' (RSC §§2526.6[b][2][iii] & 2526.1[g]), the default formula is not applicable.

The words "first rent stabilized tenant" in the regulation would later prove highly significant.

Lastly, the court rejected the tenants' argument that the apartments had not been luxury deregulated due to landlord's failure to satisfy the notice requirements set forth in former RSL §26-504.2(b):

RSL former §26-504.2(b)…provided that where an apartment is removed from rent stabilization, the landlord must provide notice to the first tenant after a high-rent vacancy deregulation. The statutory notice was required to contain certain information including the last regulated rent, the reason that such housing accommodation is not subject to rent stabilization and how the rental amount provided for in the lease has been derived so as to reach the high-rent vacancy deregulation threshold. Additionally, the owner was obligated to send and certify to the tenant a copy of the exit registration statement filed with the DHCR. Even if defendants did not send the notices required under RSL former §26-504.2(b) such would not change the deregulated status of any unit with a legal regulated rent which exceeded the high-rent vacancy threshold after the expiration of the temporary exemption (*see Levy v. Windermere Owners LLC*, 2014 WL 692960 [Sup Ct, NY County, February 24, 2014, index No. 150849/12]). The former statute provides no penalty for the failure to serve mandatory notices, nor does it make compliance a condition precedent to deregulation.

The tenants in *Connors* have filed a Notice of Appeal. It remains to be seen how the Second Department will rule. But it is noted that given the Second Department's current backlog, a decision cannot be expected any earlier than 2023.