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Four-Year Rule Continues to Bedevil the Courts

Warren A. Estis and Jeffrey Turkel, partners at Rosenberg & Estis, write: The four-year statute of limitations on rent overcharges under the RSL recently celebrated its 27th birthday. Notwithstanding, courts and individual judges continue to sharply disagree as to how the so-called "four-year rule" is to be interpreted and implemented.

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The four-year statute of limitations on rent overcharges under the RSL, first enacted pursuant to L. 1983, ch. 403, recently celebrated its 27th birthday. Notwithstanding, courts and individual judges continue to sharply disagree as to how the so-called "four-year rule" is to be interpreted and implemented.

The point is illustrated by the Appellate Division, First Department's recent decision in *Rich v. East 10th Street Assoc. LLC*, NYLJ, July 29, 2010, at 43, col. 1. In *Rich*, the Appellate Division majority, led by Justice Sheila Abdus-Salaam, held that a DHCR rent reduction order issued more than four years before the commencement of a rent overcharge action cannot be used to determine the "base rent" for the apartment. Justice Peter Tom dissented, arguing that a rent reduction order necessarily affects the calculation of the base rent, even if that order was issued more than four years before the tenant's overcharge complaint.

The majority opinion in *Rich* is at odds with the Appellate Division, Second Department's unanimous decision in *Jenkins v. Fieldbridge Assocs., LLC*, 65 A.D.3d 169, 877 N.Y.S.2d 375 (2d Dep't 2009), app. dismissed 13 N.Y.3d 855, 891 N.Y.S.2d 688 (2009), creating a split of authority between the First and Second Departments.

Facts of 'Rich'

Rich actually consists of two separate cases. In the first case, tenant Garvey Rich moved into a rent stabilized apartment in 1992 pursuant to a lease setting forth a monthly rent of $690. Two years later, Mr. Rich, among other tenants, filed a complaint with DHCR alleging decreased building wide services. On Dec. 5, 1994, DHCR issued an order reducing Mr. Rich's rent to $445.95 per month and freezing that rent until such time as the owner succeeded in obtaining a rent restoration order from DHCR. Mr. Rich claimed that he never received the rent reduction order, and the former owner apparently ignored it. No rent restoration order has ever been issued.

Mr. Rich thereafter commenced an action in Supreme Court alleging rent overcharge. Specifically, Mr. Rich asserted that (1) his rent should be reduced to the $445.95 level established by DHCR in 1994; (2) the rent should thereafter be frozen; and (3) during the four year limitation period for the refund of rent overcharges, the tenant should be refunded all rent payments made above the reduced, frozen rent.

Facts of 'Scott'

In the second case, tenant Christopher Scott took occupancy of a rent stabilized apartment in January 2004 at a monthly

rent of $925. This apartment had been the subject of two orders, apparently issued in 1983, reducing the rent to $179.03 per month and freezing that rent until the owner restored services. In *Scott*, as in *Rich*, the services have never been restored.

Mr. Scott commenced a plenary action in the nature of rent overcharge in 2008, asserting that the base rent for purposes of calculating his rent overcharge was $179.03 per month, as established and frozen by the rent agency in 1983.

The Supreme Court Decisions

In both *Rich* and *Scott*, the landlords relied on the four-year rent overcharge statute of limitations set forth in CPLR 213-a, arguing that any rent reduction order issued beyond the four-year period could not be used to calculate the base rent, i.e., the rent in effect four years prior to the commencement of the overcharge action.

In *Rich*, Supreme Court Justice Michael D. Stallman held that due to the existence of the rent reduction order, the base rent for purposes of calculating the rent overcharge during the four year period was the rent charged in the Fall of 1993, i.e., the rent level established in DHCR's Dec. 5, 1994, order. Similarly, in *Scott*, Supreme Court Justice O. Peter Sherwood held that the base rent for purposes of calculating the rent overcharge was the rent charged on August 1, 1982, as established in the 1983 rent reduction orders.

Thus in both instances, the Supreme Court ruled that even though the rent reduction orders were issued beyond the four-year statute of limitations, those orders—which both reduced and froze the rent—could be used to calculate the base rent for the apartment.

Appellate Division Majority

Justice Abdus-Salaam, writing the majority opinion joined by Justices David Friedman, John W. Sweeny, Jr., and Eugene Nardelli, held that a rent reduction order issued prior to the four-year limitation period could not be used to calculate the base rent for the apartment. Justice Abdus-Salaam wrote:

The Legislature clearly recognized that the rent actually charged on the base date may not be the legal regulated rent, but nonetheless imposed a four-year limitations period that deemed the base rent to be the legal rent. CPLR 213-a which tracks the language of the Rent Stabilization Law, precludes, with respect to actions on a residential rent overcharge, 'examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.' Additionally, 'the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement…plus in each any subsequent lawful increases and adjustments,' and where the amount of rent set forth in that annual registration statement 'is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.'

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By applying the rent that should have been charged on the base date pursuant to the rent reduction order instead of the actual base date rent, the motion courts ran afoul of the foregoing statutory provisions. The legislative scheme forecloses such an analysis, 'even where the prior rental history clearly indicates that an unauthorized rent increase had been imposed.' While it would have been appropriate, in calculating the overcharge, to take notice of the rent reduction order and freeze the legal base rent during the period when the rent reduction order was extant, consideration of the rent reduction order issued before the base date for the purpose of readjusting the legal base rent is not permitted" (internal citations omitted).

Thus, the majority concluded that the rent reduction orders in question, issued before the four-year limitation period, could not be used to calculate the base rent, but could be used to freeze the base rent until services were restored.

Justice Tom's Dissent

Justice Peter Tom held that a rent reduction order issued before this four-year period of limitations necessarily affects the calculation of the base date because such an order established a continuing obligation upon the landlord that could not be defeated by a statute of limitations:

By calculating the rent overcharge without consideration of the rent reduction order issued prior to the four-year limitations period, the majority would, in effect, frustrate a significant policy goal of the Rent Stabilization Law and encourage

unscrupulous property owners to disregard compliance orders that would, by application of the majority's methodology, have a four-year expiration date. Therefore, by allowing the unlawful rents contained in the registration statements filed by owners to establish the lawful regulated rent for tenants' premises, the majority would reward owners for flouting the respective rent reduction orders issued by DHCR and its predecessor agency.

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The four-year statute of limitations applicable to rent overcharge calculations was enacted as part of the Omnibus Housing Act of 1983 and was intended to ease the burden on owners by limiting the number of years rental records must be preserved to respond to rent overcharge complaints. Previously, owners had been required to retain and produce, on demand, all leases in effect on May 31, 1968, or thereafter. The requirement for rent registration and the four-year limitations period were intended to complement the new limit on record maintenance in effect on April 1, 1984, as codified in RSL § 26-516(g). Clearly, the statute was not intended to diminish DHCR's power to enforce the owners' obligation to provide essential services to housing accommodations in New York City.

Facts of 'Jenkins'

The facts in *Jenkins* are similar to the facts in *Rich*. In *Jenkins*, the stabilized tenant obtained a rent reduction order from DHCR that fixed, and froze, the tenant's rent at $375.44 per month. The tenant was unaware of the rent reduction order, and tenant's landlord did not implement it.

In 2002, the tenant commenced an action in civil court seeking to recover rent overcharges and treble damages. Civil court, taking the 1993 rent reduction order into account, fixed the base rent at $375.44 per month. Appellate Term reversed, and the Appellate Division reversed again, reinstating civil court's determination.

The Second Department framed its interpretative dilemma as follows:

On one hand, it would appear that the court cannot consider the order, as the order, seemingly part of the rental history of the housing accommodation was issued more than four years prior to the filing of the complaint (see CPLR 213-a). Yet it would also appear that the court is required to enforce the order and, thus, consider the legal regulated rent fixed by that order when determining the existence and amount of a rent overcharge, as Rent Stabilization Law §26-514 imposes a continuing duty on an owner subject to a rent reduction order to charge and collect the reduced legal regulated rent until the DHCR finds that all required services are being provided and issues a rent restoration order authorizing the owner to charge and collect the actual legal regulated rent.[1]

In attempting to reconcile apparently contradictory statutory demands, the Second Department held that given the need to compel owners to provide required services, and to compensate tenants deprived of those services, the better course of action was to rule that as long as the rent reduction order was in effect on the base date, the order should be used to calculate the base rent. The Second Department held that taking the opposite approach would be "countenancing the failure of the owner to obey the terms of the order, thereby frustrating the weighty goals the Legislature sought to further in authorizing the issuance of rent reduction orders."[2]

In remains to be seen whether either tenant in *Rich* will seek leave, and whether the Court of Appeals will hear the case.

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Endnotes:

1. 65 A.D. 3d at 172-73.

2. Id. at 174.

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