Rent Overcharges

After 24 Years, Four-Year Rule Still Vexing
Warren A. Estis, a founding partner at Rosenberg & Estis, and Jeffrey Turkel, a partner at the firm, write that a divided appellate panel recently held that for purposes of determining whether an owner has rebutted the presumption that an overcharge is willful, DHCR or a court may look at evidence relating to a time that predates the four-year overcharge look-back period.

Warren A. Estis and Jeffrey Turkel

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In a recent decision in *H.O. Realty Corp. v. New York State Division of Housing and Community Renewal*,[1] the Appellate Division, First Department, ruled that for purposes of determining whether an owner has rebutted the presumption that an overcharge is willful, DHCR or a court may look at evidence relating to a time that predates the four-year overcharge look-back period. The two-justice dissent in *H.O. Realty* establishes that the precise application of the four-year rule remains as contentious as ever.

Omnibus Housing Act

In 1983, the New York State Legislature passed the Omnibus Housing Act ("OHA") (L. 1983, ch. 403). Section 14 of the OHA added §26-516(a) to the RSL to provide that for purposes of determining rent overcharge complaints, the "base date" would be the "rent indicated in the annual registration statement filed four years prior to the most recent registration statement." Thus, the four-year statute of limitations for rent overcharge complaints was born.

Thereafter, however, confusion reigned. DHCR strictly construed the four-year rule; the agency accepted the base rent as legal, and then determined whether there had been an overcharge thereafter. Some courts, however, would examine the entire rental history of the apartment (in some cases, going back two decades or more) to determine the proper legal rent, but would only award a refund based on overcharges collected during the four-year period prior to the complaint. See, e.g., *Zafra v. Pilkes*, 661 N.Y.S.2d 515 (1st Dept. 1997), op. recalled and vacated on reargument 245 AD2d 218, 666 N.Y.S.2d 633 (1st Dept. 1997).

The 1997 Reform

In an effort to clarify matters, in 1997 the Legislature amended RSL §26-516(a) pursuant to the Rent Regulation Reform Act ("RRRA") (L. 1997, ch. 116). Section 33 of the RRRA amended RSL §26-516(a) to provide as follows:

> Except as provided under clauses (i) and (ii) of this paragraph, 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.
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> *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*" (material added by the RRRA emphasized).

More Confusion

The 1997 amendment, unfortunately, did not settle the issue of how the four-year rule was to be applied in all instances. For example, in *Mengoni v. New York State Division of Housing and Community Renewal*, 97 NY2d 630, 735 N.Y.S.2d 863 (2001), the Court of Appeals, resolving a split between the First and Second Departments, held that the four year statute of limitations on rent overcharges did not apply to overcharge complaints filed before April 1, 1984. In *Myers v. Frankel*, 295 AD2d 575, 740 N.Y.S.2d 366 (2d Dept. 2002), the Second Department, modifying Appellate Term, ruled that the four-year limitation period starts to run with the first overcharge alleged, and cannot be enlarged by subsequent "overcharges."

Two additional disputes concerning the four-year rule emerged in 2005. In *East West Renovating Co. v. New York State Division of Housing and Community Renewal*, 16 AD3d 166, 791 N.Y.S.2d 88 (1st Dept. 2005), the First Department ruled that DHCR can review rent records beyond the four-year period to determine whether an apartment is stabilized. In *Ador Realty v. New York State Division of Housing and Community Renewal*, 25 AD3d 128, 802 N.Y.S.2d 190 (2d Dep't 2005), the Second Department held that in order to determine whether an owner was entitled to collect a vacancy bonus under RSL §26-511(c)(5-a), DHCR or a court may look at the rental history beyond the four year look-back period.

'H.O. Realty'

In *H.O. Realty*, the tenant filed an overcharge complaint on July 17, 2002, thus establishing the base date as July 17, 1998. The owner claimed that there was no rent overcharge because he had substantially improved the apartment in 1997-98. DHCR found that the owner had, as claimed, made the improvements, and had believed in good faith that it could pass those costs on to the tenant in the form of rent increases.

After an Article 78 proceeding, DHCR took the case back and ruled that the overcharge had indeed been willful. DHCR concluded that the statute of limitations precluded the agency from looking at exculpatory evidence beyond the four-year period when determining whether an owner has intentionally overcharged the tenant. DHCR then imposed substantial treble damages. In a subsequent Article 78 proceeding, Supreme Court (Kornreich J.) affirmed DHCR's order.

The Appellate Division, by a 3-2 majority, modified Justice Kornreich's order, holding that the agency could, and should, review all of the owner's exculpatory evidence on the issue of willfulness.

Justice E. Michael Kavanagh, in an opinion joined by Justices Joseph P. Sullivan and Bernard J. Malone, Jr., wrote that the mechanical calculation of what the rent should be - to which the four-year statute of limitation clearly applies - is fundamentally different from the factual issue of whether an overcharge was willful:

> Initially, it must be noted that the Rent Stabilization Law, by its terms, provides that an owner found to have charged an unlawful rent will be given a reasonable opportunity to be heard, and if it can establish by a preponderance of the credible evidence that the overcharge was not willful, treble damages will not be imposed as a penalty. Read in context, there is nothing in this provision that, by its terms, limits the owner in proving its good faith to the four-year period immediately prior to the filing of the overcharge complaint. The four-year limitation specifically refers to the period within which a rent may be challenged; it does not, by its terms, limit the period in which the owner can draw evidence to explain its actions to the four years immediately prior to the filing of the complaint.
>
> It is difficult to conceive of a rational basis for precluding from consideration evidence that is otherwise relevant and helpful in determining willfulness simply because it predates the date of the overcharge complaint by four years. Owners, who were the intended beneficiaries of this amendment limiting the period in which rents may be challenged, will surely not complain because consideration of such evidence, whatever its date, is not adverse to their legitimate interests. In fact, owners who make every effort to comply with their obligations under the Rent Stabilization Law can only benefit from an inquiry that will allow a full and thorough review of all competent evidence on this issue. A rule that arbitrarily excludes from consideration such evidence not only fails to advance the objectives of the Rent Stabilization Law but may well result in severe penalties being imposed in situations where they clearly are not warranted" (internal citations omitted).

Thus, the majority seemed to imply that because the four-year rule was intended to benefit owners, only *owners* could submit evidence beyond the four-year look-back period on the issue of willfulness. In its next paragraph, however, the majority appeared to undercut that position, implying that tenants as well as owners could submit such information:

Parenthetically, willfulness is a penalty proceeding and DHCR should have access to any competent evidence, including an owner's record of compliance with these regulations, before deciding to impose treble damages as punishment for an overcharge. No one would seriously argue that any valid interest would be served by allowing a landlord who is a chronic offender of these regulations to bar from consideration any part of its history of charging tenants illegal rents just because

the overcharges occurred four years before the most recent complaint. Conversely, an owner who has never been found to have violated these regulations should have the full benefit of that history to support its claim that the instant overcharge was not willful, but rather, an aberration and a good-faith mistake.

The authors find this aspect of the majority's analysis to be confusing. Section 26-516(a) precludes "examination of the rental history of the housing accommodation" beyond the four-year period. But information as to landlord's past "history" of overcharging with respect to other apartments does not constitute evidence as to the "rental history of the housing accommodation" in question.

Justice John W. Sweeny, Jr., in an opinion joined by Justice Angela M. Mazzarelli, took a stricter view of the statute:

> We have previously upheld Rent Stabilization Law §26-516(a)(2), as amended by the Rent Regulation Reform Act of 1997, which specifically 'preclude[s] examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a [rent overcharge] complaint.'
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> There is no dispute in this case that the base date was July 17, 1998. The improvements claimed to have been made by the owner were completed by February 13, 1998, prior to the base date. The complaint was filed on July 17, 2002, more than four years after the completion of the claimed renovations. The inclusion of the renovations in the rental calculations was thus impermissible (internal citations omitted).

Whereas the majority viewed the case as one of pure statutory construction, where no deference was due the agency, the dissent saw this case as a fact specific one, and deferred to the agency's fact finding:

> The agency made a willfulness finding partially on the owner's improper representations as to the apartment's legal rent in its 2001 and 2002 rent registrations, as well as other factors. It cannot thus be said that the agency's findings were not supported by the record or that the IAS Court erroneously upheld those findings. The judgment of the IAS court should therefore be affirmed.

The majority remanded the matter to DHCR to redetermine the issue of willfulness. It remains to be seen whether the Appellate Division will grant leave to appeal to the Court of Appeals from this non-final order.

Warren A. Estis *is a founding partner at Rosenberg & Estis, and* **Jeffrey Turkel** *is a partner at the firm.*

Endnotes:

1 N.Y.L.J. Oct. 22, 2007 at 18, col. 1 (App. Div. 1st Dep't).
