A GUIDE TO THE NEW YORK HOUSING STABILITY AND TENANT PROTECTION ACT

for Multifamily Owners, Operators, and Lenders,
for Accountants,
and for Residential Tenants

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NOTES:

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By the way: YES! This is legal advertising. And we hope it works.

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I. THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019

On June 14, 2019, the New York State Legislature made sweeping changes to many laws that affect residential landlord and tenant relationships. The law is known as the Housing Stabilization and Tenant Protection Act of 2019.

This article is NOT exhaustive as to all the changes brought on by the HSTPA. This article covers what I think my students and readers (multifamily owners, operators, lenders, and residential tenants) will be most interested in.

II. WHAT IS RENT STABILIZATION AND HOW DO YOU KNOW IF AN APARTMENT IS RENT STABILIZED

I am never quite sure how much an audience knows about the mercurial laws of New York City rent regulation. If you do not have a solid grasp of Rent Stabilization in New York City, then these materials will not make sense to you. Therefore, I take the liberty in this section of educating you.

A. What Does Rent Stabilization Mean?

Rent Stabilization applies to about one million tenancies in New York City.[1] Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants, and imposes other requirements on landlords and tenants.

Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal ("**DHCR**"). Omnibus Housing Act § 3 (L. 1983, c. 403).

Rent Stabilized tenants are entitled to leases and lease renewals. Even if landlord fails to renew a Rent Stabilized tenant's lease, all tenant's rights remain intact. Rent Stabilization Code ("**RSC**") § 2523.5.

If a Rent Stabilized lease is not properly renewed, a landlord cannot sue tenant for the rent. *Paid Enters. v. Gonzalez*, 173 Misc.2d 681, 682 (App. Term 2nd Dept. 1997) ("Rent [S]tabilization

[1] Selected Initial Findings of the 2014 New York City Housing and Vacancy Survey; http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf.

is a lease-based regulatory scheme. As such, a tenant's obligation to pay the stabilized rent is dependent on the tenant's agreement to pay it.").

Family members of a Rent Stabilized tenant residing in a Rent Stabilized apartment often have succession rights to the tenancy. RSC § 2523.5(b)(1); RSC § 2520.6(o).

Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.[2]

Under Rent Stabilization, landlord is required to follow a very specific procedure for Rent Stabilized lease renewals. Leases must be entered into and renewed for one- or two-year terms, at the tenant's choice. RSC § 2522.5. Landlord must send the lease renewal offer between 150 and 90 days before the expiration of the current lease. RSC § 2523.5. Every lease renewal offer must have a special DHCR rider attached. At the time of this writing, the DHCR rider is 12 pages long[3]. RSC § 2522.5. A Rent Stabilized lease renewal offer must be on the same terms and conditions as the expired lease. RSC § 2522.5

Owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration. Owner's must be very careful when filing DHCR registrations because once they are filed they cannot be amended without initiating a DHCR proceeding and explaining the reason for the amendment, which is time consuming and costly and which makes the landlord look suspicious in the eyes of DHCR or the Courts. RSC§ 2528.3. I do not recommend filing for years during which you lack information. You cannot register guesses, only facts.

B. How Do You Know If A Tenancy Is Rent Stabilized?

There is no official list somewhere that definitively tells the world which apartments are subject to Rent Stabilization and which are not. The DHCR has jurisdiction over matters relating to Rent Stabilization and the DHCR maintains some records. But the records the DHCR maintains contain information that is largely self-reported by landlords

[2] https://www1.nyc.gov/site/rentguidelinesboard/index.page.

[3] http://www.nyshcr.org/Forms/Rent/ralr1.pdf.

and that is often not controlling about an apartment's Rent Stabilization status. Therefore, year after year, a landlord can report to the DHCR that an apartment is "permanently exempt", but that does not make it so.

Moreover, a current or former tenant may have signed a document acknowledging that an apartment is not subject to Rent Stabilization. But this, also, does not make it so. Parties may not contract out of Rent Stabilization coverage. See RSC § 2520.13 (Waiver of benefit void); *Thornton v. Baron*, 5 N.Y.3d 175 (2005) ("A lease provision purporting to exempt an apartment from rent regulation in exchange for an agreement not to use the apartment as a primary residence is against public policy and void.") *Drucker v. Mauro*, 30 A.D.3d 37 (1st Dept 2006) ("It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law.") It works the other way as well – landlords and tenants cannot contract *in* to Rent Stabilization, see *Heller v. Middagh Street Associates*, 4 A.D.3d 332 (2nd Dept 2004) (Landlord did not contractually agree to subject tenants' apartments to Rent Stabilization Law by attaching Rent Stabilization riders to certain leases and by tendering rent renewal leases using Rent Stabilization forms.); *Ruiz v. Chwatt Associates*, 247 A.D.2d 308 (1st Dept 1998) ("Rent stabilization coverage is matter of statutory right and cannot be created by waiver or estoppel.")

How do you ever get a definitive answer on an apartment's Rent Stabilization status? With some exceptions, the last word on whether an apartment is Rent Stabilized is in the hands of the courts or the DHCR. Until a judge is satisfied that an apartment is not Rent Stabilized, the matter is always, in some measure, unsettled.

In general, **if a building was built before 1974 and contains** (**or contained at any time since 1974**) **six or more dwelling units**, **then the apartments therein are Rent Stabilized** (Unconsolidated Laws, Title 23, Chapter 5, §8625(a)(5)) **unless certain exceptions apply**. **Moreover**, **buildings built after 1974 and that may even contain less than six units can be subject to Rent Stabilization as part of a tax exemption or abatement program**, such as those pursuant to any version of Real Property Tax Law ("**RPTL**") § 421-a[4], RPTL § 421-g, or the "**J-51**" **program**[5], **again**, **unless certain exceptions apply**.

What are the "exceptions" to Rent Stabilization referred to above? How would an owner deregulate; i.e. get out of Rent Stabilization? The two main exemptions to Rent Stabilization are "High Rent Vacancy Deregulation" and "Substantial Rehabilitation", terms-of-art in this area, which are **wildly misunderstood and misapplied by multifamily owners**. Below I provide the briefest of overviews of these two concepts.

C. Rent Stabilization Status and the Number of Residential Units in a Building

But first! **I want to emphasize that readers should not stop reading if the subject at hand is a building with less than six units**. **Rent Stabilization hides very often in buildings with less than six units**.

There are two reasons that a building with less than six units might be subject to Rent Stabilization. One has to do with the receipt of a tax benefit. The other reason has to do with the number of units in the building and I explain this below.

[4] RPTL § 421-a was enacted in 1971 to spur new construction of residential units through a tax abatement. In return for the tax exemption, landlords needed to submit to Rent Stabilization for the duration of the tax-benefit period, even when a building is constructed after January 1, 1974, and would otherwise be exempt from rent regulation. RPTL § 421-a(2)(f); *Gramercy North Associates v. Biderman*, 169 A.D.2d 345 (1st Dep't 1991), *leave to appeal denied*, 78 N.Y.2d 863 (1991). RPTL § 421-a was revamped in 2017 as the "Affordable Housing NY Program" and made retroactive to 2015. More on 421-a below!

[5] New York City's J-51 program was a tax exemption and/or abatement program for multifamily property owners. RPTL § 489. Rental units in buildings receiving J-51 must be registered with the DHCR and are generally subject to Rent Stabilization for at least as long as the J-51 benefits are in force. 28 RCNY 5-03 [f].

If a building was built before 1974 and contains six or more units, then the apartments therein are Rent Stabilized[6] unless certain exceptions apply. This is so even if the building in question had less than six units in 1974, but subsequent to 1974, six units were created in the building. *Wilson v. One Ten Duane Street Realty Co.*, 123 A.D.2d 198 (1st Dep't 1987). This is so, even if the extra units were (a) illegally created, and (b) subsequently eliminated. In *Robrish v. Watson*, 48 Misc.3d 143(A) (App. Term 2nd Dept. 2015) the appellate court stated:

> Landlord commenced this holdover proceeding to recover the "top floor" apartment of a two-family house. At a nonjury trial, landlord conceded that, in 1993 or 1994, he had begun using the house as a "rooming house" and had rented 10 different rooms to 10 different individuals, including tenant. **By the time of the trial**, **tenant was the only individual left living in the house**. Tenant argued, among other things, that his tenancy was rent stabilized and that, since his tenancy had not been properly terminated and the proceeding had not been commenced in accordance with the applicable regulations, the petition should be dismissed. In a decision after trial, the Civil Court found that the house was a *de facto* multiple dwelling because a third apartment had illegally been created in the basement, but that the tenancy was not rent stabilized. A final judgment of possession was entered in landlord's favor. The 10 different tenancies entered into by landlord with 10 different individuals for 10 different rooms in his house rendered the house subject to rent stabilization, as housing accommodations in buildings built before January 1, 1974 containing more than six units are subject thereto…The RSC defines a housing accommodation as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment". Under this definition, an individually rented room in a rooming house is a housing accommodation, and therefore, contrary to the Civil Court's decision, **a building with six or more individually rented rooms is subject to rent stabilization**, **regardless of whether any structural changes**

[6] NYC Admin. Code 26-505(b).

> **were made to the premises… Nor is it of any consequence that the illegal use of the building has ended**… Thus, the petition should have been dismissed on the ground that landlord failed to serve the required rent stabilization notices.)
>
> [Emphasis supplied.]

See also Joe Lebnan, LLC v Oliva, 39 Misc.3d 31 (App. Term 2nd Dept. 2013); *Commercial Hotel, Inc. v. White*, 194 Misc. 2d 26 (App. Term 2nd Dept. 2002); *Rashid v. Cancel*, 9 Misc. 3d 130(A) (App. Term 2nd Dept. 2005) ("In our view, the use of the basement as a sixth housing accommodation over a multi-year period brought the entire building under rent stabilization …The alleged subsequent reduction in the number of housing accommodations to fewer than six, even if done, as landlord claims, after the placement by the Department of Housing Preservation and Development of a violation, did not exempt the remaining units from rent stabilization); *124 Meserole, LLC v. Recko*, 55 Misc. 3d 146(A) (App. Term 2nd Dept. 2017) (Premises were rent stabilized because two rooms in a store that were used residentially with landlord's knowledge for years constituted "housing accommodations" as defined by the Rent Stabilization Code, which refers to "part of any building or structure," and brought total number of residential units to six.)

D. The High Rent Vacancy Deregulation Exception to Rent Stabilization

One of the few exceptions that would take an apartment in a building out of Rent Stabilization was "**High Rent Vacancy Deregulation**".

High Rent Vacancy Deregulation occurred when an apartment's *legal* regulated rent had reached a prescribed deregulation threshold ("**DRT**"). Rent Stabilization Law ("**RSL**") § 26-504.2(a). The High Rent Vacancy Deregulation threshold from 1993 forward was $2,000.00, then after January 23, 2011 the threshold was $2,500.00, then after July 1, 2015 the threshold became $2,700.00 (and increased slightly thereafter).

On June 14, 2019, High Rent Vacancy deregulation was abolished by the Housing Stability and Tenant Projection Act of 2019 ("**HSTPA**"). Although High Rent Vacancy Deregulation was abolished, as per the HSTPA, past deregulations are still valid. RSL § 26-504.2.

Moreover, High Rent Vacancy Deregulation is still available in 421-a "Affordable Housing NY Program" buildings, which will be addressed below.

1. ***A Court or the DHCR Can Look Back Forever When Making a Call on the Rent Regulatory Status of an Apartment***

Before we go further into our exploration of High Rent Vacancy Deregulation, it is very important to keep in mind that a court or the DHCR can look back as far as they want to determine whether an apartment is subject to Rent Stabilization. *72A Realty Associates v. Lucas*, 28 Misc.3d 585 (N.Y.City Civ.Ct., 2010), *Affirmed as Modified by 72A Realty Associates v. Lucas* 32 Misc.3d 47 (AT1st 2011), *Affirmed as Modified by 72A Realty Associates v. Lucas*, 101 A.D.3d 401 (1st Dept. 2012); *Gersten v. 56 7th Avenue LLC,* 88 AD3d 189 (1st Dept. 2013). *See also* NYC Admin Code § 26-516(h), which allows a court or DHCR, "in investigating complaints of overcharge and in determining legal regulated rents, [to] consider all available rent history which is reasonably necessary to make such determinations…" This is why we look back throughout an apartment's history from the 1980's forward and test that history against the following laws, which applied at relevant times.

2. ***High Rent Vacancy Deregulation is Not Allowed if a Building is Stabilized Pursuant to a Tax Exemption or Abatement Program***

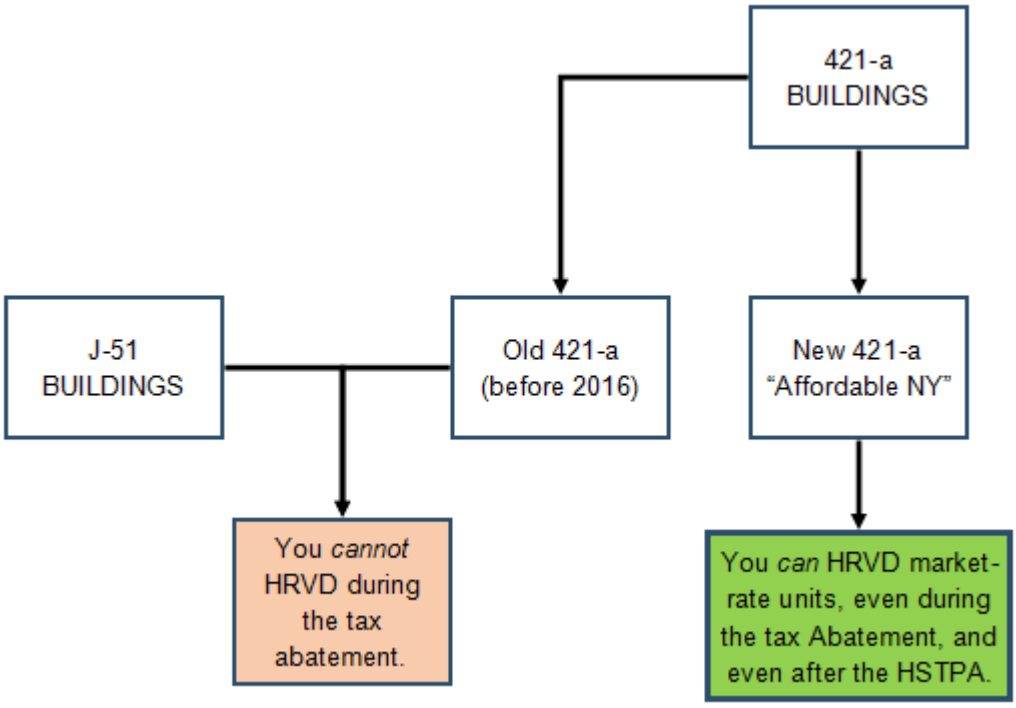
High Rent Vacancy Deregulation is not allowed, however, while a building is Stabilized pursuant to a tax exemption or abatement program. *Roberts v. Tishman Speyer,* 13 NY3d 270 (2009); *Roberts v. Tishman Speyer Properties*, 89 A.D.3d 444 (1st Dept. 2011); *Gersten v. 56 7th Avenue LLC,* 88AD3d 189 (1st Dept. 2013); *72A Realty Associates v. Lucas*, 101 A.D.3d 401 (1st Dep't 2012). An exception to this rule would be in 421-a "Affordable Housing NY Program" (defined below) buildings.

Rent Stabilized units in buildings benefitting from 421-a tax benefits *before* 2016, were not allowed to use High Rent Vacancy Deregulation, while the tax benefit was in place. However, RPTL § 421-a was revamped in 2017 as the "**Affordable Housing NY Program**" and made retroactive to 2015. Affordable Housing New York Program projects are divided into affordable portions and market rate portions. In the market rate portion of such a project, the market rate units are Rent Stabilized, but their first rent is set at a market rate. Significantly, market rate units in Affordable Housing NY Program 421-a buildings are Rent Stabilized while tax abatements are in effect *unless the units (not in the affordable portion) meet the criteria for luxury deregulation*. The

HSTPA did not originally include a carve-out for High Rent Vacancy Deregulation of market rate units in buildings benefitting from Affordable Housing NY Program 421-a. A corrective bill was passed clarifying that Affordable Housing NY Program 421-a buildings will continue to be subject to pre-2019 Rent Stabilization laws. The HSTPA was amended on June 20, 2019 to state that:

> "a market rate unit in a multiple dwelling which receives benefits pursuant to subdivision 16 of section 421-a of the real property tax law shall be subject to the deregulation provisions of rent stabilization as provided by law prior to June 14, 2019."

The net effect of all this legislation is that in **Affordable Housing NY Program 421-a buildings**, **landlords can be High rent Vacancy deregulated**, **even after June 15, 2019 and even if the 421-a tax benefits are still in place**.



3. High Rent Vacancy Deregulation and Individual Apartment Improvements

Before the HSTPA in 2019 eliminated High Rent Vacancy Deregulation, landlords were always eager to get to the DRT. One way to hasten getting there was to do Individual Apartment Improvements ("**IAIs**"). A landlord may secure a rent increase based on a substantial modification of dwelling space and/or upon provision of additional services, improvements, equipment, furniture, or furnishings to a Rent Stabilized unit. RSL § 26-511(c)(13); RSC § 2522.4(a)(1). No tenant consent is required when the IAI is made during a vacancy. RSC § 2522.4(a)(1).

DHCR distinguishes between "improvements" and "repairs" or "maintenance" in determining whether the work qualifies for the increase. *Rockaway One Co., LLC v. Wiggins*, 9 Misc. 3d 12 (App. Term 2004), *order rev'd on other grounds*, 35 A.D.3d 36 (2d Dep't 2006).[7]

Before the HSPTP in 2019, in a building with 35 or fewer apartments, a landlord was allowed to add to a Rent Stabilized tenant's rent the equivalent of one-fortieth (1/40) of the cost of the new service or equipment, including installation costs, but not finance charges. RSL Code § 26-511(c)(13); RSC § 2522.4(a)(4). For example, if a new refrigerator was installed in an apartment and the landlord's expense was $400.00, then the tenant's monthly rent was increased by $10.00 (1/40 x $400). This kind of IAI was often used to juice the rent to the Deregulation Threshold.

[7] Do NOT confuse, as many people do, IAI's with MCI's (major capital improvements). The following are the major characteristics of MCI's:

- MCI require the consent of DHCR.
- MCI's are for building-wide systems that directly or indirectly benefit ALL tenants.
- MCI's are associated with a great deal of paperwork (form RA-79)
- To qualify as an MCI and improvement or installation must:
    - Be depreciable pursuant to the IRS Code, other than for ordinary repairs
    - Be for the operation, preservation, and maintenance of the building
    - Meet the requirements set forth in a useful life schedule contained in the applicable regulations. For example, you can only apply for an MCI increase for a cast iron boiler every 35 years.
- The rent increase collectible in any one year may not exceed 6% of the tenant's rent.
- The back-up proof required to document MCI's includes (but is not limited to) certifications by contractors, proof of payment, copies of approvals from government agencies, and a list of tenants, contracts, and contractor affidavits.
- You must apply for MCI's within two years of the work being complete.

It is crucial to consider, however, that IAI's are receiving heightened scrutiny. DHCR issued Operational Bulletin 2016-1[8] "Individual Apartment Improvements", which deals extensively with the types of proof the DHCR requires of a landlord who wants to substantiate IAI's, and which states:

> Claimed individual apartment improvements are required to be supported by adequate and specific documentation, which should include:
>
> 1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
>
> 2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
>
> 3. Signed contract agreement; and
>
> 4. Contractor's affidavit indicating that the installation was completed and paid in full.

It is rare that a landlord actually has her act together to the extent I would like to see it with respect to IAI's. Here are some examples of what I see frequently:

- The cancelled checks do not indicate what invoices were being paid.
- There are no invoices marked "paid".
- The amounts of certain expenditures do not match up with the invoices.
- The invoices are chronologically discordant with the alleged work.
- Landlord does not provide signed contracts; they have paper, but not contracts.
- Landlord does not provide contractors' affidavits.
- Landlord does not provide before and after pictures of the apartment.

A simple technique that I always instruct my landlord-clients to engage in is to take before and after pictures of the renovation, a picture being worth a thousand words (or a thousand invoices, cancelled checks, and contractor's affidavits).

[8] https://hcr.ny.gov/system/files/documents/2018/09/orao20161.pdf.

4. High Rent Vacancy Deregulation and After June 15, 2015

On or after June 15, 2015, the wording of the law was changed to indicate that an apartment may not be High Rent Vacancy Deregulated until the rent reaches the DRT with a Rent Stabilized tenant in occupancy. Therefore, if the rent is below that threshold when a Rent Stabilized tenant moves out, the apartment remains Rent Stabilized even if the new rent rises above the DRT. *See* NYC Admin Code. § 26-403(E)(2)(k).

In *People's Home Improvement LLC v. Kindig*, NYLJ ID1572250769NY6542119, (Civil Court Kings County, September 6, 2019), tenant-Kindig moved to dismiss a nonpayment proceeding arguing the petition failed to state a cause of action, because the premises were subject to Rent Stabilization. Landlord cross-moved claiming the premises was deregulated, based on High Rent Vacancy Deregulation. Kindig argued that petitioner could not deregulate the premises under High Rent Vacancy Deregulation in 2017, as such deregulation may only occur when a unit is vacated after reaching the $2,700 threshold rent, including applicable one-year renewal increases. The court agreed, ruling that the Rent Act of 2015 did not intend to permit deregulation of a vacant apartment below the threshold rent through vacancy or IAI increases if the vacancy occurred after the Act's effective date. Thus, it found Kindig was a Rent Stabilized tenant and granted him dismissal of the petition as it failed to properly set forth his regulatory status.

5. High Rent Vacancy Deregulation and Preferential Rent

Finally, we need to talk about High Rent Vacancy Deregulation and "Preferential Rent", defined below.

"An apartment will also qualify for deregulation upon vacancy by the tenant, where a preferential rent of less than $2,500 per month is charged and paid and a higher legal regulated rent has been established." DHCR Fact Sheet # 36; See RSC § 2520.11[r][5]; [s][2].

However, there is heightened scrutiny of a rent roll when there are preferential rents as per RSC § 2521.2(Preferential rents):

> (a) Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation such rent shall be known as the "preferential rent." The amount of

> rent for such housing accommodation which may be charged upon renewal or vacancy thereof may, at the option of the owner, be based upon either such preferential rent or an amount not more than the previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law.
> (b) Such legal regulated rent as well as preferential rent shall be set forth in the vacancy lease or renewal lease pursuant to which the preferential rent is charged.
> (c) **Where the amount of the legal regulated rent is set forth either in a vacancy lease or renewal lease where a preferential rent is charged, the owner shall be required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four-year period preceding the filing of a complaint.**
>
> [Emphasis supplied.]

This statute is in place because many landlords have abused Preferential Rents. Landlords illegally raised legal rents, with the intention of hastening illegal deregulations. But because tenants were only being charged the Preferential Rent, tenants did not feel the pain of the unlawful legal rent and, therefore, did not report it to DHCR. The years would go by, and then the four-year look back period (now repealed) would prevent a future tenant from looking back to question the progression of the legal rents and the subsequent deregulation. Thus, the legislature made the above statute, so that courts and the DHCR could examine a landlord's records as far back as they desired when Preferential Rents were utilized. This is now somewhat obviated by the HSTPA mandate for a court to look as back as far as it wants under any circumstances. However, it remains a strong indication that Preferential Rents will continue to be closely scrutinized in deregulation cases.

E. The Substantial Rehabilitation Exception to Rent Stabilization

There is an exemption from Rent Stabilization based upon "**Substantial Rehabilitation**" of a building, governed by RSC § 2527.11 and § 2520.11(e) and by DHCR Operational Bulletin

95-2, which sets forth the position of the DHCR regarding the circumstances under which the agency will find that a building has been substantially rehabilitated. In general, for a finding of Substantial Rehabilitation, a landlord needs to be able to prove that:

- When the construction project commenced the building was in substandard and seriously deteriorated condition and the Building was at least eighty percent (80%) vacant of residential tenants.

- All of the walls, floors, and ceilings:

    - in the common areas must be replaced *and*
    - in the apartments must be replaced or made as new.

- One hundred percent of more than 75% of the applicable seventeen (17) Building-wide apartment systems contained on the list in DHCR Operational Bulletin 95-2 at I(A) have been completely replaced with new systems.

- All Building systems comply with all applicable building codes and requirements.

This all needs to be proven by admissible and highly detailed proof, much like what is required for IAI's (see above). But in addition to invoices, cancelled checks, contracts, and contractor affidavits, it is also necessary to prove Substantial Rehabilitation by submitting architectural plans and permits.

I want to add some extra emphasis on the very first prong above, because it often gets overlooked: *"When the construction project commenced the building was in substandard and seriously deteriorated condition and the Building was at least eighty percent (80%) vacant of residential tenants."* When making Substantial Rehabilitation Exemption decisions, the courts have been recently scrutinizing the condition of the building at the time the project begins. In a particularly troubling recent case, *867-871 Knickerbocker, LLC v. Poli*, 65 Misc.3d 15 (App. Term 2nd 2019), the court held that landlord failed to establish that the building had been in substandard condition prior to construction so as to make it exempt from Rent Stabilization, despite introducing extensive proof regarding construction work that was done, where landlord failed to produce any records demonstrating the condition of building prior to construction and relied solely on an expert engineer's and principal's conclusory testimony. The court stated:

At a nonjury trial, landlord's witnesses testified to the construction that had been done with respect to the plumbing, heating, gas supply, electrical wiring, intercoms, windows, roof, fire escapes, interior stairways, kitchens, bathrooms, floors, ceiling and wall surfaces, and pointing of the building exterior. Landlord's expert engineer concluded that an estimated 89% of the building had been rehabilitated. Only landlord's principal, … however, had any personal knowledge of the condition of the building prior to the construction work. With respect to that condition, Mr. Eisenberg stated only that the building had been "very neglected," "obviously wasn't taken care of," "the steps were run down," "the plumbing was broken, holes in the walls, doors missing. I mean nothing was good," "derelict," and that there were "electrical problems, plumbing issues, you name it." Mr. Eisenberg stated that there were still "some people" living in the building prior to the construction work. Mr. Eisenberg further stated that he could not remember the layout of the apartments before the renovation, and he did not know whether photographs of the building had been taken before the construction had begun. Landlord failed to produce any records demonstrating the condition of the building prior to the construction…

"[T]he basic purpose of [this] exemption is to increase the number of habitable family units available to the residents of [the City]. The mechanism by which this is accomplished is to encourage building owners to substantially rehabilitate commercial, or substandard or deteriorated housing stock by permitting them to recoup their expenses free of stabilized rents" (*Bartis v. Harbor Tech, LLC*, 147 A.D.3d 51, 57–58, 45 N.Y.S.3d 116 [2016], citing *Matter of Eastern Pork Prods. Co. v. New York State Div. of Hous. & Community Renewal*, 187 A.D.2d 320, 324, 590 N.Y.S.2d 77 [1992]). We agree with the Civil Court that the evidence produced by landlord was insufficient to support a finding that the requirements set forth in RSC § 2520.11 (e) and Operational Bulletin 95–2 of the New York State Division of Housing and

> Community Renewal, allowing for exemption from rent regulation, had been met. While landlord introduced extensive proof regarding the construction work that was done, it failed to establish that the Code's precondition that the building had been in substandard condition prior to the construction was met, because it failed to produce any records demonstrating the condition of the building prior to the construction and relied solely on testimony that was conclusory.

You also must get a new certificate of occupancy or a certificate of completion of the work before you can apply to DHCR for a finding of a Substantial Rehabilitation exemption. *174 Street, LLC*: DHCR Adm. Rev. Docket No. GW210031RO (10/7/19) (LTV #30520) (Landlord asked the DHCR to rule on whether its building was exempt from Rent Stabilization. Landlord claimed that the building was substantially rehabilitated after January 1, 1974, by work done in 2015-2016. The District Rent Administrator ruled against landlord, who appealed and lost. Landlord had obtained neither a new Certificate of Occupancy nor a DOB Letter of Completion, which would show that claimed work complied with all applicable building codes and requirements. So, landlord failed to prove that a substantial rehabilitation of the building had been completed.)

As part of its decision-making process on a Substantial Rehabilitation exemption application, DHCR will send a qualified inspector to the site, to compare the work alleged with actual conditions.

Unfortunately, many owners do not bother to seek a determination from DHCR that a building has been Substantially Rehabilitated. If an owner does not seek and get a determination from DHCR that the building has been Substantially Rehabilitated, then the matter often comes up when a landlord sues a tenant for rent and the tenant asserts the defense of Rent Stabilization. Litigating a Substantial Rehabilitation case is complex and expensive. Also, the farther away in time you get from the work, the harder it is to prove Substantial Rehabilitation. Contractors and sub-contractors go out of business or forget the details of the job, making it difficult to get affidavits from them. Records such as invoices, work orders, and cancelled checks get misplaced or destroyed. That is why I usually recommend that an owner seek a DHCR determination of Substantial Rehabilitation as soon as their project is complete, as opposed to waiting and hoping that no tenant will ever raise the Rent Stabilization defense. Eventually, someone will raise the defense.

If you want to seek a Substantial Rehabilitation exemption from DHCR, the best course is to involve me (or someone who knows this area) *before* you begin your construction project.

III. HOW THE RENT STABILIZATION LAW CHANGED IN NEW YORK IN JUNE 2019

A. Why the Law Needed to Change

A bad trend developed over the last 20 years in New York City multifamily housing, whereby speculators over-paid for buildings containing Rent Stabilized apartments, with the intention of raising the rents and eventually deregulating the apartments, thus raising the rent roll substantially to make a large and fast profit on these assets.

But the rent could only go up and apartments could only be deregulated if long-term existing tenants vacated. This prompted the speculators to bring legal cases against many long-term tenants, not always based on solid grounds. It also prompted the speculators to buy tenants out and/or harass tenants out. When vacancies occurred, higher rents and deregulations depended on the owners doing six-figures worth of work in an apartment. Often, that work never really happened. Landlords would often lie about the amount spent on individual apartment improvements. Add to this the rampant abuses related to Preferential Rents, and that's how you end up with 250,000 illegally deregulated Rent Stabilized apartments.

The law needed to evolve to curb these abuses. Nevertheless, these laws put additional burdens on the many law-abiding good owners and operators.

B. There Is No Longer A Rent-Increase Pathway to Deregulation

In June 2019, the New York State legislature took away the incentive for a landlord to seek a vacancy. The new law repeals statutes that allowed units to be deregulated on vacancy if the rent reached $2,744, or if that rent is lawfully achieved while a tenant earning $200k a year or more resided in the apartment. In short, there is no longer a rent-increase pathway to deregulation.

However, landlords can still High Rent Vacancy Luxury Deregulate market rate Rent Stabilized units under Affordable Housing NY Program 421-a. See above.

C. The Legislature Severely Limited the Ability of Owners to Take Rent Increases on Vacancies

Moreover, the legislature severely limited the ability of owners to take rent increases on vacancies, further dampening a landlord's appetite for tenant turnover. The new law:

- Repeals the statutory vacancy bonus, which allows landlords of Rent Stabilized apartments to create an automatic increase in rent up to 20% on vacancy; and

- Repeals the vacancy longevity bonus.

The rent for the new tenant is the rent that the old tenant paid, plus applicable Rent Guidelines Board increases, which historically are very low (as I write this, they are 1.5% for a one-year lease and 2.5% for a two-year lease). The new law says at RSL § 26-511(c)(14):

> "Any tenant who is subject to a lease on or after the effective date of a chapter of the laws of two thousand nineteen which amended this subdivision, or is or was entitled to receive a renewal or vacancy lease on or after such date, upon renewal of such lease, the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law."

Furthermore, individual apartment improvement increases ("IAI's") have changed dramatically pursuant to the new law. Landlords may only spend $15k in 15 years on IAI's. Landlord may only add to the rent 1/168th of such IAI's to a vacancy rent. That's about $89. In addition, major capital improvement expenditure increases ("MCI's") have been curtailed. It is beyond the scope of this already-long article to go into the details on MCI's. Again, I encourage anyone contemplating MCI's to read the new law carefully.

Long story short, the rent rolls for buildings containing Rent Stabilized apartments can be expected to increase much more modestly than before HSTPA.

D. Preferential Rent Remains in Place for A Whole Tenancy

The new law, at RSL § 26-511(c)(14), reforms Preferential Rents. The new law:

- Prohibits owners who offer tenants a "preferential rent," or rent below the legal regulated rent, from discontinuing the use of preferential rent or raising the rent to the full legal amount upon lease renewal.

- But it allows landlords to charge any rent up to the full legal regulated rent once the tenant vacates the unit, as long as the tenant did not vacate due to the owner's failure to maintain the unit.

E. Momentous Changes to Rent Stabilization Overcharge Laws

When it comes to the new laws, everyone seems to be talking about de-regulation and rent increases and, of course, those are important issues. But a close-second in importance are the momentous changes to the Rent Stabilization Law regarding rent overcharges.

1. There Is No Statute of Limitations on An Overcharge Claim

First, there is no longer any statute of limitations on a rent overcharge! Formerly, there was a four-year statute of limitations (CPLR § 213-a). That meant that an overcharge claim had to be filed within four years of the last overcharge. Now CPLR § 213-a states, "…an overcharge claim may be filed at any time…" This means that many more tenants will be eligible to file overcharge claims.

2. A Court or The DHCR Can Look Back as Far as It Wants and At as Many Sources of Information as It Deems Appropriate, When Attempting to Determine If There Is an Overcharge and At What Level the Legal Rent Should Be Set

Furthermore, a court or the DHCR can look back as far as it wants and at as many sources of information as it deems appropriate, when attempting to determine if there is an overcharge and at what level the legal rent should be set. Before this amendment to the law, a court or DHCR

could only look back four-years when determining if there was an overcharge, unless there was evidence of fraud and in some other limited circumstances.

Let us look at all the material added to the law to give a court or DHCR latitude in overcharge matters at RSL § 26-516(h):

> "The [DHCR], and the courts, in investigating complaints of overcharge and in determining legal regulated rents, shall consider all available rent history which is reasonably necessary to make such determinations, including but not limited to:
> (i) any rent registration or other records filed with [DHCR], or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers;
> (ii) any order issued by any state, municipal or federal agency;
> (iii) any records maintained by the owner or tenants; and
> (iv) any public record kept in the regular course of business by any state, municipal or federal agency. Nothing contained in this subdivision shall limit the examination of rent history relevant to a determination as to:
> (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable;
> (ii) whether an accommodation is subject to the emergency tenant protection act or the rent stabilization law;
> (iii) whether an order issued by the [DHCR] or by a court, including, but not limited to an order issued pursuant to section 26-514 of this chapter, or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;
> (iv) whether an overcharge was or was not willful;
> (v) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;

> (vi) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;
> (vii) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or
> (viii) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint."
>
> [Emphasis supplied.]

These changes to the Rent Stabilization Law regarding rent overcharges were made to stem the problems I discussed at the beginning of this article and in several of my earlier articles. Bad landlords counted on the passage of time to insulate them from their indiscretions with a rent roll. Before these changes, if a landlord illegally raised the rent, all the landlord had to do was wait and hope that no tenant challenged the illegal jump in the next four-years. The HSTPA eliminates this loophole. I will provide examples, so you can see how sweeping these changes are.

Example of How the Overcharge Law Worked Before June 2019: In 2004 (15 years ago), a landlord illegally jumped the rent ahead from $600 per month to $1,600 per month. But after that big jump, the landlord only took legal increases. It's 2018 and a tenant asks the DHCR to determine whether she has been overcharged. The DHCR can only look back 4 years (to 2014). When it looks back to 2014 and examine the rent increases landlord implemented since then, they all check out. The landlord in this example got away with the illegal jump in 2004.

Example of How the Overcharge Law Works Now: In 2004 (15 years ago), a landlord illegally jumped the rent ahead from $600 per month to $1,600 per month. But after that big jump, the landlord only took legal increases. It's July 2019 and a tenant asks the DHCR to determine whether she has been overcharged. The DHCR can look back all the way to 2004 and question the $1,000 jump. The DHCR (or a court, by the way) can look at any rent registration or other records filed with the DHCR, any orders in any earlier cases or issued by HPD for violations, any records maintained by the owner or tenants, etc. Maybe the landlord is claiming it did $40k of work in the apartment in 2004. But maybe tenant has pictures from 2004, when she moved in, showing that the apartment was not newly renovated at that time.

3. ***There Were Radical Changes to The Treble Damage Section of The Law and Attorneys' Fees Are Now Mandatory***

The most radical changes to the overcharge laws, however, are contained in the damages section. Before these amendments to the Rent Stabilization Law, a court or DHCR could award a tenant up to four years of damages for an overcharge. With these amendments, however, now a court or the DHCR can award a tenant up to six years of damages for an overcharge.

Moreover, what makes overcharge findings so devastating to landlords is the punitive damages section built into the law. Before these changes to the law, a landlord caught overcharging a tenant could simply refund the overcharged amount and avoid any punitive damages. The new law removes the ability of owners to avoid punitive damages if they voluntarily return the amount of the rent overcharge prior to a decision being made by a court or the DHCR. See RSL § 26-516 [a], as amended by L 2019, ch 36, part F, § 4 [June 2019], which states:

> After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by the Division of Housing and Community Renewal or a court of competent jurisdiction as evidence that the overcharge was not willful.

And wow are the new damages punitive!

Under the new law, if a court or a DHCR finds that an overcharge is willful, it can order that the landlord refund to tenant not only the amount it overcharged tenant, but also triple the amount of the overcharge for six full years. Before the change in the law, a court or DHCR could only award two years of triple damages.

Finally, the new law makes is mandatory (not up to DHCR's or a court's discretion, as was the case up until June 14, 2019) to award an overcharged tenant costs, reasonable attorney's fees, and interest for the overcharge.

4. How Do You Set Legal Rent? Effect of Improper DHCR Filings

In this sub-section we are departing from the HSTPA for a moment and dealing with other hugely impactful changes to Rent Stabilization that are developing via case law. These changes must be considered in any discussion regarding the new law because this all fits together in terms of the consequences in the event of an illegal deregulation and/or overcharge.

A big topic in New York City landlord and tenant law lately is, in the event that a court or the DHCR finds a failure to properly register with DHCR, how will it determine the legal rent? This comes up a lot in illegal deregulation and/or overcharge cases. In this section we try to make sense of the case law and come up with some rules to help answer this question.

First, let's start with some basic principles. As we said above when we introduced the concept of Rent Stabilization, owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration. Owner's must be very careful when filing DHCR registrations because once they are filed they cannot be amended without initiating a DHCR proceeding and explaining the reason for the amendment, which is time consuming and costly and which makes the landlord look suspicious in the eyes of DHCR or the Courts. RSC § 2528.3. So, owners must give tenants leases and lease renewals and the contents of those leases and renewals must be registered annually with DHCR. There are penalties for not complying with this. RSC § 2528.4(a). (Penalty for failure to register) states:

> The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register. … **The late filing of a registration shall result in the elimination**, **prospectively**, of such penalty, and for proceedings commenced on or after July 1, 1991, **provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration**, **an owner**, **upon the service and filing of a late registration**, **shall not be found to have collected a rent in**

> **excess of the legal regulated rent at any time prior to the filing of the late registration**…
>
> [Emphasis supplied.]

Under certain circumstances, owners who were caught wrongly deregulating or overcharging, where increases in the legal regulated rent were NOT lawful, are allowed to take retroactive increases. See *Matter of Park v. DHCR*, 150 A.D.3d 105 (1st Dept 2017) (court allowed an owner of apartments which were treated as unregulated while the building was receiving J-51 benefits to take retroactive increases where the landlord promptly corrected the pertinent DHCR rent registration statements after *Roberts* case). In *Park*, the landlord had both a good excuse for the unlawful registrations (the *Roberts* case) and it promptly (right after the *Roberts* case was finalized) corrected the errors.

Where, **however**: (**a**) **the rent increases are not lawful**, (**b**) **there is no good explanation for the unlawfulness; and** (**c**) **the registrations are not promptly corrected**, **then**, "**[t]he rule [is] that the rent amount reverts back to the last legal amount if…**a false amount was listed on a DHCR registration." *Ernest and Maryanna Jeremias Family Partnership, LP v. Matas*, 39 Misc.3d 1206(A) (NYC Civ. Ct. Kings Sty. 2013). **In other words**, **prospective application of retroactive increases are not allowed**. **The following cases track the evolution of this rule**.

In *Thornton v Baron*, 5 N.Y.3d 175 (2005), the only rent registered at DHCR was associated with a lease, which the court determined to be part of an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York. The lease was found to be void at its inception. Because the rent the void lease purported to establish was illegal, the rent registration statement listing this illegal rent was also a nullity. The court had nothing else to work with in terms of a rent history, and therefore, was forced to utilize the DHCR default method of calculating the base rent. Specifically, the Court of Appeals in *Thornton* held that:

> …a landlord whose fraud remains undetected for four years, however willful or egregious the violation, would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases. Indeed, an unscrupulous landlord in collusion with a

> tenant could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature.... Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely [citation omitted] not to immunize dishonest ones from compliance with the law.

Then, five years later in *Jazilek v Abart Holdings, LLC*, 72 A.D.3d 529 (1st Dept. 2010), the First Department held that in calculating the amount of rent overcharges, a lower court correctly declined to apply any periodic or other rent increases, other than vacancy increase of 20% and froze the rent at the level of the "legal regulated rent in effect on the date of the last preceding registration statement". *Jazilek* was NOT a fraud case. It, like *Thornton*, was a case where there was a void lease *ab intio* that violated public policy. But *Jazilek's* reasoning was not like *Thornton's*. *Thornton* was relying on the obvious injustice of letting a landlord use a fraudulent rent as a legal rent. *Jazilek*, for some reason, came to the same conclusion as *Thornton*, but resorted to reliance on RSC § 2528.4 [a] (the registration section of the regs). *Jazilek* held:

> A landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement" (Rent Stabilization Law [RSC § 2528.4 [a]). The rent registration filed by the landlord in February 2004 was false, as it continued to list the prior tenant as tenant of record, and listed the prior rent of $812.34, instead of the actual paid "preferential" rent of $1,800. The rent registration filed in June 2004 was also defective, as it listed a legal rent of $2,200, vastly in excess of $974.81, the highest possible legal rent at that time. As such, both the February and the June 2004 rent registration statements were nullities (*Thornton v Baron*, 5 NY3d 175 [2005]), and no further registration statements were filed.

Next, we have *Bradbury v. 342 West 30th Street Corp.*, 84 A.D.3d 681 (1st Dept. 2011), which relies on both *Thornton* and *Jazilek*, to, again, forbid taking a fake rent and then building on it via, "vacancy, longevity and renovations increases that defendant would otherwise have been entitled to" to get a base rent, but rather knocks landlord back to the "legal regulated rent in effect as of the date of the last preceding rent registration statement." In both *Jazilek* and *Bradbury* the

overcharge is calculated based on the frozen last legally registered rent number. *Bradbury,* like *Jazilek,* leans on RSC § 2528.4 [a], and starts to make this line of cases seem as if it is about the act or omission of the registrations:

> Owners of rent-stabilized apartments are required to file annual rent registration statements with DHCR listing, among other things, the name of the tenant in each regulated apartment along with the current rent on the registration date (*see* Administrative Code § 26-517 [a], [f]; Rent Stabilization Code [9 NYCRR] § 2528.3). An owner's failure to file a "proper and timely" annual rent registration statement bars the owner from collecting "any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement" until such time as a proper registration is filed (Administrative Code § 26-517 [e]; *see also* 9 NYCRR 2528.4 [a]). Where an owner fails to file a "proper and timely" registration, until such registration is filed, the rent is frozen at the legal regulated rent listed in the preceding registration statement (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [2010]).
>
> Here, although defendant filed rent registration statements in 2002 and 2003 listing the purported legal regulated rent as $2,000, the trial court's findings, which we now affirm, establish that those filings were intentionally false. The trial court concluded that defendant willfully and intentionally charged plaintiff the incorrect rent of $2,000 and that the maximum allowable rent was $1,390.87. The court further found that defendant's entire case was "a sham, filled with perjury, forgery, [and] fabrications" and was "designed . . . to raise the rent of the apartment . . . to an unlawful level," a level that would remove the unit from the protections of rent stabilization.
>
> In light of these findings, we conclude that defendant's 2002 and 2003 DHCR filings were not "proper" within the meaning of Administrative Code § 26-517 (e). This Court recently upheld the imposition of a rent freeze in a similar situation (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529 [2010], *supra* [rent registration

> statement listing a legal rent in excess of the highest possible legal rent was defective and not a "proper" filing]; *see also Thornton v Baron*, 5 NY3d 175, 181 [2005] [rent registration statement listing illegal rent was a nullity]). Because defendant failed to file proper statements in 2002 and 2003, and because the record does not show that any such proper statements were subsequently filed, defendant was barred from collecting any rent in excess of the last properly registered rent, i.e., the $402.43 rent listed in the 2001 registration.

Appellate Term Second then imposed a "*Bradbury Rent Freeze*" in *125 Court Street, LLC v. Sher*, 58 Misc.3d 150(A) (AT2nd 2018). This was a 421-a case where the owner filed an impermissible legal first rent, while charging tenant a "preferential rent", and then later improperly attempted to raise the rent to the purported legal rent. There was no finding of fraud. Yet the court held that:

> In these circumstances, the rent was "frozen" at the initial legal regulated rent of $3,540 per month and landlord was entitled to no increases until September 2013 when the registrations were corrected (*see Jazilek v. Abart Holdings, LLC*, 72 AD3d 529, 531 [2010]; *see also Thornton v. Baron*, 5 NY3d 175, 181 [2005]; *Bradbury v. 342 W. 30th St. Corp.*, 84 AD3d 681, 684–685 [2011]). **Landlord's amended registrations have no retroactive effect**.
>
> [Emphasis supplied.]

Ernest and Maryanna Jeremias Family Partnership, LP v. Matas, 39 Misc.3d 1206(A) (NYC Civ. Ct. Kings Sty. 2013) relies on *Bradbury* and states the rule as follows:

> ...The rule that the rent amount reverts back to the last legal amount if, as here, a false amount was listed on DHCR registration has been established through many recent cases [citing what I have cited here].

Park (mentioned above) was directly distinguished by the recent case of *EMA Realty, LLC v. Leyva,* 2019 N.Y. Slip Op. 29110 (App. Term 1st 2019), where the court noted that, in *Park*,

the landlord had a good excuse for not properly registering the tenancy with DHCR because of a change in the state of the law and once landlord in *Park* realized its mistake it promptly corrected it. In *EMA*, the landlord had no basis for a "justifiable belief" that its registrations did not require any corrections and, moreover, it failed to promptly correct its rent registration statements once it knew of its mistake. Therefore, in *Ema*, the rent was "frozen" at the last registered rent and could not be prospectively corrected with DHCR filings.

Thus, the functional rule now is that is DHCR filings are wrong and there is no good excuse for that wrongness and the error is not quickly corrected, then the *Legal Rent* is *frozen* at the last legal registered rent and retroactive increase calculations are not allowed.

5. Prediction – Epic Battles Over Illegally Deregulated Apartments

Every apartment that gets swatted back into Rent Stabilization is *never*…coming…out. And now it's easier to get an apartment wrongly deregulated back into Rent Stabilization, because of the enhanced look-back options built into the new law. And when an apartment goes back into Rent Stabilization, its going in with a healthy overcharge award. With these new laws, tenants have much greater incentives to challenge the regulatory status of their apartment. And would-be multifamily purchasers have greater incentive to question the efficacy of alleged deregulations.

This will be the new battlefield in the wake of these new laws. Landlords were the hunters (the ones bringing frequent cases against tenants), and now they shall be the hunted (the ones defending against cases brought by tenants), as Legal Aid and private tenant attorneys seek to push as many of those 250,000 illegally deregulated units back into Rent Stabilization and win an overcharge award along with the re-regulation.[9]

I have long had a service for tenants to help them figure out whether their allegedly free-market apartment is actually subject to Rent Stabilization[10]. I have also long had a Rent

[9] My only concern is that there may not be adequate enforcement of these laws for middle class New Yorkers who are tenants. Low income New Yorkers have Legal Aid. Higher income New Yorkers have firms like mine. Middle class New York will still need help navigating their rights under these laws. This year, I launched an initiative separate from my law firm, for just this purpose – the Tenant Learning Platform[9]. Unfortunately, the TLP is still too young to tackle illegal deregulation. But stay tuned…

[10] http://www.itkowitz.com/rent-stabilization-coverage-analysis-for-tenants.

Stabilization Due Diligence product for landlords[11], the main purpose of which is to detect illegally deregulated apartments. Both of these services are in great demand.

IV. WHAT OPPORTUNITIES STILL EXIST FOR REAL ESTATE INVESTORS FOR MULTIFAMILY PROPERTIES

There are still some opportunities for multifamily investment in the wake of the HSTPA.

A. Blocks of Co-Op Sponsor Apartments

I see nothing in these new laws that prevents a co-op apartment long occupied by a non-purchasing tenant who is currently Rent Stabilized, from becoming deregulated when the tenant finally surrenders the apartment, at which point the unit can be sold to a shareholder. I have several clients who invest in blocks of these apartments.

B. Substantially Rehabilitated or New Construction Buildings Where Tax Abatements Expiring

I see nothing in these new laws that prevents a building that is subject to Rent Stabilization SOLELY by reason of the receipt of a tax abatement from deregulating organically at the end of an abatement period.

With such buildings, it is crucial that the prospective buyer do Rent Stabilization Due Diligence[12] to make sure that the building does not have a reason, independent of the abatement, for being subject to Rent Stabilization. If a unit was subject to Rent Stabilization in the absence of J-51 benefits, upon the termination of those benefits, the unit continues to be regulated. *72A Realty Associates v. Lucas*, 101 A.D.3d 401 (1st Dep't 2012). Moreover, every lease and renewal must be checked for the proper J-51 rider language. Absent the right language, tenants will remain Rent Stabilized after the expiration of the abatement. Deregulation may occur upon the expiration of a tenant's lease after the tax benefits expire, provided the tenant's initial lease and each renewal thereof contained a notice in at least 12-point type informing the tenant that the unit's protected

[11] http://www.itkowitz.com/due-diligence

[12] http://www.itkowitz.com/due-diligence

status would eventually lapse. New York City Administrative Code §§ 11-243, 11-244 (former § J-51).

C. Legitimately Deregulated Apartments

Nine out of ten alleged deregulations that I analyze are illegitimate and those apartments belong back in Rent Stabilization. That still leaves one in ten, however, that were correctly deregulated. As I suggested above, those apartments are going to be worth their weight in gold. They are out there; investors just have to invest in Rent Stabilization Due Diligence[13] to find them.

On June 20, 2019, the legislature added an addendum to the new law, clarifying that, "any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated…"

D. Development

I see nothing in these new laws that prevents an owner from applying to DHCR for permission not to renew Rent Stabilized leases because the applicant-owner has shown DHCR approved plans from the New York City Department of Buildings for a new building and a legitimate loan commitment to finance such project. The only change to this type of application I see is that a judge can give a tenant relocated pursuant to such non-renewal up to a year to relocate. I predict that these new laws will cause various owners to reconsider the development option. That's probably a good thing, inasmuch as this increases the amount of affordable housing in New York City.

[13] http://www.itkowitz.com/due-diligence

V. GENERAL CHANGES IN LANDLORD AND TENANT LAW CAUSED BY THE HSTPA

A. RPL § 226(c) New Notices to Increase A Non-Regulated Tenant's Rent or To Refuse to Renew Non-Regulated Tenancies

Real Property Law ("**RPL**") § 226-c (Notice of rent increase or non-renewal of residential tenancy) has been added and states:

> "1. Whenever a landlord intends to offer to renew the tenancy of an occupant in a residential dwelling unit with a rent increase equal to or greater than five percent above the current rent, or the landlord does not intend to renew the tenancy, the landlord shall provide written notice as required in subdivision two of this section. If the landlord fails to provide timely notice, the occupant's lawful tenancy shall continue under the existing terms of the tenancy from the date on which the landlord gave actual written notice until the notice period has expired, notwithstanding any provision of a lease or other tenancy agreement to the contrary.
> 2. (a) If the tenant has occupied the unit for less than one year and does not have a lease term of at least one year, the landlord shall provide at least thirty days' notice.
> (b) If the tenant has occupied the unit for more than one year but less than two years, or has a lease term of at least one year but less than two years, the landlord shall provide at least sixty days' notice.
> (c) If the tenant has occupied the unit for more than two years or has a lease term of at least two years, the landlord shall provide at least ninety days' notice."

Coupling this section together with the anti-retaliatory eviction statute discussed within this article, and it almost becomes like a form of limited rent regulation for free-market apartments. Landlords can no longer refuse to renew tenants or raise their rents exorbitantly with the same ease as before these changes.

B. RPL § 227-e A Residential Landlord Now Has A Duty to Mitigate Damages If A Tenant Breaches A Lease

A residential landlord now has a duty to mitigate. Landlord must take "reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the tenancy, whichever is lower." Once landlord re-rents, the new lease terminates the old lease.

This is a big change and will make it much easier now for tenants to break residential leases.

C. RPL 238-a(2) Residential Late Fees Not To Exceed $50 (OR 5%)

The maximum late fee that landlord may charge per month, after the rent is five days late, is $50 (or 5%, whichever is lower).

D. GOL 7-107 Amended So No Residential "Deposit or Advance" Shall Exceed One Month's Rent and Other Changes To

NYS General Obligations Law ("**GOL**") § 7-107 was amended so that, "No [residential] deposit or advance shall exceed the amount of one month's rent under such contract." Please notice that the statute affects "advances" as well as deposits.

There were many other changes to the security deposit statute under GOL § 7-107 that landlords and tenants should read and make themselves aware of, including, but not limited to the fact that there are now inspection provisions that apply both before possession is taken and after vacatur, and if an itemized statement of damages is not provided within a limited time after tenant vacates, landlord will forfeit her right to the deposit.

VI. CHANGES TO THE LANDLORD AND TENANT LITIGATION PROCESS IN NYC CAUSED BY THE HSTPA

A. RPL § 223–b The Retaliatory Eviction Defense Has Been Expanded to Encompass More Tenant Activities

The retaliatory eviction defense has been expanded to encompass more tenant activities.

First, landlord retaliation is prohibited not only when tenant complains to a government authority, but also when tenant complains directly to the landlord or to landlord's agent.

Second, landlord retaliation is prohibited not only when tenant alleges a violation of law but also when tenant alleges a violation of the warranty of habitability.

Third, landlord may not, among other things, retaliate by outright refusing to renew the lease or offering to renew the lease at "an unreasonable rent increase".

Fourth, the rebuttable presumption now exists for a year from tenant's attempts to enforce her rights; the presumption formerly existed for six months from such complaint.

B. RPL § 232–a Termination Of Month–To–Month Tenancy New Time Periods

We have new time periods for terminating a month-to-month tenancy in the City of New York in a new RPL § 232-a. The newly drafted statute incorporates time periods for termination by reference to RPL § 226-c, which states:

> "2. (a) If the tenant has occupied the unit for less than one year and does not have a lease term of at least one year, the landlord shall provide at least thirty days' notice.
> (b) If the tenant has occupied the unit for more than one year but less than two years, or has a lease term of at least one year but less than two years, the landlord shall provide at least sixty days' notice.
> (c) If the tenant has occupied the unit for more than two years or has

> a lease term of at least two years, the landlord shall provide at least ninety days' notice."

Commercial month-to-month tenancies in the New York City may still be terminated on 30 days' notice.

C. RPL § 235-e(d) Extra Predicate Notice for Recovering Rent

RPL § 235-e has been modified to add the following paragraph:

> "(d) If a lessor, or an agent of a lessor authorized to receive rent, fails to receive payment for rent within five days of the date specified in a lease agreement, such lessor or agent shall send the lessee, by certified mail, a written notice stating the failure to receive such rent payment. The failure of a lessor, or any agent of the lessor authorized to receive rent, to provide a lessee with a written notice of the non-payment of rent may be used as an affirmative defense by such lessee in an eviction proceeding based on the non-payment of rent."

This new subparagraph "d" is tucked at the end of the "Duty to provide a written receipt" section of the Real Property Law. Nevertheless, it seems to me that this new subsection's implications go far beyond anything to do with providing a rent receipt. There are two major things to consider here. First, does this new requirement apply to commercial tenancies as well as residential ones. Second, how does the new RPL § 235-e(d) notice fit in with the service of a rent demand or notice to cure for failure to pay rent in the commercial context?

How does the RPL § 235-e(d) notice fit in with the service of a rent demand or notice to cure for failure to pay rent in the commercial context? Clearly, the RPL § 235-e(d) notice is an additional predicate step that must be followed before a summary proceeding for the nonpayment of rent can be initiated. The RPL § 235-e(d) notice can NOT be combined with the statutory rent demand of Real Property Actions and Proceedings Law ("**RPAPL**") § 711. They are totally different things. So the question then arises, does the RPL § 235-e(d) notice have to be served before the RPAPL § 711 rent demand? Is so, how much sooner?

Until I get more guidance from an appellate court or the legislature, I am looking for this answer to New York Civil Practice Law and Rules § 2103(b)(2) (Service of papers):

> "…where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state…"

See also ATM One, LLC v. Landaverde, 2 N.Y.3d 472 (2004), which applied CPLR § 2103 to notices to cure called for in the Rent Stabilization Code. I know, it's not exactly applicable because RPL § 235(e)-d does not contain a "period of time prescribed by law", rather it is just a reminder. Yet it seems, to me, that the purpose of a reminder is defeated if the reminder is not allowed to reach the tenant before the landlord issues a formal RPAPL § 711 rent demand. So, until precedent gives us an answer, I am waiting until five days after the certified mailing of the RPL § 235-e(d) notice before I have the landlord issue and serve the RPAPL § 711 rent demand.

Finally, just like a statutory rent demand, the RPL § 235-e(d) notice needs to be issued by the landlord; it cannot be issued by landlord's attorney.

D. RPAPL § 702 – In A Residential Summary Proceeding, Only Rent May Be Sued For, Not Additional Rent or Late Fees

In a residential summary proceeding, only rent may be sued for, not additional rent or late fees. RPAPL § 702 states:

> Rent in a residential dwelling. In a proceeding relating to a residential dwelling or housing accommodation, the term "rent" shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement.

E. 14-Day Rent Demand Under RPAPL § 711

Rent demands for residential and commercial tenants will now be on 14-days' notice, up from three days before the RPAPL § 711 was changed.

RPAPL § 711 goes on to add a special protection for the successors to tenant after the tenant dies. If landlord wants to sue for the rent at that point, landlord may only go after tenant's estate, but doing so is without prejudice to the possessory rights of the successors. I am not sure this is really a change from how such a claim would have been handled before the statute was amended.

F. Payment Is A Defense To Nonpayment RPAPL § 731(4)

Newly added RPAPL § 731(4) states:

> "In an action premised on a tenant defaulting in the payment of rent, payment to the landlord of the full amount of rent due, when such payment is made at any time prior to the hearing on the petition, shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced."

Again, payment was always treated as a defense to a nonpayment summary proceeding, so I am not sure that this section does anything but codify case law and accepted procedure.

G. RPAPL § 732 – Nonpayment Petition Returnable Within 10 After It Is Served, And RPAPL § 733 – A Holdover Petition Must Be Served Between Ten and Seventeen Days Before the Petition Is Noticed to Be Heard

Tenants now have ten days to answer a nonpayment petition, courtesy of the new RPAPL § 732.

A holdover petition must be served between ten and seventeen days before the petition is noticed to be heard, courtesy of the new RPAPL § 733.

Also, RPAPL §743 has been changed to take out that complicated nonsense about if a tenant got served within eight days of the court date they would have to answer within three days of the court date. No one is going to miss that.

H. Rent Deposit Statute RPAPL § 745(2) Much Less Versatile for Landlord

RPAPL § 745(2) now says that after two adjournments requested solely by tenant or sixty days charged solely to tenant (as opposed to thirty days), whichever is shorter, that landlord can move for tenant to be ordered to deposit ongoing use and occupancy (i.e. rent). Also, those adjournments don't count against tenant if tenant is asking for the time in order to get a lawyer.

The new RPAPL § 745(2) tells us that this request has to be made via a motion (not an application) and that the court can only order the deposit of use and occupancy going forward from the date of the court's order (as opposed to use and occupancy that accrued from the date of the petition).

The new RPAPL § 745(2) also expands the lists of defenses that, if interposed properly by tenant, will defeat the motion for the rent deposit. Such defenses include:

> "(i) the petitioner is not a proper party to the proceeding pursuant to section seven hundred twenty-one of this article; or(ii) (A) actual eviction, or (B) actual partial eviction, or (C) constructive eviction; and respondent has quit the premises; or(iii) a defense pursuant to section one hundred forty-three-b of the social services law; or(vi) a defense based upon the existence of hazardous or immediately hazardous violations of the housing maintenance code in the subject apartment or common areas; or (v) a colorable defense of rent overcharge; or (vi) a defense that the unit is in violation of the building's certificate of occupancy or is otherwise illegal under the multiple dwelling law or the New York city housing maintenance code; or(vii) the court lacks personal jurisdiction over the respondent."

Under the new RPAPL § 745(2), if tenant is ordered to deposit the ongoing use and occupancy but fails to, the court no longer has the discretion to strike the tenant's answer, containing tenant's defenses and counterclaims.

RPAPL § 745(2) is not getting a lot of attention, but I predict this is going to be one of those quiet game-changers, because this section will affect tactical considerations by both sides.

When it is less likely that a tenant will be ordered to pay rent during a proceeding, a judgment-proof tenant then has little incentive not to delay the case if said tenant values the opportunity to gain time to either live rent free or find his or her next home. This should increase a landlord's incentive to settle quickly on terms favorable to tenant.

I. RPAPL § 749 Warrants

RPAPL § 749, regarding warrants of eviction, has changed. The warrant now must include the earliest date upon which it can be executed.

The new RPAPL § 749 allows the court to stay re-letting and renovation of the premises for a "reasonable period of time". The language of the statute is not clear to me, but I assume this means for a reasonable time *after* the warrant is executed.

A tenant must now receive at least fourteen days' notice of an eviction served upon tenant by the marshal.

The new RPAPL § 749 no longer says that the landlord and tenant relationship is terminated upon issuance of the warrant, and goes on to say that the tenant may pay the full rent due any time before the warrant is issued, which will cause the court to vacate the warrant.

J. Longer Hardship Stays and The Right to Cure RPAPL § 753

As per RPAPL § 753:

> "In the event that [a] proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a thirty day stay of issuance of the warrant, during which time the respondent may correct such breach."

The tail-end cure period was formerly only ten days.

Also, as per RPAPL § 753, the court can stay the issuance of a warrant of eviction for up to a year in the event of hardship. What "hardship" might mean is spelled out in detail and should be reviewed by all practitioners. Again, as always, I encourage everyone to read the law closely for themselves.

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for over twenty years. Michelle represents BOTH tenants and landlords and her core competencies include: Rent Stabilization and DHCR Matters; Rent Stabilization and Regulatory Due Diligence for Multifamily Properties; Rent Stabilization Coverage Analysis for Tenants; Sublet, Assignment, and Short-Term Leasing Cases (like Airbnb!); all kinds of Residential Tenant Representation; Good Guy Guaranty Litigation; Co-op Landlord and Tenant Matters; Loft Law Matters; De-Leasing Buildings for Major Construction Projects; Emotional Support Animals in No-Pets Buildings; and Co-Living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com, Lorman Education Services, Rossedale CLE, The New York State Bar Association, Real Property Section, The Women Attorneys in Real Estate, The National Law Institute, The Long Island Chapter of the National Appraisal Institute, The Columbia Society of Real Estate Appraisers, LandlordsNY, The Association of the Bar of the City of New York, Thompson Reuters, The Cooperator, and Argo U.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, blogs, videos, and live presentations. Michelle developed and regularly updates a seven-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 20,000 lawyers have purchased Michelle's CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle co-authors a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee's treatise. As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle is the "Tenant's Right's Advisor" for Bushwick Daily. Michelle has recently been quoted in a bunch of articles in Brick Underground and she has appeared on Brick's podcast episode on co-living. Michelle is also an instructor and blogger on the Tenant Learning Platform, www.tenantlearningplatform.com.

Michelle is currently serving on the New York State Bar Association Real Property Sections' Task Force on the Housing Stability and Tenant Protection Act of 2019.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle's eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

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