A Possible Blow To NY Rent Regulation Law Constitutionality

By **Maxwell Breed and Lisa Liu** (April 16, 2020)

Maxwell Breed

Lisa Liu

On April 2, amid the COVID-19 crisis, New York's Court of Appeals barred, as unconstitutional, retroactive application of certain provisions of the Housing Stability and Tenant Protection Act of 2019 — the recent overhaul of New York's rent regulatory laws.

The matter of Regina Metropolitan Co. LLC v. New York State Division of Housing and Community Renewal, a sharply split 4-3 decision spanning 57 pages (not counting the dissent), now calls into question whether other aspects of HSTPA might be susceptible to constitutional challenge for similar reasons that retroactive application has now been restricted.

First, some background: In June 2019, HSTPA extended New York's rent regulatory laws in perpetuity, rather than incrementally, for periods of years, as had been the case for decades.[1] In so doing,HSTPA announced a new purpose for the rent regulatory laws — preserving affordable housing.[2] HSTPA also eliminated provisions that had permitted deregulation of covered units under certain circumstances, while at the same time substantially restricting the ability to increase rents.[3]

As relevant to Regina Metro, HSTPA made significant changes to rent overcharge claims and procedures — for example, extending the statute of limitations from four to six years and possible liability for treble damages from two to six years, increasing the time-period for required retention of rental records, and charging tribunals with examining a unit's full rental history and not just the four-year period before a complaint's filing. Such changes, as enacted, would apply to pending claims.[4]

Now, the Regina Metro court has held that HSTPA's rent overcharge provisions can only be applied prospectively, notwithstanding the express statutory language to the contrary. In so ruling, Regina Metro decided a series of cases pending since long before HSTPA, all of which involve rent overcharge claims brought in the wake of Roberts v. Tishman Speyer Properties — the historic Court of Appeals decision from 2009, holding that, contrary to common practice, apartments in buildings subject to certain tax benefit programs could not be deregulated while the benefits were in effect, even if otherwise permitted.[5]

In each of the Regina Metro cases, the tenants, years after bringing rent overcharge claims seeded by Roberts, argued that HSTPA's expansion of available damages and other rent overcharge procedures should apply to their claims.[6]

The Court of Appeals rejected those arguments. In the first instance, the court held that HSTPA's rent overcharge provisions can only be applied prospectively, notwithstanding express statutory language to the contrary, based upon the substantive effect such retroactive application would have on property owners — such as impairing past rights, increasing liability for past acts and imposing of new duties for transactions long-since concluded.[7]

Emphasizing the strong public policy favoring repose, the court concluded that HSTPA, as enacted, failed to provide the requisite textual assurance that the Legislature had

considered the harsh and destabilizing effect of reviving barred claims on owners' settled expectations.[8] Notably, the court recognized that the Legislature has historically acted with deliberation and clarity when upsetting the strong public policy favoring finality, predictability, fairness and repose served by statutes of limitations, but had failed to do in enacting HSTPA.[9]

Though the analysis might well have ended there, the Court of Appeals went on to hold that the relevant HSTPA provisions also do not satisfy constitutional due process requirements, because the Legislature had failed to provide any support or rational basis for significantly expanding the scope of owner liability based on conduct that had been lawful before the enactment of HSTPA.[10]

For example, under HSTPA, as enacted, owners could effectively be penalized for having disposed of tenant records years earlier, even though doing so was legal at the time.[11] Considerations like this contributed to the court's critical finding that retroactive application of HSTPA's rent overcharge provisions would not address any of the concerns announced as purposes for the rent-regulatory laws under HSTPA, since punishment for past conduct (which had been lawful at the time) would not, for instance, preserve the stock of stabilized housing going forward.[12]

In what might be considered a rebuke to the Legislature, the court, before concluding that rent overcharge claims should be subject to the law in effect at the time any alleged overcharge occurred, asserted that in "the retroactive context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met."[13]

These and other findings might very well bear on future judicial consideration of other portions of HSTPA. For instance, now that Regina Metro has found that HSTPA's retroactive rent overcharge provisions lack the rational basis necessary to withstand due process analysis, the new affordable housing purpose for the rent regulatory laws might be more susceptible to regulatory takings or due process challenges questioning the legitimacy or purpose of the regulatory transference of affordable housing costs onto private owners, and whether rent regulation even would advance that purpose (if it were legitimate).[14]

Another example, HSTPA, as noted above, has, for the first time, extended the rent-regulatory laws in perpetuity, rather than for a discrete term of years.[15] However, this extension, like the transference of the cost of providing affordable housing onto private owners, does not seem to have been supported by any new legislative findings, inquiries or analysis, and seems directly at odds with the ultimate goal of the transition from regulation to a normal market of free bargaining between landlord and tenant.[16]

Nor does HSTPA's disincentivizing reinvestment in regulated properties through the substantial curtailment of the ability to recoup capital expenditures seem to further rent regulation's purpose of addressing an "acute shortage of housing accommodations."[17] Regina Metro, then, suggests that the perceived lack of legislative justification for retroactive application of HSTPA's rent overcharge provisions might apply elsewhere in the act.

All this goes to say that Regina Metro could well factor in future decisions evaluating the constitutionality of other aspects of HSTPA. The decision might also instigate efforts by the Legislature to address HSTPA's perceived infirmities, constitutional or otherwise.

Maxwell Breed is a partner and Lisa Liu is an associate at Warshaw Burstein LLP.

[1] See HSTPA, Part F, § 1.

[2] See HSTPA, Part D, § 1 ("[t]he legislature further recognizes that severe disruption of the rental housing market has occurred and threatens to be exacerbated as a result of the present state of the law in relation to the deregulation of housing accommodations upon vacancy. The situation has permitted speculative and profiteering practices and has brought about the loss of vital and irreplaceable affordable housing for working persons and families.").

[3] See HSTPA, Part D, § 1; HSTPA, Part E, §§ 1 and 2.

[4] See HSTPA, Part F, §§ 1, 4, and 10.

[5] Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009).

[6] Regina Metro. Co. LLC v. DHCR, 2020 NY Slip. Op. 02127, at *4 (2020).

[7] See Regina Metro., supra, at *3 and *6-7.

[8] See Regina Metro., supra, at *13; see generally John J. Kassner & Co. v. New York, 46 N.Y.2d 544, 550, 415 N.Y.S.2d 785 (1979) ("[a]lthough the Statute of Limitations is generally viewed as a personal defense to afford protection to defendants against defending stale claims, it also expresses a societal interest or public policy of giving repose to human affairs …").

[9] See Regina Metro., supra, at *13.

[10] See Regina Metro., supra, at *14.

[11] See Regina Metro., supra, at *11.

[12] See Regina Metro., supra, at *17.

[13] Regina Metro., supra, at *18.

[14] See Regina Metro., supra at *17; see e.g. Penn. Cent. Transp. Co. v. New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977); Yee v. City of Escondido, California, 503 U.S. 519, 112 S.Ct. 1522 (1992); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849 (1988); Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (June 23, 2017); Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960) (regulatory taking requires valid purpose).

[15] See HSTPA, Part F, § 1.

[16] HSTPA, Part G, § 2; 22 NYCRR § 26-501; ETPA § 2.

[17] See id.