

THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019: Second Take

Hon. Jean Schneider

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I. Introduction

We have now been living with the HSTPA (Chapter 36 of the Laws of 2019, and Chapter 39 of the Laws of 2019) for four months. We are all still learning, and arguing, and there is very little case law to rely on. There are many more questions than there are answers, let alone definitive answers.

With a nod to Ed Josephson, of LSNY, I have arranged the material here in three broad categories: Vacancy Issues, Rent Setting and Rent Overcharges, and Procedural Issues. Not every part of the new law fits easily into one of these categories but most parts do.

The overall effective date of the statute is June 14, 2019, when it was passed by the Legislature and signed by the Governor. However, each section of the law has its own effective date, and some provisions within a section have separate effective dates. Just for good measure, the corrective chapter amendment, adopted June 24, 2019, changed some effective dates.

II. Vacancy Issues

- A. The 20% vacancy increase, the longevity increase, and the provisions allowing for a vacancy increase on a second succession, all of which were part of the Rent Regulatory Reform Act of 1997, are repealed. (Part B) Rent Guidelines Boards are prohibited from enacting annual increases for vacancy, longevity, or any other increases that do not apply to all leases equally. (Part C) Annually adopted vacancy increases were permitted prior to 1997 and were regularly approved by the Rent Guidelines Board. Under the new law, the rent increase permitted for any lease, vacancy or renewal, in a given year, will be the same. The financial incentive for a landlord to turn over an apartment has, except in certain narrow circumstances, been eliminated.
- B. High income/high rent deregulation, NYC Admin. Code Section 26-504.1, and high rent vacancy deregulation, NYC Admin. Code Section 26-504.2, are repealed. (Part D) This part of the statute contains a declaration of emergency, referring to “severe disruption” caused by vacancy deregulation.
- C. All of these vacancy-related provisions are effective immediately on June 14, 2019. The chapter amendment clarifies that “any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.” There will be plenty of argument about what this means. What is it that has to have happened by June 14 in order for the apartment to have been deregulated? Vacancy? Renovation? Rental to a new tenant at a rate above the threshold? The chapter amendment also clarifies that buildings subject to rent regulation because they received a tax abatement under Section 421-a of the Real

Property Tax Law are still governed by the deregulation provisions of the old law, presumably because that was the deal the owners made when they received the abatement.

D. Owner's Use

1. Recovery of a rent stabilized apartment for owner's use now requires a showing of "immediate and compelling necessity," the standard that had been in place for rent controlled apartments. For both categories of apartment, an owner may recover only one apartment for the owner's use, and a unit may not be recovered for this purpose if the tenant or the tenant's spouse is over 62 years old and has lived in the apartment for 15 years or more, or if the tenant or the tenant's spouse is disabled. (Part I)
2. These provisions are effective immediately and "shall apply to any tenant in possession at or after the time it takes effect, regardless of whether the landlord's application for an order, refusal to renew a lease or refusal to extend or renew a tenancy took place before this act shall have taken effect." There are also provisions in this section for penalties if a landlord commits a fraud in attempting to recover an apartment for owner's use.

E. Non-Profit Units

1. Units rented by non-profit operators to provide scattered site housing for "vulnerable individuals or individuals with disabilities who are or were homeless or at risk of homelessness" are now rent stabilized and "affiliated subtenants authorized to use such accommodations by such not-for-profit shall be deemed to be tenants." (Part J)
2. This provision takes effect immediately but for leases already in effect on the effective date, the provision takes effect only upon renewal of the lease.

III. Rent Setting and Rent Overcharges

A. Preferential Rents

1. Part E of the law provides that if the tenant is being charged and is paying a rent lower than the regulated rent, the rent to be charged on a renewal is that lower rent plus any permitted guidelines increase. The rent may return to the regulated rent only upon a vacancy. This appears to be the only situation in which a landlord gets a financial benefit from turning over an apartment.
2. The effective date language on this provision is complicated. "Any tenant who is subject to a lease on or after the effective date of a chapter of the laws on 2019 which amended this subdivision, or is or was entitled to receive a renewal or vacancy lease on or after such date ..." is covered by the provision. The chapter amendment, Part Q, Section 11, added clarifying language. If, on June 14, 2019, the tenant already had a lease in effect

which withdrew the preferential rent under the old law, the new rent remains in effect. If, however, the tenants preferential lease was still in effect, or if the tenant had a right to a renewal lease on June 14, the tenant is entitled to retain the preferential rent.

3. This section also carves out an exception for buildings subject to regulation as a result of a regulatory agreement with a government agency and receiving Section 8, either project based or through local grants. Where the rent set by the government agency regulating the housing is below the regulated rent, the rent may revert to the regulated rent upon renewal or vacancy, provided that the vacancy was not created by failure to comply with the warranty of habitability. The chapter amendment adds that the rent may revert only with the approval of the regulating agency.

B. Overcharges

1. The statute of limitations for overcharge claims is expanded from four years to six years (Part F). Even more important, though, is language that says an overcharge complaint may be filed with DHCR or a court of competent jurisdiction “at any time, however, any recovery of overcharge penalties shall be limited to the six years preceding the complaint.” DHCR or the court “shall consider all available rent history which is reasonably necessary to make such determination.” And the legal regulated rent, for purposes of determining a rent overcharge claim, “is deemed to be the rent indicated in the most recent reliable annual registration statement for a rent stabilized tenant filed and served on the tenant six or more years prior to the most recent registration statement.”
2. In deciding a rent overcharge claim, a court may consider “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.
3. So the statute of limitations means something very different from what it meant under prior law. See 699 Venture Corp. v. Zuniga, 64 Misc. 3d 847 (Bronx Civ. 2019), Ollie Associates LLC v. Santos, 64 Misc. 3d 1208 (A) (Civ. Bronx). This standard is pretty similar to the judge-made law in effect prior to the Rent Regulatory Reform Act of 1997, but with a much longer rent history to draw from, and a period of 22 years in which landlords were told they only had to keep records for four years.
4. Treble damages are now imposed for the entire six year period, unless the landlord establishes lack of willfulness. Refund of the overcharge after filing of the complaint is no longer evidence of lack of willfulness. Treble damages may be imposed for overcharges that resulted solely from a failure to file timely registration statements.
5. A landlord is only required to maintain records for six years, but “an owner’s election not to maintain records shall not limit the authority” of the DHCR and the courts to examine the rental history and determine the legal regulated rent, and the

court or DHCR “shall consider all available rent history which is reasonably necessary to make such determination.”

6. The new law clarifies that any court of competent jurisdiction (like the Housing Court) has jurisdiction to consider a claim for rent overcharge, and that it is the tenant’s prerogative to choose whether to litigate the claim in court or at the DHCR. “The courts and the division shall have concurrent jurisdiction subject to the tenant’s choice of forum.”
7. These provisions take effect immediately, June 14, 2018, “and shall apply to any claims pending or filed on or after such date.” There has already been some dispute about what makes a particular claim “pending.” See SF 878 E. 176th LLC v. Grullon, 2019 NY Slip Op. 29201 (Bronx Civ.), 315 Jefferson LLC v. Antonio, 2019 NY Slip Op. 29255 (Civ. Kings).

C. Rent Control Increases (Part H)

Annual increases for rent controlled apartments are no longer 7.5% per year. They are now limited to the average of the last five years of RGB increases. Fuel cost pass-alongs are eliminated. The provisions are effective immediately.

D. IAI’s (Part K)

1. An IAI charged with the tenant in place requires the tenant’s “informed” consent in writing, on a form to be adopted by DHCR.
2. A landlord is limited to spending \$15,000.00 on a maximum of three IAI’s over a period of 15 years. The expenditure must be for “reasonable and verifiable modification or increase in dwelling space, furniture, furnishings or equipment.”
3. The rent may be increased by 1/168th of the cost of the work for buildings with 35 or fewer units and 1/180th of the cost for larger buildings. In either case, the increase expires after 30 years.
4. The chapter amendment clarifies that this provision is applicable starting with the first improvement after June 14, 2019.
5. DHCR is required to adopt regulations for IAI’s including that the work be done by licensed contractors, that there be no common ownership between the landlord and the contractor, that all hazardous and immediately hazardous violations must be cleared, that photographs must be taken before and after the work is done, and that these records be kept permanently.

E. MCI’s (Part K)

1. MCI's must now be essential for preservation, energy efficiency, functionality or infrastructure of the entire building, including heating, windows, plumbing and roofing, but may not be for operational costs or unnecessary cosmetic improvements. An owner is eligible for an MCI only if more than 35% of the tenants in the building are rent regulated.
2. The amount of an MCI must be reduced by the amount of any government grant given to help pay for the improvements and by any insurance payments compensating for the costs of the improvements. To be eligible for an MCI a building must have no hazardous or immediately hazardous violations. DHCR must audit and inspect 25% of buildings with MCI's.
3. The cost of an MCI is amortized over twelve or twelve and a half years depending on the size of the building. A tenant's rent may be increased only by 2% per year. This limitation applies to all MCI's granted after June 16, 2012 and collected after June 14, 2019. The MCI increase expires after 30 years. The rent increase may not be collected retroactively. Collection starts on the first day of the month beginning at least 60 days after notice to the tenant of the increase.

IV. Procedural Changes (and a few other things)

- A. All of the provisions in Part M, which covers changes in the Real Property Law and the Real Property Actions and Proceedings Law, with certain specified exceptions, are "effective immediately and shall apply to actions and proceedings commenced on or after such effective date." Is this provision clear, or is it internally inconsistent?
- B. The retaliation statute, RPL Section 223-b, is substantially expanded and strengthened. The presumption of retaliatory motive is extended to one year. A complaint about breach of the warranty of habitability can form the predicate for retaliation. Offering a new lease at an unreasonable rent can be an act of retaliation.
- C. New RPL Section 226-c provides that in any unregulated residential unit statewide, if the landlord intends to raise the rent more than 5% or intends not to extend the tenancy, the landlord must provide the tenant with a notice in writing. The law does not say how the notice is to be served, but RPL Section 232-a, which specifies service as required for a petition and notice of petition when terminating a month to month tenancy in New York City, is amended to include the new time frames. If the tenant has been in occupancy less than a year and does not have a lease for a year or more, the tenant must be given 30 days notice. If the tenant has been in occupancy for more than a year but less than two years, and does not have a lease for two years or more, then the tenant must be given 60 days notice. If the tenant has been in occupancy for two years or more or has a lease for two years or more, the tenant must be given 90 days notice. If the notice is not given, then the tenancy continues on the same terms and conditions until the notice is given and the required period expires.

This provision is effective 120 days after June 14, 2019. Does this mean that it applies to tenancies ending after that date so that the notices have to be given earlier?

- D. New RPL Section 227-e provides that when a tenant moves out before the end of the lease, the landlord must make reasonable efforts to mitigate damages.
- E. New RPL Section 227-f prohibits refusal to rent to a tenant based on a tenant blacklist. The New York State Attorney General has enforcement powers. This provision is effective, under the chapter amendment, 30 days after adoption of the original law.
- F. RPL Section 235-e substantially strengthens the receipts law. A receipt must now be given for a personal check if the tenant requests one, and the request is good for the rest of the tenancy. If the tenant makes a payment in person, the receipt must be given right away. If the payment is made remotely, the receipt must be given in 15 days. The law also specifies what must be included in the receipt.

This section also requires that if a landlord does not receive a rent payment within five days of when it is due, it must give the tenant notice in writing, by certified mail, stating that payment has not been received. If no notice is given, the failure to give notice “may be used as an affirmative defense by such lessee in an eviction proceeding based upon nonpayment of rent.”

- G. RPL Section 238-a limits fees a landlord may charge for processing a rental application. It also limits late fees to a maximum of \$50.00 or 5%, whichever is less, and requires that they be applied only if the rent is at least five days late.
- H. The General Obligations Law is amended to limit security deposits in unregulated apartments to one month’s rent, and to set out a procedure for return or withholding of the deposit when the tenant moves out, including specific time frames. In a lawsuit over whether the landlord was entitled to withhold all or part of the security deposit, the landlord has the burden of proving that amounts withheld were reasonable. If the landlord violates the law, the landlord is liable for actual damages and for punitive damages in the amount of twice the deposit amount.

The security deposit provisions are effective 30 days after the effective date of the law and “shall apply to any lease or rental agreement or renewal of a lease or rental agreement entered into on or after such date.”

- I. New RPAPL Section 702 defines “rent” as “the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral agreement.” It also provides that “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 a lease or rental agreement.”

This provision applies only to residential cases, and would seem to bar collection of legal fees and late fees in a summary proceeding even if the lease calls these fees “additional rent.” Fees provided for in the lease could still be collected in a plenary action.

What is the impact on fees awarded in a post-eviction case to “make the landlord whole?” How about fees counterclaimed by the tenant under RPL Section 234?

- J. RPAPL Section 711 now provides that no tenant “or lawful occupant” may be removed without a summary proceeding. It also now requires that the demand in a nonpayment proceeding be in writing and give 14 days notice to pay or give up possession.

The previous provision which permitted suing the surviving spouse or issue of a deceased tenant for nonpayment of rent has been replaced by a provision permitting suit against the occupants of an apartment rented to a deceased tenant. The suit results only in a possessory judgment against the estate of the deceased tenant and has no consequences for the occupants.

- K. Section 731(4) of the RPAPL now provides that if a tenant pays the full amount of the rent due to the landlord “prior to the hearing of the petition,” the payment “shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced.” When is the “hearing of the petition” ? If the grounds for the proceeding are rendered moot, does that mean the case must be dismissed?

Section 749 of the RPAPL is amended to require that a warrant in a nonpayment proceeding be vacated if the tenant tenders to the landlord or deposits with the court all the rent due any time before the warrant is executed, unless the landlord can establish that the tenant withheld the rent in bad faith. How does this work if the tenant hands the landlord the full amount when the marshal is at the door?

- L. Section 732 of the RPAPL now provides that a tenant has ten days, rather than five, to answer a nonpayment petition. The provisions of this section that limit the court to a five day stay after trial and to a ten day stay from service after entry of a default judgment, are now both modified with “except as provided in Section 753 of this article.” More on this below. The chapter amendment made this provision effective 30 days after adoption of the original law.

- M. A holdover proceeding is now made returnable between 10 and 17 days after service, and the provision permitting a demand for an answer before the trial date has been eliminated. Under the chapter amendment, this provision was also effective 30 days after adoption of the original law.

- N. Section 745 of the RPAPL has been changed completely. First, either party is entitled to a first adjournment of at least 14 days. The provision limiting adjournments to 10 days has been eliminated. Additional adjournments are at the discretion of the court. The rent deposit law has been turned upside down. A rent deposit is, to begin with, discretionary rather than mandatory. A deposit may be considered after 60 days of adjournment solely at the tenant’s request, or on the tenant’s second request for an adjournment, but a request by an unrepresented tenant to adjourn to obtain counsel is not counted. There are additional exceptions to the circumstances under which a deposit may be ordered. A request for a deposit must be made by motion on notice,

and only rent that comes due after the order may be required to be deposited. A tenant who fails to make a deposit may be sent for an immediate trial but may not lose his or her right to litigated defenses and counterclaims. The chapter amendment makes these provisions effective 30 days after adoption of the original law.

- O. Section 747-a of the RPAPL limiting the court's discretion to grant a stay after judgment has been repealed.
- P. Section 749 of the RPAPL has been amended to require that the warrant state the first date on which execution of the warrant may occur pursuant to the court's order, and that the warrant must command the executing officer to remove "all persons named in the proceeding." The marshal must give 14 days notice of an eviction, and must execute the warrant on a business day. The issuance of the warrant no longer cancels the landlord-tenant relationship. The law clarifies that the court may, for good cause, stay or vacate a warrant, stay reletting or renovation, and restore a tenant to possession.

The court has issued Chief Clerk's Memorandum 209 and Advisory Notice 20 to clarify the court's interpretation of the provision about the earliest execution date. These documents state that our stated earliest execution date will not include the 14 days for the marshal's notice, and that where there are multiple payment dates in a stipulation or order, the earliest execution date will be the date of the last payment. This will require petitioner's counsel to obtain a court order lifting the stay if there is a failure to make an earlier payment.

- Q. Section 753 of the RPAPL, which once applied only to holdover proceedings, now applies to nonpayments and holdovers. It gives the court the power to stay a warrant for up to a year in residential cases statewide, after considering certain specified factors. The stay must be conditioned on payment, which may be in installments. This provision clarifies the court's discretion to grant stays of more than five days in nonpayment proceedings.

This provision also expands the post-judgment stay to cure a breach of the lease from 10 days to 30 days.

- R. Under new Section 757 of the RPAPL, if a lessee is removed from leased premises after a foreclosure or tax foreclosure, the proceeding must be sealed and all record of the proceeding must be kept confidential. "No disclosure or use of such information relating to such lessee shall be authorized and the use of such information shall be prohibited."
- S. New Section 768 of the RPAPL creates a crime of unlawful eviction for the entire state, similar to the existing city law.

V. Other stuff

- A. The law requires the DHCR to report annually on its regulatory and enforcement activities, and on lots of statistics. The agency may have to increase the size of its research department. The law also creates a temporary commission charged with reporting on the impact of the law by the end of 2022.
- B. The law permits localities that do not currently have rent regulation to choose to adopt it.
- C. The law eliminates the sunset provisions of prior law. Rent control and rent stabilization have always been based upon a finding that there was a housing emergency, and that rent regulation was necessary until the emergency was resolved. The Legislature has apparently concluded that after 73 years, this emergency is not going away. The laws are now permanent.
- D. The law eliminates coop and condo conversions by eviction plans, and requires that for a noneviction plan to be declared effective, 51% of the tenants in occupancy must opt to purchase.
- E. The law contains extensive new regulation of manufactured homes.