

**Resnicow v W 7879 LLC**

2024 NY Slip Op 31454(U)

April 24, 2024

Supreme Court, New York County

Docket Number: Index No. 104686/2011

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS**

**PART 57M**

*Justice*

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DAVID RESNICOW,

**INDEX NO. 104686/2011**

Plaintiff,

- v -

**Trial Decision based on  
Stipulated Facts**

W 7879 LLC,N, K AND S LLC, WEST 79TH LLC, MN  
BROADWAY LLC, EVELYN NAGEL AS CO-EXECUTOR OF  
THE ESTATE OF MICHAEL NAGEL, AND AS CO-  
TRUSTEE OF THE DESCENDANTS SINGLE TRUST U/W  
MICHAEL NIGEL, THE DESCENDANTS SEPARATE  
TRUST U/W MICHAEL NAGEL FBO STEVEN NAGEL, AND  
THE DESCENDANTS SEPARATE TRUST U/W MICHAEL  
NAGEL FBO, ALAN NAFEL AS CO-TRUSTEE OF THE  
DESCENDANTS SEPARATE TRUST U/W MICHAEL  
NAGEL FBO CLAIR NAGEL JERNICK, AND THE  
DESCENDANTS SEPARATE TRUST U/W MICHAEL  
NAGEL FBO ALAN NAGEL, LISA W. NAGEL  
IRREVOCABLE T, LLC

Defendants.

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**BACKGROUND**

On April 11, 2024, Justice Adam Silvera assigned this action to this Court for a bench trial.

The relevant facts herein were stipulated to by the parties on January 31, 2019. The parties agreed to submit briefs concerning the law and its application to these stipulated facts and the documents submitted with the stipulation.

This Court held a pre-trial conference with counsel on April 15, 2024, and agreed to afford each party an opportunity to make a further submission as to applicable legal authority and arguments by April 19, 2024.

On April 19, 2024, the parties made such further submissions and the Court reserved decision.

The parties represented to the Court that there is no remaining allegation of fraud as pertains to the underlying dispute.

Defendants argue that because the overcharge initially accrued prior to the enactment of the HSTPA, the determination and/or calculation of any overcharge is governed by the pre-HSTPA version of CPLR 213-a and RSL.

Plaintiff argues that Defendants' calculation of the rent overcharge is correct through the date of the enactment of the HSTPA, but that a separate formula, should be used for any monies paid after the date the statute was enacted.

For the reasons set forth below, the Court finds that Defendants' calculation was correct, no separate two-tier calculation is supported by legal precedent and the complaint is dismissed.

### **STIPULATED FACTS**

The following relevant facts have been stipulated to by the parties.

David Resnicow, is the rent stabilized tenant, along with his wife, Diane Solway, of apartment 104 a/k/a 229 at 229. West 78\* Street, New York, New York 10024 (hereinafter "Resnicow Premises").

Defendants, W7879 LLC, N, K AND S LLC, WEST 79™ LLC, MN BROADWAY LLC, EVELYN NAGEL as co-executor of the Estate of Michael Nagel, and as co-trustee of the Descendants Single Trust u/w Michael Nagel, the Descendants Separate Trust u/w Michael Nagel fbo Steven Nagel, et al., and the Descendants Separate Trust u/w Michael Nagel fbo Evelyn Nagel, et al., ALAN NAGEL as co-trustee of the Descendants Separate Trust u/w Michael Nagel fbo Clair Nagel Jernick, et al., and the Descendants Separate Trust u/w Michael

Nagel fbo Alan Nagel, et al., and LISA W. NAGEL IRREVOCABLE T, LLC, are the owners and landlords of 229-230 West 79\* Street, New York, New York 10024 (hereinafter "Subject Building").

Plaintiffs filed a Complaint against the Defendants on April 18, 2011 ("Initial Complaint."). Plaintiffs thereafter served and filed the First Amended Verified Complaint ("Complaint"), dated and verified on August 12, 2011. The Second Cause of Action in the Complaint seeks rental overcharges in an amount equal to the difference between the relevant Plaintiff's monthly rental payments and the legal rent for Plaintiff's Premises, and, in the event they do not recover treble damages, interest on each overpayment from the date when each payment was made. The Complaint asserted that the base date for purposes of calculation of the rent is May 1, 2006, the date from which Defendants measured their own calculation of the legal rent, as set forth in paragraph 11 below.

The Third Cause of Action seeks treble damages equal to three times the difference between the relevant Plaintiff's monthly rent payment from the date falling two years prior to the Complaint, and the legal regulated rent, and continuing thereafter.

The Fourth Cause of Action seeks attorney's fees as against the Defendants pursuant to Real Property Law Sec, 234.

The Fifth Cause of Action seeks reformation of the Plaintiff's leases to reflect the legal rent and to reflect successive terms of two years.

Defendants interposed an Answer to the Complaint ("Answer") dated and verified on September 14, 2014. The Answer contains six Affirmative Defenses and a Counterclaim for attorney's fees as against the Plaintiffs.

For purposes of this Action, the parties agree that the base date for calculating the legal regulated rent is May 1, 2006. They disagree as to how to arrive at the legal rent on the base date.

The Subject Building benefitted from a J-51 tax abatement from the year 1992 through the year 2004.

Michael Cusick and Barbara Peabody were the last rent stabilized tenants in occupancy prior to Resnicow taking possession of the Resnicow Premises.

The rent on the Cusick Lease was \$2,791.54. 37. Michael Cusick and Barbara Peabody vacated the Resnicow Premises on or about March 20, 1996.

Resnicow executed a non-rent regulated Lease for the term March 20, 1996 through March 31, 1998 at a monthly rent of \$2,950.00.

Resnicow executed the following non-rent regulated Lease Extension Agreements for the following terms:

- April 1, 1998 through March 31, 2000, at a monthly rent of \$3,450.00.
- April 1, 2000 through March 31, 2002, at a monthly rent of \$3,800.00.
- April 1, 2002 through March 31, 2004, at a monthly rent of \$4,100.00.
- April 1, 2004 through March 31, 2005, at a monthly rent of \$4,500.00.
- April 1, 2005 through March 31, 2007 at a monthly rent of \$4,700.00.
- April 1, 2007 through March 31, 2008 at a monthly rent of \$5,200.00.
- April 1, 2008 through March 31, 2009 at a monthly rent of \$5,600.00.
- April 1, 2009 through March 31, 2010 at a monthly rent of \$5,800.00.
- April 1, 2010 through March 31, 2011 at a monthly rent of \$6,000.00.

Resnicow executed the following rent stabilized Renewal Leases for the following terms:

- April 1, 2011 through March 31, 2012 at a monthly rent of \$5,726.18.
- April 1, 2012 through March 31, 2013 at a monthly rent of \$5,940.91.
- April 1, 2013 through March 31, 2014 at a monthly rent of 6,059.73.
- April 1, 2014 through March 31, 2015 at a monthly rent of \$6,302.12
- April 1, 2015 through March 31, 2016 at a monthly rent of \$6,365.14.
- April 1, 2016 through March 31, 2018 at a monthly rent of \$6,492.44.
- April 1, 2018 through March 31, 2020 at a monthly rent of \$6,574.49.

By letter dated May 19, 2010, Defendants' counsel informed Resnicow of the Court of Appeals decision in *Roberts v. Tishman Speyer Properties, L.P.*, advised Resnicow that his rent has been adjusted based on said decision and attached a check for a rent overcharge refund of \$20,006.21. Defendants based the calculation on the free market rent that had been charged on May 1, 2006, which was four years prior to the date of the letter, and thereafter adding rent guideline board approved stabilized increases to that rent. Resnicow did not cash the check.

By letter dated May 20, 2010, from Defendants' counsel to Resnicow, Defendants enclosed copies of rent registrations for the Resnicow Premises for the years 2006 through 2009. Up to that point, Defendants did not register with the DHCR the rents set forth on the leases entered into with Resnicow.

Copies of the Registration Apartment Information for the Resnicow Premises for the years 1984-2018 are annexed to the stipulation. The dates said registrations were filed are reflected therein and Resnicow does not deny receipt of service of said registrations.

### **DISCUSSION**

The Court of Appeals decisions in *Roberts. et al. v Tishman Speyer Prooerties. et al.*, 13 N.Y.3d 270 (2009) and *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Connnunity Renewal*, 35 N.Y.3d 332 (2020) govern the outcome in this matter.

In *Roberts*, the Court of Appeals rejected DHCR's statutory interpretation that allowed for luxury deregulation in a building in receipt of J-51 benefits.

Following the *Roberts* decision, the landlord herein directed counsel to review all the tenancies in the subject building to ascertain if any apartments were improperly deregulated based upon high rent/vacancy while the building was receiving J-51 tax benefits, to provide

stabilized leases to affected tenants and to recalculate the rent and refund any rent overcharge due them. Plaintiff was one of those tenants.

In determining Plaintiff's current legal rent Defendants relied on Rent Stabilization Code (hereinafter "R.S.C.") § 2526.1(a)(3) which provided that the base date rent was the amount charged four years prior to any complaint filed by the tenant. See also, R.S.L. § 26- 516(a) (2) and C.P.L.R. §213-a.

The New York Legislature enacted the Housing Stability Tenant Protection Act ("HSTPA") on June 14, 2019. Part F of the HSTPA "ma[de] sweeping changes" to the Rent Stabilization Law's ("RSL") rent overcharge provisions (*Dugan v. London Terrace Gardens*, 177 A.D.3d 1, 8 [1st Dept. 2019]) and addressed, among other things, the method to determine whether a landlord has collected an overcharge above the rent authorized for a housing accommodation subject to rent stabilization laws and the length of the look-back period for overcharges. The HSTPA extends the lookback period during which a tenant can obtain damages for rent overcharges from the previous four years to six years, and allows for consideration of all available rent history in making such determinations.

In *Regina* the Court of Appeals held:

... if applied to past conduct, the amendments to the statute of limitations, overcharge calculation and damages provisions in Part F of the HSTPA would impose new liability and thus have a "retroactive effect" – altering substantive rights in multiple ways. The statute of limitations with respect to overcharge claims has been treated as running backward from the date of initiation of the claim, previously permitting recovery of overcharges occurring only in each of the four years preceding the complaint. Thus, the relevant illegal conduct for which a tenant can recover is the overcharge committed in any given year during the recovery period.

*Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 367 (2020).

Subsequently the First Department has held that:

To the extent plaintiffs seek to recover overcharges that accrued before the enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36, § 1), effective June 14, 2019, the amendments to CPLR 213-a and Rent Stabilization Law of 1969 § 26-516 enacted under the HSTPA are not applicable (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 386 [2020]).

*Austin v. 25 Grove St. LLC*, 202 A.D.3d 429, 430 (2022).

The holding that rent overcharges based on *Roberts* which accrued prior to the enactment of the HSTPA and were based on conduct that occurred prior to the enactment of that statute, should be calculated based on pre HSTPA methods has since been reaffirmed. *See eg Wise v 1614 Madison Partners LLC* 214 AD3d 550 (1<sup>st</sup> Dept, 2023)(*court correctly determined that the four-year statute of limitations under the former CPLR 213-a governed the rent overcharge claims, which accrued prior to the enactment of the HSTPA*).

In *Burrows v 72-25 153<sup>rd</sup> St., LLC* 215 AD3d 105 (1<sup>st</sup> Dept, 2023), the Appellate Division held “(o)ne of *Regina's* relevant holdings was that the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36 [eff June 14, 2019]), which extended from four years to six years the statute of limitations applicable to an overcharge claim and the rental records that can be considered in adjudicating such a claim, does not apply retroactively to conduct that preceded its enactment ...” (id). *See also Jekielek v 260 Partners, LP* 221 AD 3d 565 (1<sup>st</sup> Dept, 2023)(*irrespective of defendant’s waiver of the statute of limitations, under RSC 2520.6(f)(1) base date for purposes of calculating rent overcharge is four years before filing complaint as the filing of the action preceded enactment of HSTPA*).

In this action, the landlord immediately after the *Roberts* decision, and prior to any complaint or request by the tenant, recalculated the rent, issued a refund for the overcharge in

what Plaintiff now acknowledges was the proper amount, issued stabilized lease renewals and registered the apartment with DHCR for the four years prior to the issuance of the refund.

One year later Plaintiff commenced this action and in the ensuing 13 years has continued it even though the tenant received everything he was entitled to, not only prior to the commencement of this action, but eight years prior to the enactment of the HSTPA. There is simply no merit to Plaintiff's claim that under these circumstances this Court should use a two-tier method for the calculation of the rent overcharge.

The Court notes that Plaintiff's argument has previously been rejected by appellate courts in the following cases: *Wise v. 1614 Madison Partners, LLC*,<sup>1</sup> 214 AD3d 550 (1st Dept. 2023); *West Pierre Assoc. LLC v. Harvey*, 81 Misc.3d 139(A) (AT, 1st Dept. 2024)(where tenant's 2022 overcharge claim, was based upon increase in rent that occurred in 2014, years prior to tenant's first lease in 2020 pre-HSTPA law governs); *Crest I LP v. Venture*, 81 Misc.3d 1 (AT, 1st Dept. 2023)(where tenant's 2020 overcharge claim was based upon unexplained increase in rent that occurred prior to the commencement of tenant's first lease in 2010, pre-HSTPA law governs).

This Court is not persuaded by Plaintiff's argument that *Crest* and *Harvey* should be disregarded by the Court as nonbinding incorrectly decided decisions.

Based on the foregoing, the complaint is dismissed.

***Defendants' Claim for Attorneys' Fees Is Granted***

Given that Plaintiff's claim has been dismissed in its entirety there can be no dispute that Defendants are the prevailing parties in this action.

Defendants seek attorneys' fees in this action pursuant to the March 18, 1996 lease between the parties, which provides in paragraph 20(A)(5) that the tenant must reimburse the landlord for "(a)ny legal fees and disbursements for legal actions or proceedings brought by

(landlord) against (tenant) because of a Lease default by (tenant) or for defending lawsuits brought against (landlord) because of your actions.”

Such language has been held sufficient to award the landlord attorneys’ fees where the landlord prevails in suit brought against it by the tenant. *Thienebe v Ansonia Associates* 226 AD2d 211 (1<sup>st</sup> Dept., 1996); *Rose v Montt Assets, Inc.* 187 Misc2d 497 (App Term, 1<sup>st</sup> Dept, 2000).

Plaintiffs agree that given the ruling of the Court, the Defendants are entitled to attorneys’ fees. Plaintiffs state in their reply brief:

The Tenant does not dispute that should the Landlord prevail in this action, and this Court agrees that no overcharge exists in excess of that which was already refunded to the Tenant prior to the interposition of this Complaint, that the Landlord is entitled to legal fees in defending this action per paragraph 20 of the Lease between the parties.

Based on the foregoing, Defendants are awarded attorneys’ fees for their successful defense of this action.

The matter shall be referred to a special referee to conduct a hearing on the reasonable amount of attorneys’ fees to be awarded and to report back the referee’s findings after such hearing.

WHEREFORE it is hereby:

ORDERED that the complaint is dismissed in its entirety and the clerk shall enter judgment reflecting same; and it is further

ORDERED that Defendants are the prevailing parties in this action and are entitled to judgment on their counterclaim for attorneys’ fees; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court on the reasonable amount of attorneys’ fees to be awarded to Defendants; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Defendants shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the Defendants shall serve a copy of all time sheets, any applicable retainer agreements, and any other documentation relevant to the determination of the reasonable amount of attorneys’ fees sought within 24 days from the date of this order and the Plaintiff shall serve any objections to said documentation within 20 days from service of Defendants’ papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part,

subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the decision and order of the Court.

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**SABRINA KRAUS, JSC**

DATE: 4/24/2024

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify \_\_\_\_\_ )