2020-09-24

# 699 Venture Corp. v. Zuniga

[*1]

| **699 Venture Corp. v Zuniga** |
| --- |
| 2020 NY Slip Op 20241 |
| Decided on September 24, 2020 |
| Civil Court Of The City Of New York, Bronx County |
| Bacdayan, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and subject to revision before publication in the printed Official Reports. |

Decided on September 24, 2020

Civil Court of the City of New York, Bronx County

**699 Venture Corp., Petitioner,**

**against**

**Domitila Zuniga, Respondent.**

19533/2019

Lazarus, Karp & Kalamotousakis, LLP, for Petitioner

The Legal Aid Society, for Respondent

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a), of the papers considered in review of this motion:

**Papers** Numbered

Notice of Motion and annexed Affirmation in Support 1

Affirmation in Opposition, annexed Affidavit and Exhibits (A-B) 2

Reply Affirmation 3

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

**BACKGROUND AND APPLICABLE LAW**

In this nonpayment proceeding, Petitioner seeks renewal and modification of the court's prior decision and order which granted Respondent, Domitila Zuniga, a rent stabilized tenant, leave to conduct discovery dating back to 1996 in support of rent overcharge counterclaim. Petitioner argues that Respondent did not "did not raise with sufficiency a fraud in order to be allowed examination of the rent records beyond the four yearspermitted by the statute of limitation for overcharge complaints in effect prior to theenactment of [the ousing Stability and Tenant Protection Act of 2019 ("HSTPA")]." (Affirmation of Petitioner's counsel at 23.)

The decision was issued on July 1, 2019, shortly after the passage of the HSTPA on June 14, 2019. As the court then observed, Part F of the HSTPA enacted sweeping changes to the provisions of law regarding examination of the rental history and determination of rent overcharges and legal regulated rents. Instead of the prior four-year limitation on review of records, the new law mandated that "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 any rent registration or other records filed with the state division of housing and community renewal . . . ." (Rent [*2]Stabilization Law of 1969 [Administrative Code of the City of NY] § 26-516

[h], as added by L 2019, ch 36, § 1, part F, § 5 [emphasis added] [internal numeration omitted].) It provided further:

> "Nothing contained in this subdivision shall limit the examination of rent history relevant to a determination as to . . . 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 . . . rendered such rent or registration unreliable." (*Id.*)

In effect, the HSTPA also redefined the "base date" rent from which an overcharge is calculated by amending provisions of the Rent Stabilization Law to provide that "the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in *the most recent reliable annual registration statement* filed and served upon the tenant six or more years prior to the most recent registration statement . . . ." (Administrative Code § 26-516 [a], as amended by L 2019, ch 36, § 1, part F, § 4 [emphasis added]; *see generally* Rent Stabilization Code [9 NYCRR] § 2520.6 [f].)[FN1] The last of the amendments that are relevant here were made to CPLR 213-a and provided that, although overcharge damages could only be awarded for the six-year period preceding interposition of the claim, "an overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges." (L 2019, ch 36, part F, § 6.)

The language of the HSTPA gave these amendments immediate effect and provided they be applied to pending claims, as well as to future ones. (L 2019, ch 36, part F, § 7.) Shortly after its passage, the Appellate Division upheld the application of these provisions to pending claims, finding "no merit to [the landlord's] claim that applying the amendments to RSL § 26-516 and CPLR 213-a to this pending litigation violate[d] due process." (*Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 10 [1st Dept 2019], *recalled and vacated* — AD3d &mdash, 2020 NY Slip Op 04239 [2020].) Numerous courts, including this one, followed the *Dugan* Court's pronouncement.

In this court's opinion, now under review, application of Part F of the HSTPA mandated a transformed analysis of what was discoverable in the context of overcharge claims and abrogated much of the appellate authority that evolved around the prior law. It eliminated any requirement that significant indicia of fraud be established to warrant examination of the rent history beyond the statute of limitations (*see Matter of Grimm v State of New York State Div. of Hous. & Community Renewal*, 15 NY3d 358 [2010]; *Thornton v Baron*, 5 NY3d 175 [2005]), and rendered obsolete the precept that a significant increase in rent was alone

insufficient to allow for such an examination. (*See Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014].) Instead it charged courts to search the entire rent history, "regardless of the date to which the information on such registration refers," for the "most recent reliable annual registration statement filed and served upon the tenant six or more years prior to [*3]the most recent registration statement." (Administrative Code § 26-516 [a], [h].)

Accordingly, the court granted Respondent's request for disclosure of documents and other information dating back to 1996, having found that to be the year of the most recent reliable registration statement.**[FN2]**

However, on April 2, 2020, the Court of Appeals issued its decision in *Regina Metropolitan* which parsed the constitutionality of the retroactive application of Part F to pending overcharge claims and found such application to violate "fundamental notions of substantial justice embodied in the Due Process Clause." (*Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. and Community Renewal*, — NY3d &mdash, 2020 NY Slip Op 02127 [2020].) In so finding, the Court held that "the overcharge calculation amendments cannot be applied retroactively to overcharges *that occurred prior to their enactment*." (*Regina Metropolitan*, 2020 NY Slip Op 02127, *9 [emphasis added].)

As is relevant to the Petitioner, the *Regina* Court espoused that owners who reasonably relied on the record retention provision permitting owners to dispose of records outside of a four-year period may be subject to overcharge damages under the HSTPA "for purported historical overcharges that were once supported by documentation." (*Id.* at *16.) The Court voiced its opinion that retroactive application of the HSTPA provisions which eliminate the prior record retention limitations exacerbates the retroactive effect of Part F by upending an owner's expectation of repose derived from the pre-HSTPA law. (*See id.* at *12, n 20.)

*Regina Metropolitan* quashed the prior interpretation of Part F of the HSTPA allowing for review of the rental history outside of the statute of limitations with the sole exception of instances where a fraudulent scheme to remove an apartment from rent regulation is demonstrated. (*Id.* at *5.) In such cases, the Court recognized within its precedent "a limited common-law exception to the otherwise-categorical evidentiary bar, permitting tenants to use such evidence only to prove that the owner engaged in a fraudulent scheme to deregulate the apartment." (*Id.* at *5.) The *Regina* Court resurrected and defined the pre-HSTPA law:

> "The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred — not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations. In fraud cases, this Court sanctioned use of the default formula to set the base date rent." (*Id.* at *5.)

In pronouncing Part F of the HSTPA to be unconstitutional as retroactively applied and reviving the relevant pre-HSTPA law, the Court of Appeals noted that:

> "[N]othing in the [pre-HSTPA] rent stabilization scheme suggested that where an unrecoverable overcharge occurred before the base date, thus resulting in a higher base [*4]date rent, the four-year lookback rule operated differently. To the contrary, the limitations provisions — in order to promote repose — precluded consideration of overcharges prior to the recovery period, and it is clear from *Boyd* that use of a potentially inflated base date rent, flowing from an overcharge predating the limitations and lookback period, was proper in the absence of fraud." (*Id.* at *6.)

When previously granting Respondent's request to conduct discovery from 1996 to the present, this court did not analyze Respondent's allegations of fraud Rather, under the HSTPA, ample need for disclosure was demonstrated by an unreliable rent registration in 1997 which rendered the 1996 rent registration the most recent reliable rent registration the base date pursuant to the HSTPA However, because Respondent seeks disclosure of documentation that falls outside the resurrected four year statute of limitations, the court must now assess whether Respondent has asserted facts to establish a "fraudulent scheme to deregulate the apartment" warranting discovery apropos her claim of overcharge prior to the base date (*See Matter of Regina Metro Co , LLC*, 2020 NY Slip Op 02127, at *5; *see also* Administrative Code former § 26 516 [a] [2]; CPLR former 213 a; *Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]; *Matter of Grimm*, 15 NY3d 358 [2010].)

In opposition to Petitioner's motion, Respondent asks the court to adhere to its original decision on the basis that significant indicia of fraud warrant discovery beyond the four-year look back period. Respondent also argues that, because "the Court of Appeals specifically affirmed that Part F of the Housing Stability and Tenant Protection Act ("HSTPA") can be applied prospectively . . . discovery is still necessary to show whether Petitioner can prove that it is collecting a lawful rent from June 14, 2019 (the effective date of the HSTPA) forward." (Affirmation of Respondent's counsel at 3.) In reply, Petitioner argues that

Respondent has failed to demonstrate significant evidence of a fraudulent scheme to deregulate the subject premises, and has failed to plead fraud with sufficient detail as required by CPLR 3016 (b) [FN3]

For the following reasons, Petitioner's motion to renew this court's July 1, 2019 decision and to modify the discovery order therein is granted.

**DISCUSSION**

To determine whether a party has established "ample need" to conduct discovery in a summary proceeding, courts consider a number of factors, not all of which need be present in every case, including: (1) whether the party seeking discovery has asserted facts to establish a cause of action; (2) whether there is a need to determine information directly related to the cause of action; (3) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts; (4) whether prejudice will result from the granting of an application for disclosure; (5) whether the prejudice can be diminished or alleviated by an order fashioned by [*5]the court for this purpose; and (6) whether the court, in its supervisory role can structure discovery so that *pro se* tenants, in particular, will be protected and not adversely affected by discovery requests. (*New York Univ. v Farkas*, 121 Misc 2d 643, 647 [Civ Ct, NY County 1983]; *see* CPLR 408.)

Under the standard enunciated by *Regina*, a cause of action for an overcharge calculated using the default formula requires a demonstration of facts supporting a "fraudulent scheme to deregulate the apartment." (*Regina Metropolitan*, 2020 NY Slip Op 02127, *4.) "In the absence of fraud," even a potentially illegal "base date" rent is properly accepted. (*Id.* at *7). "Fraud consists of evidence of a representation of material fact, falsity, scienter, reliance and injury." (*Id.* at *5, n 7 [internal citations and quotation marks omitted].) The elements of fraud must be pleaded, and each element must be set forth in detail. (CPLR 3016 [b].)

Despite having had the opportunity to submit an amended answer drafted under pre-HSTPA law, Respondent's answer inadequately particularizes the elements of fraud, and lacks any allegation that Petitioner engaged in a fraudulent scheme to deregulate the apartment. However, as was the case with her original motion papers, her submissions in opposition to Petitioner's motion present her evidence to that point.

Respondent asserts that there were unlawful, unexplained increases (and one 5% decrease) in the registered rent between 1996 and 1999. (Affirmation of Respondent's counsel at 9-11.) To impugn the registrations in 1998 and 1999 as not attributable to legitimate individual apartment improvement increases ("IAIs"),[FN4] Respondent states that when she moved into the apartment in 2007, ten years after any improvements would have been made, "nothing seemed new or renovated, the apartment consisted of used and old kitchen appliances." (Respondent aff at 15.)[FN5]

For the years between 2000 and 2007, Respondent notably does not assert that any unlawful increases were assessed on the registered rents. In fact, the New York City Rent [*6]Guidelines Board ("RGB") increase taken in 2000 on the rent registered in 1999 is accurate.[FN6] A vacancy occurred in 2001 and Petitioner registered the rent at $850, rather than the $913.53 it could have charged based on the vacancy increase in effect at the time.[FN7] The next year in 2002, Petitioner registered the rent at $901. (Respondent's Exhibit A.)

Respondent's original rent stabilized lease was registered for a one-year term commencing August 1, 2007 at a preferential rent of $1,150, with a legal rent registered with DHCR of $1,620.64 which was $379.36 shy of the deregulation threshold in effect at the time. (*See* Administrative Code former § 26-504.2 [a], as amended by L 1997, ch 116, § 15, repealed by L 2019, ch 36, part D, § 5.) After Respondent's initial lease expired, the increases in both the registered legal regulated rents and the preferential rents are accurate based on the relevant RGB orders. (New York City Rent Guidelines Board, *Rent Guidelines Board Apartment Orders No.1 through #52 [1969 to 2020]*, available at https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/09/apartmentorders2020.pdf [last accessed Sept. 18, 2020].) Petitioner did not take an increase that it legally could have assessed on the registered preferential rent that Respondent was paying between 2011 and 2012. (*Id.*; *see also* Respondent's Exhibit A.)

In further support of her allegation of Petitioner's fraudulent scheme to deregulate the premises, Respondent's attorney hypothesizes that the dual registries of preferential and legal regulated rents "could lull tenants into not challenging the lawfulness of the legal regulated rent" (affirmation of Respondent's counsel at 56), a sentiment not echoed in Respondent's affidavit. Respondent also points to Petitioner's failure to provide her with a vacancy lease rider, and Petitioner's failure to preserve both the legal regulated rent and the preferential rent in her leases. Finally, Respondent's attorney argues that the Legal Aid Society ("LAS") is

litigating twelve separate cases in this building wherein the tenants each allege overcharge, thus demonstrating a scheme to deregulate the entire building.

The facts in this case considered altogether, the court finds that Respondent has not demonstrated sufficient evidence of a fraudulent scheme to deregulate the subject apartment which might serve to remedy the inadequately drafted cause of action and warrant discovery beyond the statutory look-back period. (*See 57 Elmhurst, LLC v Williams*, 68 Misc 3d 215 [Civ Ct, Queens County 2020], quoting *Farkas*, 121 Misc 2d at 647 ["As Respondent has not come forth with adequate evidence to demonstrate fraud . . . under the standard established by the Court of Appeals, she has failed to assert 'facts to establish a cause of action' . . . that would entitle her to the discovery sought."].)

That LAS is litigating 12 cases in the same building alleging similar defenses, does not [*7]evince a fraudulent scheme to deregulate *this* apartment.[FN8] The significant increase in rent between 1996 and 1997 is not *per se* sufficient to establish fraud (*Matter of Boyd*, 23 NY3d at 1000-1001), nor is Respondent's statement that, when she took occupancy, nothing in the apartment looked new and the appliances were old and used, sufficient to support her suspicion that the landlord did not assess a legitimate IAI. (Respondent aff at 10; *517 W. 212 St. LLC v Musik-Ayala*, 58 Misc 3d 652, 662 [Civ Ct, NY County 2017] [citing to *Boyd* and finding that a conclusory, non-expert assessment of an IAI is insufficient to raise an issue of material fact that Petitioner has engaged in fraudulent conduct].)

Additionally, neither the irregularities in the apartment's registration history highlighted by Respondent's counsel, nor Petitioner's failure to provide Respondent with lease riders serve to elaborate a fraudulent scheme to deregulate the premises and thereby rehabilitate Respondent's pleading defects.[FN9] Respondent never alleges that Petitioner misrepresented the rent stabilized status of her apartment to her. (*Vendaval Realty, LLC v Felder*, 67 Misc 3d 145[A], 2020 NY Slip Op 50786[U] [App Term, 1st Dept 2020] [finding a fraudulent scheme when neither tenant nor her predecessor were informed that the apartment was rent stabilized nor offered a stabilized lease].) Moreover, even the higher legal regulated rents registered with DHCR did not, *over the course of the 23 years at issue herein*, threaten to reach the deregulation threshold. The last legal registered rent for Respondent's apartment apparent to the court from the DHCR printout submitted by Respondent is $605.22 away from the deregulation threshold of $2,700 at the time of that registration in 2016. (*See* Respondent's Exhibit A.)[FN10]

The court recognizes the difficulty in some cases of demonstrating a fraudulent scheme [*8]to remove an apartment from rent stabilization with sufficient detail without discovery. However, while the burden of demonstrating "ample need" for discovery related to a cause of action is necessarily lower than *prevailing* on a cause of action at trial, discovery in a summary proceeding should not be permitted for the purposes of formulating a cause of action or a defense to an action. (*Farkas*, 21 Misc 2d at 647.) Indeed it is possible, "even without discovery" to "adequately allege[ ] a misrepresentation or failure to disclose a material fact, falsity, scienter, justifiable reliance . . . and damages," (*Kaufman v Cohen*, 307 AD2d 113, 121 [2003]), a standard not met here by Respondent.[FN11]

Finally, the court is not persuaded by Respondent's argument that "the Court of Appeals specifically affirmed that Part F of the [HSTPA] can be applied prospectively . . . [and thus] discovery is still necessary to show whether Petitioner can prove that it is collecting a lawful rent from June 14, 2019 (the effective date of the HSTPA) forward." (Affirmation of Respondent's counsel at 3.) In fact, the *Regina* Court stated that it had "*no occasion* to address the prospective application of any portion of the HSTPA, including Part F." (*Regina Metropolitan*, 2020 NY Slip Op 02127, *8-9.) Respondent's amended answer comprising her overcharge claim was interposed as of April 22, 2019. Thus, pre-HSTPA law, as delineated by the *Regina* Court, applies to Respondent's claims of overcharge and there is no occasion herein to address the application of the HSTPA to Respondent's claims which pre-date its passage in June 2019.

Accordingly, it is hereby

ORDERED that Petitioner's motion to renew and to modify the discovery order in the August 13, 2019 decision is GRANTED to the extent that Respondent's request for leave to conduct discovery from 1996 to present is denied. This decision and order addresses the entirety of the relief properly requested in the parties' papers.

This constitutes the decision and order of the court which will sent by regular mail and email to the parties. The parties will receive email notification of a date and time for a virtual appearance in Part J.

Dated: September 24, 2020

Bronx, New York

HON. KAREN MAY BACDAYAN

Judge, Housing Part

**Footnotes**

**Footnote 1:**The prior iteration of section 26-516 [a] of the RSL provided that the legal regulated rent be calculated from "the rent indicated in the annual registration statement filed four years prior to the most recent registration statement . . . ." (Administrative Code former § 26-516 [a]; *see also* Rent Stabilization Code § 2526.1 [3] [i].)

**Footnote 2:**Specifically, Respondent's discovery request sought (1) the names of tenants since 1996 who resided in the apartment prior to Respondent and those tenants' leases, (2) all documents from 1996 to present demonstrating how the rent was calculated, (3) all registration documents from 1996 to present, (4) documents related to improvements, renovations, or repairs from 1996 to present, and (5) all leases between Respondent and Petitioner and any attachments or riders thereto.

**Footnote 3:**In its reply affirmation, Petitioner for the first time asks the court to strike Respondent's overcharge defense and counterclaim. However, whatever the merits of this argument, "the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Sam and Joseph Sasson LLC v Guy*, 62 Misc 3d 1215[A], 2019 NY Slip Op 50141[U] [Civ Ct, NY County 2019], citing *Stang LLC v Hudson Square Hotel, LLC*, 158 AD3d 446 [1st Dept 2018], *All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834 [1st Dept 2015].) Accordingly, this argument is not considered.

**Footnote 4:**Until the HSTPA, an owner was allowed to apply a permanent increase in the legal regulated rent in an amount equal to 1/40 (in a building with 35 or fewer units) or 1/60 (in a building with more than 35 units) of the cost of a "substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a [vacant] housing accommodation." (Administrative Code former § 26-511 [13].)

**Footnote 5:**Respondent's original motion for discovery alleged that no New York City

Department of Buildings ("DOB") permits were issued for the premises between 1996 and 1999. (Affirmation of May 10, 2019 of Respondent's counsel at 14.) However, DOB permits are not required to obtain an IAI increase. (New York State Div. of Hous. & Community Renewal, *Policy Statement 90-10* [June 26, 1990] [in effect at the time], available at https://hcr.ny.gov/system/files/documents/2019/05/ORAP9010.PDF [last accessed Sept. 18, 2020]; *see also* New York State Div. of Hous. & Community Renewal*, Operational Bulletin 2016-1* [revised Feb. 3, 2020], available at https://hcr.ny.gov/system/files/documents/2020/02/operational-bulletin-2016-1_0.pdf [last accessed Sept. 18, 2020].)

**Footnote 6:**The 1999 registered rent is $759.00. RGB Order # 31 allowed for an increase on a one-year renewal lease of 2%, or $15.18 which when added to $759 brings the rent to $774.18, the exact amount registered by Petitioner. (New York City Rent Guidelines Board, *Rent Guidelines Board Apartment Orders #1 through #52 [1969 to 2020]*, available at https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/09/apartmentorders2020.pdf [last accessed Sept. 18, 2020].)

**Footnote 7:**If there had been a vacancy in the last 8 years and the rent was more than $500 the vacancy increase for a one-year lease was 18% (20% - [4%-2%]). (*See* Administrative Code § 26-511 [c] [former (5-a)], as added by L 1997, ch 116, § 19, repealed by L 2019, ch 36, part B, § 1.)

**Footnote 8:**LAS previously moved, unsuccessfully, to consolidate six of these proceedings all of which appear in the same Housing Court Part (*699 Venture Corp. v Catalan, et al*, Civ Ct, Bronx County, Feb. 1, 2019, Index No. 53023/2018.)

**Footnote 9:**While, for example, *Grimm*, invoked by Respondent, did involve the landlord's failure to provide lease riders and register the rent (*Matter of Grimm v State of NY Div. of Hous. & Community Renewal*, 68 AD3d 29, 32 [1st Dept 2009], *affd* 15 NY3d 358 [2010]), it also involved a nonregulated, unregistered lease agreement comprising a fictitious rent (*id.* at 29) and a suspicious transfer of the building between two connected parties without a purchase price or taxes having been paid (*id.* at 33), both indications of a fraudulent stratagem not present here.

**Footnote 10:**It is not explicit that an apartment must be fraudulently deregulated in all cases in order to warrant expansion of the four-year look back period. Indeed, an illegal overcharge could portend swift and inevitable deregulation in some cases, and, along with other factors, amount to a fraudulent scheme to deregulate an apartment. (*See e.g. Matter of Pehrson v Div. of Hous. & Community Renewal*, 34 Misc 3d 1220[A], 2011 NY Slip Op 52487[U] [Sup Ct, NY County 2011] [finding that numerous discrepancies along with a significant vacancy increase that set the rent only $52.53 away from the deregulation threshold at the time made deregulation inevitable upon the next vacancy; *see also 435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509 [1st Dept 2020] [denying summary judgment to a landlord on the basis that an issue of fact existed as to whether it had engaged in a fraudulent

scheme to illegally raise the HUD certified rent building-wide by tampering with the program recertification process and pressuring and misleading numerous tenants in order to raise the initial rent stabilized rent upon cessation of federal oversight].

**Footnote 11:**In this context, the court cautions that the CPLR 3016 pleading requirements "should not be interpreted so strictly as to require specificity where it may be impossible to state in detail the circumstances constituting a fraud, thus preventing an otherwise valid cause of action." (*Pludeman v N. Leasing Sys., Inc.*, 40 AD3d 366, 368 [App Div, 1st Dept 2007], *affd* 10 NY3d 486 [2008] [internal citations and quotation marks omitted]; *see Lanzi v Brooks*, 43 NY2d 778, 780 [1977]; s*ee also Sargiss v Magarelli*, 12 NY3d 527, 530—31 [2009] ["[A]lthough under CPLR 3016 (b) 'the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud].)

Return to Decision List