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RENT STABILIZATION

Tribunals Split on Effect of Post-'Roberts' Conduct


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In *Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), the Court of Appeals, reversing DHCR's long-standing policy, held that apartments in J-51 buildings could not be luxury deregulated while J-51 benefits remained in effect. *Roberts* left a host of unanswered questions, including whether its ruling should be applied retroactively.

On Aug. 18, 2011, in *Gersten v. 56 7th Ave. LLC*, 88 AD3d 189 (1st Dept. 2011), the First Department held that *Roberts* should be retroactively applied. On March 6, 2012, the appeal to the Court of Appeals in *Gersten* was withdrawn and discontinued. 18 NY3d 954 (2012).

Once the law became clear, the question arose as to how promptly landlords had to register and re-calculate the rents of erroneously deregulated apartments. A secondary question arose as to the appropriate penalty for a landlord's failure to promptly comply with *Roberts* and *Gersten*.

As discussed below, the First Department, Second Department, and DHCR have all answered these questions differently.

First Department Rulings

The First Department initially addressed these issues in *Kreisler v. B-U Realty Corp.*, 164 AD3d 1117 (1st Dept 2018), *lv dismissed*, 32 NY3d 1090 (2018). There, the court ruled:

> The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated *Roberts*, came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.
>
> We reject defendants' asserted reliance on a 'pre-*Roberts*' framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. (Internal citation omitted).

164 AD3d at 1117.

Once the law became clear, the question arose as to how promptly landlords had to register and re-calculate the rents of erroneously deregulated apartments. A secondary question arose as to the appropriate penalty for a landlord's failure to promptly comply with 'Roberts' and 'Gersten.' The First Department, Second Department, and DHCR have all answered these questions differently.

Kreisler was less than definitive on the issue of post-*Roberts* conduct. In addition to delay, the landlord therein had already otherwise engaged in an unnamed fraudulent scheme to deregulate the subject apartment. But shortly after *Kreisler*, the First Department made its position clear in *Nolte v. Bridgestone Assoc., LLC*, 167 AD3d 498, 498-99 (1st Dept 2018):

> The court properly examined the rental history of the subject apartment beyond the four-year statutory limitations period. (CPLR 213-a) upon finding that defendant was engaged in a fraudulent scheme to deregulate apartments. The record shows that defendant failed to promptly register the apartments and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of *Roberts v. Tishman Speyer Props., L.P.*, was clear. (Internal citations omitted).

Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renew-

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al, 35 NY3d 332 (2020), did not alter the First Department's policy. In *Montera v. KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept. 2021) the First Department noted that although landlords who erroneously deregulated J-51 apartments before 2012 were given "safe harbor," "we have not extended this rule to cases decided after *Roberts* and *Gersten*. To the contrary, our jurisprudence holds that an owner may not flout the teachings of *Roberts*." 193 AD3d at 105.

Notably, in *Montera*, Justice Judith Gische dissented. Addressing the *Kreisler* and *Nolte* line of cases, Gische wrote that "*Regina*, with its robust requirements for finding fraud in *Roberts* overcharge cases has *sub silentio* overruled this authority." *Id.* at 116.

Other cases favorably citing the *Kreisler*/*Nolte*/*Montera* line of authority include *Dadisman v. D-Day Realty LP*, 2021 WL 2688500 (Sup Ct, NY County); *Tribbs v. 326-338 E 100th LLC*, 2021 WL 1893189 (Sup Ct, NY County); *Aras v. B-U Realty*, 2021 WL 3741619 (Sup Ct, NY County); *Townsend v. B-U Realty*, 67 Misc 3d 1228(A) (Sup Ct, NY County 2020). Notably, in *Wijk v. 812 Realty LLC*, 2021 WL 305775 (Sup Ct, NY County), Justice Paul A. Goetz observed that "a landlord's willful noncompliance with its obligation to register apartments as rent-stabilized after 2013 *may* be evidence demonstrating" a fraudulent scheme to deregulate (emphasis supplied).

The First Department cases raise an interesting issue. The default rent formula is used where a fraudulent scheme to deregulate an apartment "tainted the reliability of the rent on the base date." *Matter of Grimm v. New York State Div. of Hous. & Community Renewal*, 15 NY3d 358, 367. If the landlord's failure to register post-*Regina* and *Gersten* occurred *after* the base date, such failure could not have possibly "tainted" a base date rent charged years earlier. It remains to be seen whether the Court of Appeals will endorse the First Department's policy, as restated in *Montera*.

The Second Department

In *Gridley v. Turnberry Vil., LLC*, 196 AD3d 95 (2d Dept 2021), the Second Department affirmed Supreme Court's dismissal of a class-action overcharge action, largely because there was no evidence of an actual overcharge. The Second Department cited *Nolte* for the proposition that "[t]here are instances in which failure to timely register an apartment as rent stabilized could constitute evidence of fraud." *Id.* at 102.

The Second Department observed, however, that the owner in *Gridley* registered the apartment in question after DHCR's 2016 "blanket notification to landlords of the change in law" regarding J-51 benefits and luxury deregulation. The court concluded that "the late registration of the apartment as rent-stabilized, only after notification by the DHCR of a change in law several years in the making, does not indicate that Turnbury was engaged in a fraudulent scheme to deregulate the apartment." It may be that in the Second Department, a landlord's "safe harbor" to register apartments and recalculate rents following *Roberts* and *Gersten* extends to 2016, some four years later than the 2012 safe harbor in the First Department.

DHCR

DHCR took an even more lenient approach in *Matter of Burstein*, DHCR Adm. Rev. Dckt. No. IS-4100979-RK, issued on June 7, 2021. There, notwithstanding *Roberts* and *Gersten*, the landlord did not register the apartment in question as stabilized until 2017. DHCR nonetheless refused to find a fraudulent scheme to deregulate:

> The fact that the owner deregulated the apartment and continued to treat the apartment as deregulated both prior to Roberts and after the base date of this case, does not, alone, prove owner fraud. Prior to Roberts, it was the position and policy of this Agency to allow vacancy and luxury deregulation of apartments that were in buildings receiving J-51 tax benefits. Moreover, the Agency did not promulgate post-Roberts policies, prohibiting such deregulation and instructing owners on how to register apartments, until years after the issuance of Roberts, and years after the base date of this case. Therefore, the owner's treatment of the apartment as deregulated up until, and after, the base date, was not evidence of fraud. Pursuant to Regina, the base date rent in cases such as this one, in which owner fraud is not found, is the rent charged and paid on the base date, which was the rent correctly used by the RA as the base date rent, and as the rent upon which the RA calculated subsequent legal rents.

DHCR concluded:

> The owner's failure to register the apartment as rent regulated for several years until 2017, reflected the owner's belief that the apartment was not regulated and does not evidence owner fraud. As explained above, the owner was simply following Agency policy at the time, and there was understandable confusion regarding the correct application of the RSL among owners and tenants surrounding the right, or the non-right, of an owner to deregulate apartments in buildings receiving J-51 benefits both prior to and after the issuance of the Roberts decision.

The issue of how promptly landlords had to register apartments following *Roberts* and *Gersten* remains undecided. In view of this uncertainty delinquent landlords should register as soon as possible.