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RENT REGULATION

The Altman Conundrum


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In *Altman v. 285 West Fourth*, 127 AD3d 654 (1st Dept 2015), the First Department held (at least under the facts of that case) that in order to effectuate vacancy luxury deregulation, the legal regulated rent had to be above the statutory deregulation threshold *at the time the outgoing tenant vacated*. According to the First Department, the fact that the legal rent was above the statutory threshold at the time the incoming tenant moved in was of no moment.

Thereafter, the Appellate Term, First Department, called *Altman* into question in *Aimco 322 East 61st Street v. Brosius*, 2015 WL 7039052 (App Term 1st Dept). In addition, in *Dixon v. 105 West 75th Street*, 2015 WL 4744404 (Sup Ct NY Co), Justice Manuel J. Mendez held that *Altman* does not apply in circumstances where the landlord combines two apartments to create an apartment that did not previously exist, and then collected a rent over the deregulation threshold.

This article will examine the relevant history of the statute in question, as well as the *Altman*, *Aimco* and *Dixon* decisions.

The Statute

Pursuant to the Rent Regulation Reform Act of 1993 (L 1993, ch 253), the Legislature added §26-504.2 to the Rent Stabilization Law. That section provided that apartments which rented for $2,000 or more per month between July 7, 1993 and Oct. 1, 1993, and which became vacant on or after July 7, 1993, would be deregulated upon vacancy. The New York City Council thereafter amended the statute to eliminate all of these dates, such that an apartment could be vacancy deregulated if it became vacant on or after April 1, 1994, and if it rented for at least $2,000 per month.[1]

In 1997, the New York City Council amended the statute to provide that for vacancies occurring on or after April 1, 1997, vacancy deregulation would only apply if the outgoing tenant actually paid a legal rent of $2,000 or more.[2] Just weeks later, the New York State Legislature further amended §26-504.2 pursuant to the Rent Regulation Reform Act of 1997 (L 1997, ch 116). The Legislature retained the City Council's restrictive 1997 language, but added that the definition of "housing accommodations" shall not include "any housing accommodation which is or becomes vacant on or after the effective date of the Rent Regulation Reform Act with a legal regulated rent of $2,000 or more per month."

> In 'Aimco,' Justice Mendez held that 'Altman' does not apply in circumstances where the landlord combines two apartments to create an apartment that did not previously exist, and then collected a rent over the deregulation threshold.

By 2011, courts had long since held that vacancy deregulation would take effect as long as the legal regulated rent was above the deregulation threshold when the new tenant moved in. See, e.g., *Jemrock v. Krugman*, 13 NY3d 924 (2010) ("[t]his case turns on the factual issue of whether the landlord's expenditures for 'improvements' were at least equal to the amount [approximately $30,000] necessary to bring the legal rent above the luxury decontrol threshold"). Even in *Roberts v. Tishman Speyer*, 62 AD3d 71 (1st Dept 2009), the Appellate Division observed that vacancy deregulation shall take effect where "the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more." Obviously, vacancy allowances and individual apartment improvements are added to the rent after the outgoing tenant vacates.

In June of 2011, the Legislature amended RSL §26-504.2 to read as follows:

> Housing accommodations' shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and before the effective date of the rent act of 2011 and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month; or, for any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 and before the effective date of the rent act of 2011, with a legal regulated rent of two thousand dollars or more per month (material added by L. 2011, ch 97, pt B, §12 underscored).

RSL §26-504.2, as amended in 2011, consists of two distinct clauses, separated by the word "or." The first clause, as amended, states that for any housing accommodation that became vacant between April 1, 1997 and June 24, 2011 (the effective date of the Rent Act of 2011), vacancy deregulation will only be effective where, at the time the outgoing tenant vacates, "the legal regulated rent was two thousand dollars or more per month." Simple enough.

The second clause, as amended, creates a different rule, stating that vacancy deregulation will be effectuated where the apartment "is or becomes vacant…with a legal regulated rent of two thousand dollars or more per month." Thus, the $2,000 monthly rent need not be in effect at the time the outgoing tenant vacates. The problem is that the second clause governs vacancies that occur between "the effective

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date of the rent regulation reform act of 1997" (June 18, 1997) and June 24, 2011. Thus, with the exception of apartments that become vacant between April 1, 1997 and June 18, 1997, *the two clauses cover the exact same period of time*. Put another way, of the 170.5 months covered by clause one, roughly 168 of those months are also covered by clause two.

'Altman'

In *Altman*, the apartment in question was renting for $1,829 per month at the time the tenant (Keno Rider) vacated on or about March 18, 2005. At that time, Rider's subtenant, Richard Altman, entered into a deregulated vacancy lease for the apartment, based on the fact that the prior rent of $1,829, when increased by the statutory vacancy allowance, exceeded $2,000 per month.

In a declaratory judgment action commenced by Altman, Supreme Court (Mills, J.), citing the second clause in RSL §26-504.2, declared Altman's apartment to be exempt from stabilization:

> In this case, there is no dispute that, at the time Rider surrendered his rights to the apartment, his rent was $1,829.49. Plaintiff also admits that Equity Properties 'was entitled to increase the last rent paid by Rider by 20% when it entered into a new lease with plaintiff.' Accordingly, Rider's rent of $1,829.49 plus a 20% statutory vacancy increase, exempted the apartment from the RSL. (Internal citations omitted).[3]

On appeal, the First Department disagreed, relying on the first clause in RSL §26-504.2:

> The motion court erred in dismissing plaintiff's complaint, and declaring that the apartment is not subject to the Rent Stabilization Law (see Administrative Code of City of N.Y. §26-504.2[a]). Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000 (see Rent Stabilization Code [9 NYCRR] §§26-504.2, 26-511[c][5-a])…[4]

On Sept. 8, 2015, the First Department denied the landlord's motion for reargument and/or leave to appeal in *Altman*.

'Aimco'

In *Aimco*, a vacancy occurred in 2001. Because post-vacancy increases pushed the legal rent above $2,000, the landlord treated the incoming tenant as deregulated. The Appellate Term, First Department, initially held that the question of the stabilization status of the apartment could not be summarily determined:

> The record raises but does not resolve several material triable issues, including whether the apartment at issue was exempt from rent stabilization because of a high rent vacancy that occurred in 2001, and whether the landlord's expenditures for apartment improvements in the year prior to the high rent vacancy justified the increase in the rent over the $2,000 threshold then in effect.

Appellate Term, focusing on the *second clause* in RSL §26-504.2, distinguished *Altman*:

> In this regard, we note that Rent Stabilization Law…§26-504.2(a) contains two statutory bases for high rent deregulation, the second of which is if the housing accommodation '*is or becomes vacant*… with a legal regulated rent of two thousand dollars or more per month' (emphasis added). In addition, increases in rent for postvacancy improvements count 'to bring the legal rent above the luxury decontrol threshold' (*Jemrock Realty v. Krugman*,...; see *Roberts v. Tishman Speyer*,... [high rent deregulation when 'the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more'], affd. 13 NY3d 270, 281 [2009] ['postvacancy improvements…count toward the $2,000 per month rent threshold [L 97, ch 116]' for high rent deregulation]; cf. *Altman v. 285 W. Fourth St.*,...[relying solely on RSL §26-504.2[a]'s first statutory basis for high rent deregulation, that is, 'at the time the tenant vacated…the legal regulated rent was two thousand dollars or more per month']).

It remains to be seen whether lower courts will follow 'Altman' or 'Aimco.'

'Dixon'

A different but related issue arose in *Dixon,* supra. It has long been settled that where a landlord combines two apartments into an apartment that did not previously exist, the landlord is entitled to collect a first rent. See, *300 West 49th Street Assoc. v. New York State Division of Housing and Community Renewal*, 212 AD2d 250 (1st Dept 1995). In *Dixon*, the landlord combined two vacant, adjoining apartments in 2004, and rented the combined apartment as deregulated based on a rent in excess of $2,000. Benjamin Dixon, who moved into the combined apartment in 2013, commenced a declaratory judgment action asserting, inter alia, that the apartment was rent stabilized. Dixon cited *Altman* in support of this claim. The Supreme Court rejected Dixon's argument, stating:

> The court in *Altman* dealt with the issue of vacancy increases following the departure of the tenant of record, and the prohibition of rent stabilization deregulation for rent under $2,000 at the time of the tenant's departure.
>
> Section 2520.11(r)(10) of the Rent Stabilization Code states that 'where an owner substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation, as provided in this subdivision, exemption pursuant to this subdivision shall apply.' Once 'the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist,' the apartment is no longer rent stabilized 'thereby rendering its rental history meaningless,' and entitling the owner to 'first rent' within the meaning of Section 2520.11(r)(10).
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> Here, the documentation submitted by the owners showed that the apartment was converted from a one floor apartment to a duplex apartment which included additional living space, installation of an internal staircase and additional roof-top penthouse. This created a new unit obliterating the existing apartment thereby rendering its rental history meaningless. This court did not misapprehend any relevant facts or misapply controlling principles of law holding that the owners were entitled to deregulation of the apartment's rent stabilized status."

Thus, the Supreme Court ruled that *Altman* does not apply to newly created apartments.

It remains to be seen whether lower courts will follow *Altman* or *Aimco*.

1. Loc. L. 1994, No. 4.
2. Loc. L. 1997, No. 13.
3. *Altman v. 285 West Fourth LLC*, 2014 WL 5284727 (Sup Ct NY Co).
4. 127 AD3d at 655.