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Rent Regulation

Landlords Win in Two First Department Cases

By **Warren A. Estis**

And **Jeffrey Turkel**

In two recent decisions, the Appellate Division, First Department, over rigorous tenant objections, held that the apartments in question were exempt from rent stabilization.

'Matter of Park'

Matter of Park v. New York State Div. of Hous. and Community Renewal, decided on April 6, 2017, involved a building that received J-51 benefits through June 30, 2010. A previous tenant, acclaimed actress Uta Hagen, died in 2004. At that time, the maximum base rent(MBR) for the rent-controlled apartment was $1,548.48 per month. The landlord then performed a gut renovation on the apartment at a cost of more than $200,000.

Because the apartment had been rent controlled, the landlord was entitled to charge the incoming tenant a "market rent," subject to the tenant's right to file a Fair Market Rent Appeal (FMRA). Under the applicable formulas, the landlord could increase the rent in an amount equal to 50 percent of the MBR. The landlord was also allowed to increase the rent by 1/40th of the cost of the gut renovation. This brought the legal rent to $7,357.29 per month; the landlord charged the incoming tenant, Piers Playfair, $7,200 per month. In accordance with DHCR's regulations at the time, the landlord treated the apartment as luxury deregulated, even though the building was still receiving J-51 benefits.

The incoming tenant could have, but did not, file an FMRA. He vacated the apartment in September 2010, three months after the J-51 benefits expired.

The next tenants, Christina Park and Kyun Sang Park, took occupancy in November 2010 at a monthly rent of $7,400. In 2012, in accordance with the Court of Appeals' decision in *Roberts v. Tishman Speyer*, 13 NY3d 270 (2009)—which held that luxury deregulation is not available while a building is receiving J51 benefits—the landlord filed amended registrations with DHCR for the years 2006 through 2011. The Parks then filed an FMRA, many years after the rent-controlled tenant vacated.

In a 2014 order, DHCR denied the FMRA as untimely, and held that the apartment was deregulated. Of particular note is DHCR's discussion as to how soon landlords had to comply with the Court of Appeals' 2009 decision in *Roberts* in order to avoid a finding of fraud. With respect to the landlord's 2012 amendment of the apartment rent registrations, DHCR wrote:

> Nor can it be considered fraudulent conduct not to immediately begin filing amended registrations after the Roberts decision by the Court of Appeals in that it was not until August and November of 2011 that the Appellate Division found that Roberts should not be given retroactive effect. See *Roberts v. Tishman Speyer,* 89 AD3d 444 (1st Dept. 2011) and *Gersten v. 56 7th Avenue*, 88 AD3d 189 (1st Dept. 2011). Courts have also held other contexts that penalties for lack of proper contemporaneous registration cannot be automatically applied in any cases affected by the *Roberts* litigation. See e.g., *Dodd v. Riverside*, 2012 NY Misc Lexis 2991, 2012 NY Slip Op 31653."

Supreme Court (Wooten, J.) affirmed DHCR's order, and was affirmed in turn by the First Department. The First

WARREN A. ESTIS *is a founding member of Rosenberg & Estis.* JEFFREY TURKEL *is a member of the firm.*

Department summarized its holding as follows:

> It is clear that in 2010, after the J-51 benefits expired, the apartment remained subject to rent stabilization. In the absence of J-51 benefits, the rent stabilization laws permit an owner to rely on the luxury decontrol laws, and if their attendant conditions are met, to deregulate an apartment. When the petitioners leased this apartment in 2010, all the circumstances permitting luxury decontrol were present and satisfied. By then the J-51 benefits had expired. They had expired before *Playfair*, the previous tenant, moved out of the apartment. Also, the last legally permissible rent exceeded the luxury decontrol threshold, then $2,000 per month. Consequently, the apartment was properly leased to petitioners as unregulated and at a free market rent (RSL § 26-504).

In so holding, the First Department rejected various of the tenants' arguments. The court held that landlord's initial failure to register the apartment from 2006 forward did not result in rent-stabilized status, and that to hold otherwise would "unfairly penalize the owner for action that was taken in good faith, relying upon DHCR's own interpretation of the law, without furthering any legitimate purpose of the rent stabilization laws." Nor did landlord's failure to file toll the tenants' time within which to file an FMRA, which is four years after the rent-controlled apartment is vacated.

The First Department also refused to breach the four-year statute of limitations, holding that "DHCR properly concluded that the owner did not engage in fraud when it removed the apartment from rent regulation in 2005 because it was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations."

The First Department's ruling represents a common sense approach to implementing *Roberts*. Although *Roberts* bars luxury deregulation while J-51 benefits are still being received, it does not require landlords to forfeit rent increases that were otherwise permissible under rent stabilization, or require such draconian measures as rent freezes, default rent calculations, or breaching the four-year statute of limitations. *Roberts* was a windfall for incoming tenants in J-51 buildings, who never expected to be rent-stabilized. See *Borden v. 400 East 55th Street Assoc.*, 24 NY3d 382, 401 (2014). The First Department has now clarified that one windfall is enough.

> The court's ruling in 'Matter of Park' represents a common sense approach to implementing 'Roberts.'

'Dixon'

In *Dixon v. 105 West 75th Street*, decided March 30, 2017, the landlord took two top floor vacant apartments (5A and 5B), added a structure above them, and created twin duplex apartments. Landlord then charged the new tenant of 5B a market rent, based on the DHCR policy that a landlord may charge such rent where it substantially alters the outer dimensions of a vacant housing accommodation. Where, as here, the market rent exceeds the luxury deregulation threshold, the apartment is deregulated.

Tenant commenced an action in Supreme Court seeking, inter alia, a declaration that apartment 5B was rent stabilized. The landlord, submitting documentary evidence concerning the addition of a second story to the apartment, moved to dismiss pursuant to CPLR 3211(a)(1). Supreme Court (Menendez, J.) dismissed the complaint, and the First Department affirmed in a 4-1 decision.

The majority held that the landlord satisfied its burden by establishing that "it made the necessary improvements to qualify for [a] first rent, since it established that it substantially altered the character of the apartment by connecting it to the new penthouse." Although the tenant had pointed to certain alleged infirmities in the landlord's proof, the majority held that the documents "demonstrate in an unambiguous and conclusive fashion the basic premise that landlord made a significant change to the living space, thus satisfying CPLR 3211(a)(1) and the substantive provisions that led to the rent increase."

The dissent (Gesmer, J.), citing CPLR 3211(a)(1), held that the landlord had not submitted sufficient documentation in admissible form to utterly refute the tenant's claims. Thus, the dissent focused on evidentiary issues, while the majority—believing that it was obvious from the record that the landlord had created a new duplex apartment that had never previously existed—held that such evidence was more than sufficient to establish deregulation.