Appellate Term Governs J-51 Calculations (for Now)

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In *Roberts v. Tishman Speyer Props.*,[1] the Court of Appeals, affirming the Appellate Division, First Department, held that luxury deregulation is not available in buildings receiving J-51 benefits. These decisions came as a surprise to hundreds of owners, who had relied on DHCR's advice—and a DHCR regulation—stating that luxury deregulation was indeed available in such buildings.

After *Roberts*, the issue arose as to how the rents of erroneously deregulated apartments should be recalculated, now that the Court of Appeals had declared these apartments to be rent stabilized. Tenants argued that for a variety of reasons, owners should be denied rent increases that they would otherwise be entitled to, such as (1) statutory vacancy increases; (2) statutory "longevity" increases; (3) individual apartment increases; and (4) standard Rent Guidelines Board renewal increases. Tenants also sought treble damages and attorney fees.

Owners, in turn, argued that they should not be penalized for following the law as DHCR interpreted it, and should be allowed to collect all of the rent increases to which they were otherwise entitled. Owners also argued that treble damages and attorney fees were inappropriate where rents were calculated in accordance with then-current law.

'72A Realty Associates'

In *72A Realty Assocs. v. Lucas*,[2] Judge Peter M. Wendt addressed at length the proper method of recalculating stabilized rents in *Roberts*-type situations. The court, agreeing with the landlord therein, held that the rent would be recalculated under the standard four-year statute of limitations, without any penalties or rent freezes. The court also rejected the use of the default rent formula, endorsed by the Court of Appeals in *Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 108 (2005), applicable in cases where apartments are unlawfully deregulated:

The four-year statute of limitations in CPLR 213-a does, however, apply to tenant's overcharge claim. Petitioner is not guilty of fraud, or any intentional evasion of the RSL, such as the landlord in *Thornton v. Baron*. Rather, petitioner, in setting an unregulated rent for respondent, was simply acting in a manner consistent with the Rent Stabilization Code that the Court of Appeals later ruled, in *Roberts*, to be a DHCR misinterpretation of RSL §§ 26-504.1 and 26-504.2(a).

* * *

Thus, the base date rent for this purpose is the rent in effect in October 2004, in the amount of $2250 per month pursuant to the lease between the parties commencing September 1, 2004. Also, since the landlord herein committed no fraud or conscious evasion of the RSL, respondent is not entitled to an award of treble damages.

For the above reasons, landlord is neither being penalized nor prejudiced by the fact that it will only be allowed to collect a legal rent stabilized rent based on allowable Rent Guidelines Board increases over the $2250 per month rent respondent herself actually paid on the base date, starting September 2004 (internal citations omitted).

On appeal, the Appellate Term, First Department[3] affirmed Wendt's methodology, stating:

With respect to tenant's rent overcharge counterclaim, we agree that no basis was shown for the court to go outside the four-year look-back period, or to impose treble damages upon landlord, tenant having failed to demonstrate a tenable claim of fraud or willfulness on the landlord's part. Nor has tenant shown any basis for application of the *Thornton* rent formula to determine the legal rent for the apartment (internal citations omitted).

In addition, the Appellate Term held that attorney fees should not be assessed against the landlord:

…we find persuasive landlord's argument that the imposition of attorney's fees against it would be unfair under the particular circumstances of this case, where its possessory claim, albeit unsuccessful, was at least colorable at the time of commencement of the holdover proceeding (internal citations omitted).

The Appellate Term's order in *72A Realty* was argued on appeal before the Appellate Division, First Department on May 29, 2012. As of the date of this writing, the appeal has not yet been determined.

In the Meantime

Over the last three months, the New York County Supreme Court has rendered five decisions in *Roberts*-type cases endorsing the Appellate Term's *72A Realty* methodology. These cases are discussed below.

The first such case was *Rosenzweig v. 305 Riverside Corp.*,[4] decided on June 7, 2012 by Justice Judith J. Gische. In *Rosenzweig*, the tenant commenced a declaratory judgment action seeking, inter alia, recomputation of his rent, treble damages, and attorney fees. The landlord asserted that the legal rent for the apartment was $9,767.32 per month, just slightly under the $10,000 per month actually charged. The landlord's figure was based on the rent in effect four years

prior to the tenant's complaint ($2,178.54), plus vacancy increases, a longevity increase, and individual apartment improvement rent increases based on a purported $233,000 renovation.

The tenant argued, among other things, that "based upon 305 Riverside's failure to register the rent, it is now frozen at the last legally filed rent of $2,178.54."

The Supreme Court, relying on *72A Realty*, wrote:

The *72A Realty Associates* formula, while not perfect, is the one that, in this court's opinion, makes the most sense. It neither unduly punishes either party nor does it create any windfall, because the parties followed what was widely believed to be the correct law at the time the lease was made.

The Supreme Court next rejected the tenant's argument that the rent should be frozen based on "305 Riverside's failure to register a proper and timely rent stabilization rent with the DHCR." The court wrote:

Roberts overcharge cases, such as this one, are not really about registration compliance; they are, in a broader sense, about the reach and application of the rent stabilization laws and how to now calculate a legal rent. At the time 305 Riverside would have been required to register a rent stabilized rent under *Roberts*, the DHCR did not even require such registration. Fixing the rent stabilization rent in hindsight under the failure to register provisions of the RSL and RSC would, under these circumstances, be unduly punitive for what was action otherwise taken in good faith, relying on the agency's own interpretation of the law.

Finally, the Supreme Court declined to award the tenant treble damages:

Whether treble damages are available in the context of post *Roberts* overcharge cases is a further legal issue now emerging in the trial courts. Although there is a presumption that any overcharge is willful, willfulness in the context of post *Roberts* overcharge cases is almost impossible to establish. This is because the initial rents were established in reliance on existing DHCR regulations as they then stood. Since *Roberts*, the law on how to calculate rent stabilized rents is emerging, without any fixed formula. Thus, any attempt at recalculating the rent cannot be considered a willful disregard of law that is not yet fully established.

One week later, on June 19, 2012, Gische issued a similar ruling in *Dodd v. 98 Riverside Drive*.[5]

In *Cohen v. 820 West End Avenue*,[6] a rent controlled apartment became vacant in 2001 at a time when the lawful rent was $1,119.30 per month. The landlord then renovated the apartment and rented it on a deregulated basis at a monthly rent of $2,700. The building's J-51 benefits did not expire until 2010.

The tenants brought a declaratory judgment action alleging that:

…defendant has engaged in fraudulent conduct by (1) filing false registration statements each year after the 2001 vacancy and (2) not abiding by the First Department decision in *Roberts*. Thus, plaintiffs maintain that there is a sound basis to use the default formula set forth in *Thornton v. Baron*, which is applied when there is fraud or an intentional evasion of the rent control law (internal citation omitted).

Justice Paul Wooten found for the owner on this issue, holding:

In *72A Realty Assoc. v Lucas*, the Appellate Term, First Department, affirmed the trial court's application of a formula that looked back to the rent charged four years immediately preceding the overcharge complaint, and then added the allowable rentstabilized increases for every year after. This Court agrees with this method of calculation. The legal rent shall be the rent agreed to in the lease four years immediately preceding the filing of this action, which was $3,425, plus the periodic rent stabilization guideline increases in each consecutive year (internal citations omitted).

See also *Casey v. Whitehouse Estates*,[7] an Aug. 6, 2012 decision from New York County Supreme Court Justice Anil C. Singh; *Barron v. Laurence Towers*,[8] decided on Aug. 14, 2012 by Justice Gische.

The question remains as to whether *72A Realty,* the basis for all of the Supreme Court decisions herein, will be affirmed by the Appellate Division, First Department. A decision in that appeal is expected this Fall.

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Endnotes:

1. 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009).

2. 28 Misc. 3d 585, 902 N.Y.S.2d 791 (N.Y.C. Civ. Ct. 2010).

3. 32 Misc. 2d 47, 929 N.Y.S.2d 349 (App. T. 1st Dept. 2011).

4. 35 Misc. 3d 1241(A), 2012 WL 2295535 (Sup. Ct. N.Y. Co.).

5. 2012 WL 2502774 (Sup. Ct. N.Y. Co.).

6. Sup. Ct. N.Y. Co. Index No. 100222/11 [n.o.r.].

7. 36 Misc. 3d 1225(A), 2012 WL 3168689 (Sup. Ct. N.Y. Co.).

8. 2012 WL 3638855 (Sup. Ct. N.Y. Co.).
