

RENT REGULATION

The Doctrine of Primary Jurisdiction Comes to the Fore



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Following *Roberts v. Tishman Speyer*, (13 NY3d 270 [2009]), many tenants commenced Supreme Court actions seeking declarations that their apartments were rent stabilized, in addition to damages for rent overcharge. The question then arose as to whether such disputes should be adjudicated in the first instance in Supreme Court (a court of general jurisdiction) or before the *Division of Housing and Community Renewal* (DHCR), the expert agency responsible for administering the *Rent Stabilization Law* (RSL). The answer to this question would turn on the so-called doctrine of primary jurisdiction.

Landlords generally wanted DHCR to determine these matters. DHCR, which prior to *Roberts* had ruled that luxury deregulation was available in buildings receiving J-51 benefits, was responsible for putting landlords in this fix to begin with, and was more likely than Supreme Court to be lenient with respect to rent calculations, allegations of fraud, and claims for treble damages. In addition, DHCR decisions were more likely to be uniform in application, lending some predictability to a regulatory scheme that *Roberts* had turned on its head.

This article will trace the application of the doctrine of primary jurisdiction in the post-*Roberts* era.

The Doctrine

In *Davis v. Waterside Housing Co.* (274 AD2d 318 [1st Dept. 2000]), the landlord filed an application with DHCR to remove the housing complex from Mitchell-Lama regulation. The tenants then brought an action in Supreme Court seeking a declaration that the complex would be subject to rent stabilization upon such removal. Reversing Supreme Court, the First Department dismissed the action, stating:

The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency.

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The IAS court erred in ruling that the doctrine does not apply in this instance

because the issues before the court were not within DHCR's specialized field and do not involve that agency's technical expertise. To the contrary, the Legislature has specifically authorized that agency to administer questions relating to rent regulation" (internal citations and quotation marks omitted).

Initial Application of the Doctrine

In *Gerard v. Clermont New York Assoc.*, (81 AD3d 497, 497-98 [1st Dept. 2011]), the landlord moved to dismiss a post-*Roberts* putative class action. Supreme Court (Sherwood, J.) granted that motion. The First Department reversed, holding:

The court abused its discretion in dismissing the complaint under the doctrine of primary jurisdiction. This action presents legal issues left open after the Court of Appeals' decision in *Roberts v. Tishman Speyer*, including whether that decision is to be applied retroactively or prospectively. It is the courts, not the Division of Housing and Community Renewal, that should address these issues in the first instance. (citation omitted).

Later Application

While the courts decided various post-*Roberts* issues, see e.g., *Gersten v. 56 7th Ave., LLC* (88 AD3d 189 [1st Dept. 2011]), both DHCR and the courts

were adjudicating the proper method of calculating stabilized rents in erroneously deregulated apartments, as well as claims of fraud, demands for treble damages, and whether rents should be “frozen” because landlords, upon DHCR’s advice, had not registered these apartments as rent stabilized. The question of whether these more routine issues should be decided by DHCR or the courts arose in *Davidson v. 730 Riverside Dr.*, (2015 WL 5171072 [Sup Ct, NY County]). The court (Kalish, J.) determined that DHCR should adjudicate the tenant’s claim for rent overcharge:

Pursuant to the doctrine of primary jurisdiction, the instant matter should be determined by DHCR, given its expertise in rent regulation. DHCR can investigate Plaintiffs’ fraud allegations, determine the regulatory status of the Premises, and, if warranted, apply the default formula adopted in *Thornton* to determine the base rate. (citations omitted).

2017 Rulings

As existing post-*Roberts* cases matured in the courts, the primary jurisdiction issue reached a critical mass, resulting in numerous Supreme Court decisions in 2017. In *Chester v. Cleo Realty*, (2017 WL 3396466 [Sup Ct, NY County]), eight tenants brought an action in Supreme Court seeking overcharges, reformation of their leases, and a declaration that their apartments were rent stabilized. The landlord moved to dismiss, asserting that DHCR should determine these issues in the first instance. The court (Heitler, J.) agreed, holding that “this court will almost certainly be required to consider issues that fall squarely within the purview and expertise of DHCR, including whether and when the apartments at issue should have been registered with DHCR, what the base rent should be for each apartment, and whether there were any rent overcharges with respect to the apartments.”

Justice Debra James addressed the primary jurisdiction issue in *Mintzer*

v. 510 W. 184th St., (2017 WL 4217272 [Sup Ct, NY County]). There, the landlord moved to dismiss, arguing that Supreme Court did not have jurisdiction to determine rent regulatory matters. The court disagreed, but nevertheless granted the motion, holding that “the matter should be determined by DHCR, given its expertise in rent regulation.”

In *Comfort v. 118 2nd Ave NY*, (2017 WL 4708067 [Sup Ct, NY County]), Justice Arlene P. Bluth dismissed an action

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for rent overcharges and related relief concerning an apartment that had been erroneously deregulated in a building receiving J-51 benefits. Citing the doctrine of primary jurisdiction, Bluth held:

DHCR’s expertise is necessary given the unique nature of the disputed issues in this case. DHCR can consider whether the large rent increase from 2002 to 2003 was justified, analyze defendants’ purported treatment of the apartment as rent-stabilized throughout plaintiff’s tenancy and evaluate the significance of defendants’ refund check for overcharging plaintiff. DHCR has the knowledge and experience to decide whether it is appropriate to look beyond four years, to determine the current regulatory status of the apartment and to conclude the exact amount, if any, owed to plaintiff.

In *Wang v. Jedmon Realty* (2017 WL 5270683 [Sup Ct, NY County]), Justice Kathryn E. Freed dismissed an action for declaratory relief and rent overcharge, holding that DHCR was “best suited to determine whether the apartment was not registered as rent stabilized when it should have been, whether there were any rent overcharges for the apartment

based on renovations which were or were not made, and whether plaintiff is entitled to any damages as a result of any acts, fraudulent or otherwise, which defendants are alleged to have committed.” See also *Wright v. 116 Ave. C Investors* (2017 WL 5270661 [Sup Ct, NY County]).

The First Department addressed this issue in its Nov. 28, 2017 decision in *Collazo v. Netherland Prop. Assets* (155 AD3d 538 [1st Dept. 2017]). The court held that Supreme Court had “providently exercised its discretion in ruling that plaintiffs’ rent overcharge claims should be determined by the New York State Division of Housing and Community Renewal in the first instance.”

In *Lamb v. 118 2nd Ave. NY*, (2017 WL 6039503 [Sup Ct, NY County]), the tenant commenced an action for claims of rent overcharge. The landlord moved to dismiss based on primary jurisdiction, and thereafter filed an application with DHCR seeking a declaration that the apartment was in fact exempt from rent regulation. In a Dec. 6, 2017 order, Justice Barbara Jaffe granted the motion to dismiss, observing that DHCR “has expertise in these matters.” Thus, the landlord prevailed even though the tenant sought relief in Supreme Court before the landlord filed its complaint with DHCR.

Conclusion

Practitioners representing landlords in similar Supreme Court actions should strongly consider moving to dismiss based on primary jurisdiction. Defending a DHCR complaint is far less expensive than defending a Supreme Court action, and DHCR is more likely to adopt a lenient attitude toward landlords who were misled by DHCR’s faulty advice.