RENT REGULATION

Dropping Mitchell-Lama Not Itself 'Unique or Peculiar'

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In her recent decision in *Columbus 95th Street LLC v. New York State Division of Housing and Community Renewal*, NYLJ, Dec. 4, 2009, at 39, col. 5, New York County Supreme Court Justice Alice Schlesinger upheld a provision of the Rent Stabilization Code ("RSC") which states that prior regulation under Mitchell-Lama does not, of itself, allow a landlord to obtain rent increases for "unique or peculiar" ("U/P") circumstances under rent stabilization.

Background

Section 35(2) of Article II of the Private Housing Finance Law (commonly known as the Mitchell-Lama law) allows owners of Mitchell-Lama buildings to take their buildings out of Mitchell-Lama under certain enumerated circumstances. Such buildings—if constructed before Jan. 1, 1974—would then become subject to rent stabilization. Section 26-512 of the Rent Stabilization Law ("RSL") provides that the last rents charged under Mitchell-Lama shall become the first rents under rent stabilization.

The use of Mitchell-Lama rents as initial stabilized rents, however, was problematic for owners. While a building's income—its rent roll—remains the same immediately after leaving the Mitchell-Lama program, the building's expenses immediately *increase* because the landlord no longer has the benefit of Mitchell-Lama tax abatements. Owners, looking for a way to increase initial stabilized rents, looked to RSL §26-513(a), which states in its entirety:

> The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four, may, within sixty days of the local effective date of this section or the commencement of the first tenancy thereafter, whichever is later, file with the commissioner an application for adjustment of the legal regulated rent for such housing accommodation. The commissioner may adjust such initial legal regulated rent upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.

Owners argued that the transition from Mitchell-Lama to rent-stabilized status was, of itself, a "unique or peculiar" circumstance warranting a rent increase. Various owners then filed U/P applications with DHCR.

'KSLM'

One such owner was the landlord in *KSLM-Columbus Apts. Inc. v. New York State Division of Housing and Community Renewal*, 6 AD 3d 28, 772 N.Y.S.2d 665 (1st Dept. 2004) aff'd as modified 5 N.Y.3d 303, 801 N.Y.Sup.2d 783 (2005).[1] The owner therein owned three former Mitchell-Lama buildings, constructed in 1968, and applied to DHCR for U/P increases.

A principal issue in *KSLM* was the threshold question of jurisdiction. RSL §26-513(a), quoted above, only applies to apartments subject to the Emergency Tenant Protection Act (L. 1974, ch. 576, §4) ("ETPA"), not apartments subject to the RSL. Thus, the question arose as to whether the apartments in *KSLM* were RSL or ETPA apartments.

The Court of Appeals ruled that the determining factor as to RSL or ETPA status was the building's date of construction. The RSL generally applies to buildings of six or more units completed on or after Feb. 1, 1947 but on or before March 10, 1969. See RSL §26-504(a)(1). The ETPA generally applied to buildings completed after March 10, 1969 but before Jan. 1, 1974. In *KSLM*, the three buildings in question were constructed in 1968, such that the ETPA seemingly did not apply and the owner could not seek U/P increases.

Nothing under rent regulation, however, is that simple, and *KSLM* was no exception. Pursuant to the Vacancy Decontrol Law (L. 1971, ch. 371), apartments originally subject to the RSL became destabilized if vacated after June 30, 1971. Three years later, L. 1974, ch. 576 §2 amended the Vacancy Decontrol Law to provide that such destabilized apartments would then be picked up by the ETPA. Thus, the owner in *KSLM* asserted that any apartment in the three subject buildings that became vacant on or after June 30, 1971 was an ETPA apartment, such that the owner could apply for U/P increases. The Court of Appeals agreed stating:

> The VDL, effective July 1, 1971, provided simply: "housing accommodations which become vacant shall become exempt from regulations and control...." But for the ETPA, that would still be the law today, and would apply to former Mitchell-Lama apartments that were vacated after the VDL's effective date. A 1974 amendment changed the language to read "hous-

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ing accommodations which became vacant on or after July first, nineteen hundred seventy-one or which hereafter become vacant shall be subject to the provisions of the emergency tenant protection act of nineteen hundred seventy-four." The apartments described in that section are "made subject to" rent stabilization by the ETPA. Thus, RSL §26-513(a) applies to those apartments.[2]

The tenant-interveners in *KSLM* raised a second threshold issue, arguing that the owner should be barred for applying for U/P increases whether or not they were ETPA apartments because voluntarily leaving Mitchell-Lama regulation, of itself, was not a "unique or peculiar" circumstance. The Appellate Division without specifically addressing this argument, did note the following:

> A review of former Commissioner Halperin's and the DC's letters indicate their awareness that housing developments emerging from a more stringent state or federal regulatory system, such as the PHFL, should be entitled to use that a basis for the "unique and peculiar circumstances" requirement necessary to apply for an initial rent adjustment under RSL §26-513(a). Thus, the DHCR, at least at some point, was aware of the economic disadvantage a building owner would encounter upon losing its Mitchell-Lama financing and tax incentives.[3]

The tenant's interveners raised the same argument also argued before the Court of Appeals in *KSLM*. Notwithstanding, the Court of Appeals held that the *KSLM* owner was in no way disqualified from applying to DHCR for U/P increases as to those apartments governed by the ETPA.

DHCR New Regulation

DHCR was unhappy with the Court's ruling in *KSLM*, a ruling which compelled DHCR to process —and possibly grant—various U/P applications pertaining to buildings which had transferred from Mitchell-Lama to rent stabilized status. Accordingly, in 2007, DHCR amended the RSC to add new §2522.3(f)(4), which reads as follows:

> Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under...section 2522.4(b) and (c) of this Part [i.e., comparative hardship or alternative hardship] (material in brackets supplied).

'Columbus 95th Street'

Two landlords, Columbus 95th Street LLC and Highbridge House Ogden, LLC,[4] had pending U/P applications before DHCR and commenced Supreme Court proceedings challenging the validity of DHCR's amended regulation and/or its application to pending cases. The crux of the owners' argument in the consolidated proceeding was premised on *KSLM*; the owners argued that by holding that the landlord therein could file a U/P application with DHCR as to its ETPA apartments, they alleged that the Court of Appeals held that a transfer from Mitchell-Lama regulation to rent stabilization, of itself, was a sufficient basis to grant U/P rent increases.

DHCR, the attorney general, and the various tenant groups in *Columbus* took a more narrow view of *KSLM*. They argued that the Court of Appeals in *KSLM* simply held that certain of the apartments therein were covered by the ETPA, such that the landlord was entitled to apply for U/P increases; the Court did not determine the merits of the application, or state what would or would not be a basis for granting such increases.

Justice Schlesinger ruled against the owners, writing:

> ...*KSLM* cannot reasonably be read to guarantee an owner an automatic entitlement to a U/P rent increase upon exiting Mitchell-Lama. Rather, it simply acknowledges the owner's right to apply for such a rent increase. As the Code amendment does not deprive the owner of its right to apply for a U/P rent increase, it neither contravenes *KSLM* nor otherwise diminishes the owner's statutory rights.
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> Given its plain and ordinary meaning, the amendment advises the owner that it must do more than merely report that the building was formerly subject to Mitchell-Lama to qualify for a U/P rent increase. It further advises that a claim focused on economic hardship allegedly attributable to the former Mitchell-Lama status is more properly processed under the provision allowing rent increases based on hardship. The amendment does not foreclose the owner from applying to increase the rents of former Mitchell-Lama tenants upon a particularized showing of "unique or peculiar circumstances."

Notably, in an earlier order in *Columbus*, Supreme Court Justice Lewis Bart Stone wrote:

> Here Columbus had originally sought the aid of this Court to require DHCR to consider and rule upon its application under RSL §26-513(a), a remedy expressly recognized by the Court of Appeals in *KSLM-Columbus Apts.* DHCR claims its subsequent acts to eviscerate such remedy and to apply such eviscerational change to pending applications were proper and authorized. Whether they were is of course, a question of law, and it is also clearly just and appropriate that Columbus has the right to be heard on such issue as Columbus has a clear economic interest in the outcome.

Justice Schlesinger, however, discounted Justice Stone's comments as merely a "characterization of the competing arguments," which did not "bind this Court in anyway."

Justice Schlesinger next rejected the owner's claim that DHCR's promulgation of the amended Code provision exceeded its rulemaking authority:

> Pursuant to Legislative mandate, DHCR has broad rulemaking authority which it has exercised in connection with rent regulation generally for 50 years and with respect to the Rent Stabilization Law since 1984. The regulation at issue was promulgated consistent with that authority and consistent with the governing regulation RSL §26-513(a) quoted above which allows a party, be it the owner or tenant, to apply for a rent adjustment based on "unique or peculiar circumstances."

Justice Schlesinger also rejected the owner's claim that the amended regulation was arbitrary:

> ...quite significantly, the regulation is wholly consistent with prior interpretations of the phrase "unique or peculiar circumstances" by the housing agency and the courts. Those interpretations reveal that the opportunity granted to seek U/P rent adjustments was intended to apply to individual housing accommodations with unusual factors, rather than buildings as a whole based merely on their classification under state law.
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> Here...the owners withdrew their buildings from Mitchell-Lama knowing that they would lose the financial benefits of that program and that the apartments would become subject to Rent Stabilization. That choice to forego Mitchell-Lama benefits in favor of a different form of rent regulation would not constitute per se "unique or peculiar circumstances" on a building-wide basis. However the regulation as amended does not preclude the possibility that "unique or peculiar circumstances" may exist with respect to an individual housing accommodation which would justify a rent increase under the statute.

Supreme Court then directed DHCR to decide the subject U/P applications within 150 days.

Nicholas Kamillatos, counsel for one of the owners in *Columbus*, reports that there has been no final determination as to whether the owners in *Columbus* will prosecute an appeal to the Appellate Division, First Department.

DHCR argued that the Court of Appeals in 'KSLM' simply held that certain of the apartments therein were covered by the ETPA, such that the landlord was entitled to apply for U/P increases; the Court did not determine the merits of the application, or state what would or would not be a basis for granting such increases.

1. The owner in *KSLM* was represented by the authors' law firm, Rosenberg & Estis, P.C.
2. 5 NY 3d.
3. 6 AD. 3d at 39.
4. In the interest of full disclosure, *Highbridge House Ogden, LLC*, was represented in *Columbus* by the authors' law firm, Rosenberg & Estis, P.C.