Mitchell-Lama

Owner of Former Units Can File for Rent Hike
Warren A. Estis, a founding partner at Rosenberg Estis, and Jeffrey Turkel, a partner at the firm, write that the Court of Appeals has ruled that owners of former Mitchell-Lama buildings completed on or before March 10, 1969 can apply for "unique and peculiar" rent increases under the Rent Stabilization Law with respect to any apartment which has had a vacancy since June 30, 1971.

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On June 14, 2005, the New York State Court of Appeals ruled in *KSLM-Columbus Apts., Inc. v. New York State Division of Housing and Community Renewal*[1] that owners of former Mitchell-Lama buildings completed on or before March 10, 1969 can apply for "unique and peculiar" rent increases under the Rent Stabilization Law with respect to any apartment which has had a vacancy since June 30, 1971. The Court rejected DHCR's position that such owners were disqualified as a matter of law from applying for unique and peculiar rent increases.

In the interest of full disclosure, the authors note that the owner in KSLM was represented by Rosenberg & Estis, P.C.

Statutes

The Rent Stabilization Law of 1969 ("RSL-69") (Local Laws 1969, No. 16, now codified at §26-501 et seq. of the New York City Administrative Code) generally applies to buildings containing six or more dwelling units that were completed on or after Feb. 1, 1947 and before Mar. 10, 1969. RSL §26-504(a)(1). In contrast, buildings with six or more units completed after Mar. 10, 1969 but before Jan. 1, 1974 are generally subject to the Emergency Tenant Protection Act ("ETPA") (L. 1974, ch. 576, §4). Mitchell-Lama buildings ¿ i.e., those regulated under Article II of the Private Housing Finance Law ("PHFL") ¿ are expressly exempted from the RSL-69 and the ETPA for so long as they maintain their Mitchell-Lama status. RSL §26-504(a)(1)(b); ETPA §5(a)(3).

The issue of whether a New York City building or apartment has become stabilized by virtue of the RSL-69 or the ETPA is usually of no consequence. But when a building comes out of Mitchell-Lama and becomes stabilized, the difference is crucial in at least one respect. RSL §26-513(a), which was added to the statute in 1974 (L. 1974, ch. 576 §12), allows owners to apply for a "unique and peculiar" rent increase if ¿ and only if ¿ the apartment in question became stabilized by virtue of the ETPA:

The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four may . . . file with the commissioner an application for adjustment of the initial 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 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.

KSLM

The owner in *KSLM* constructed three Mitchell-Lama apartment buildings in 1968. Because of the 1968 construction date, the apartments would have been subject to the RSL-69 but for their Mitchell-Lama status. The owner withdrew the buildings from Mitchell-Lama in March of 1998, whereupon the buildings became rent stabilized. The last Mitchell-Lama rents for each apartment became the "initial regulated rent" pursuant to Rent Stabilization Code §2521.1(j).

The KSLM owner, however, now faced a dilemma. Although it was receiving the same rents under rent stabilization as it had under Mitchell-Lama, the owner had lost two major benefits when it exited the Mitchell-Lama program: (1) partial real estate tax exemptions, and (2) long-term, low-interest government mortgage loans. Thus, the owner's income from the property remained the same, but its expenses increased dramatically.

Accordingly, the owner applied to DHCR for unique and peculiar rent increases under RSL §26-513(a) for all of its stabilized apartments. The owner established that average stabilized monthly rents for studio, one-bedroom, two-bedroom and three-bedroom apartments in its buildings were $267, $333, $407 and $522, respectively, whereas average monthly rents for similarly situated apartments, were, respectively, $1,000, $1,600, $2,500 and $3,600.

DHCR Denies Applications

In orders issued on Feb. 18, 2000, DHCR's Rent Administrator ("RA") denied the owner's rent increase applications, holding that the buildings, constructed in 1968, necessarily became stabilized under the RSL-69. DHCR's commissioner affirmed the RA's orders on Jan. 25, 2001, stating:

The Commissioner finds that if the subject units had not been regulated under the PHFL, they would have been subject to regulation under the RSL of 1969 on that local law's effective date, as the buildings met all of the requirements (e.g., containing six or more units) for jurisdiction under the RSL of 1969. Once the exemption provided for in the RSL of 1969 no longer applied, the buildings became subject to the RSL by virtue of the RSL of 1969 and not the ETPA.

In the proceedings before the commissioner, the owner had raised an additional argument based upon the Vacancy Decontrol Law ("VDL") (L. 1971, ch. 371). The VDL originally provided that all apartments vacated after June 30, 1971 would be free of rent regulation. Three years later, however, L. 1974, ch. 576, §2 amended the VDL to provide that such apartments, whether rent controlled or rent stabilized, would be picked up by the ETPA. Thus, the owner asserted, 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 unique and peculiar rent increases.

The commissioner, however, rejected the owner's argument:

The fact is that the subject accommodations were not subject to the RSL between June 30, 1971 and June 30, 1974, therefore none of them could be deemed removed from regulation under the RSL based on a vacancy during that period.

The Supreme Court Affirms

In a June 4, 2003 ruling, the New York County Supreme Court (Abdus-Salaam, J.) affirmed DHCR's order, holding that because the buildings were built in 1968 ¿ squarely within the RSL-69's 1947-1969 window period ¿ the buildings became subject to stabilization by virtue of that statute once they left Mitchell-Lama regulation. The court rejected the owner's VDL argument, holding: "[a]s is pointed out by respondent, the KSLM units were not subject to the RSL between June 30, 1971 and June 30, 1974, thus vacancies in those units did not result in deregulation and there was no need for the ETPA to apply to those units to place them again under a regulatory scheme."

The Appellate Division Reverses

In an order dated Feb. 26, 2004, the Appellate Division, First Department reversed, holding that the owner was entitled to apply for unique and peculiar rent increases for all the apartments in its buildings.[2] The Appellate Division ruled that because the buildings were previously exempt from the RSL-69 due to Mitchell-Lama coverage through 1998, they necessarily became subject to stabilization by virtue of the ETPA. The court also adopted the owner's argument that any and all apartments vacated after June 30, 1971 were ETPA units:

The DHCR found that because of KSLM's participation in the Mitchell-Lama program, those units that became vacant between June 30, 1971 and June 30, 1974 (the window in which the Vacancy Decontrol Law applied prior to the enactment of the ETPA) were exempt from the RSL and were not deregulated, and thus there was no need to apply the ETPA to those units. Yet, as KSLM points out, DHCR'S order is based on the inherently contradictory reasoning that apartments in the KSLM buildings are now subject to RSL jurisdiction to the exclusion of ETPA jurisdiction, but not subject to the RSL for purposes of vacancy deregulation. Thus, in light of such contradictory logic, DHCR's determination is irrational.[3]

The Court of Appeals Modifies

On June 14, 2005, the Court of Appeals modified the order of the Appellate Division. The Court first held that DHCR was correct in holding that these 1968 buildings became stabilized by virtue of the RSL-69:

These are pre-1969 buildings, which, if they had not been Mitchell-Lama buildings, would have been regulated under the 1969 law, and would not have needed the ETPA to bring them under stabilization. The 1969 law . . . exempts multiple dwellings that are 'subject to rent regulation under the private housing finance law . . . .' We agree with DHCR that a building no longer subject to rent regulation under the PHFL loses its exemption under the statute and becomes subject to rent stabilization. Thus, petitioner's buildings would become subject to stabilization under the 1969 law, even if the ETPA had never been enacted.

The Court of Appeals also rejected the owner's contention that under the Urstadt Law (L. 1971, ch. 372), which forbade the City of New York (as opposed to the State of New York) from subjecting to rent regulation apartments that were not rent regulated on July 1, 1971, necessarily barred the buildings from RSL-69 status:

At the time of the Urstadt Law's enactment, the RSL was the default rent stabilization regulatory scheme. Halting its application to exempt units whose expirations were certain to occur would read too much into the Urstadt Law in that the Legislature was attempting to end rent stabilization in New York City. This simply was not the case.

The Court of Appeals, however, agreed that under the VDL, as amended in 1974, all apartments in the KSLM buildings vacated after June 30, 1971 became ETPA units:

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 'housing 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.

The KSLM owner has advised that of the 418 apartments at the KSLM buildings, only about 60 have been continuously occupied since June 30, 1971. Thus, the Court of Appeals allowed the owner to apply for unique and peculiar rent increases for 85 percent of the apartments in its buildings, a substantial turnaround from DHCR's earlier ruling that the owner was not allowed to apply at all.

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Endnotes:

1. N.Y.L.J. June 15, 2005, at 19, col 1.

2. 6 A.D.3d 28, 772 N.Y.S.2d 660 (1st Dept., 2004).

3. 6 A.D.3d at 39.
