The 'Gersten' Ruling: Some Clarification Post-'Roberts'

Warren A. Estis and Jeffrey Turkel, partners at Rosenberg & Estis, analyze *Gersten v. 56 7th Ave LLC*, where the First Department addressed some of the issues that *Roberts v. Tishman Speyer Properties, L.P.* left unresolved, including retroactivity, statute of limitations, and the effect of final and binding DHCR orders of deregulation that were issued pre-*Roberts*.

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It has been widely observed that the Court of Appeals' ruling in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009), raised more questions than it answered. Even the majority in *Roberts* acknowledged this, noting that the full effect of its decision depended "on issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants."[1] The majority added that "if the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief."[2] Although the Legislature amended and extended the Rent Stabilization Law pursuant to L. 2011, ch. 97, effective June 24, 2011, the Legislature did not address any of the issues that *Roberts* had raised.

In its Aug. 18, 2011 decision in *Gersten v. 56 7th Ave LLC*, 2011 WL 3611920, 2011 N.Y. Slip Op. 06300 (A.D. 1st Dept.), the Appellate Division, First Department addressed some of the issues that *Roberts* left unresolved, including retroactivity, statute of limitations, and the effect of final and binding Division of Housing and Community Renewal (DHCR) orders of deregulation that were issued pre-*Roberts*.

'Gersten'

The plaintiffs in *Gersten* first moved into their rent stabilized West Village apartment in 1979. By 1995, they rented three apartments in the building, which they had combined into a single unit with the owner's consent. The building started receiving J-51 benefits in 1990 under the tax incentive program for the renovation of multiple unit residential buildings. Those benefits ultimately expired on June 30, 2009.

In 1998, the former owner filed a luxury deregulation petition with the Division of Housing and Community Renewal (DHCR), asserting that the rent for the combined apartments was more than $2,000 per month, and asking DHCR to determine whether the plaintiffs' income exceeded the $175,000 threshold for high income luxury deregulation. In September of 1999, DHCR issued an order deregulating the combined apartments. The plaintiffs did not appeal that order, which then became final and binding.

Or did it? When the Court of Appeals issued its ruling in *Roberts* on Oct. 22, 2009, it became obvious that DHCR's 1999 order of deregulation had been "incorrectly" decided; the building was receiving J-51 benefits at the time that DHCR issued its order, thus making the apartment, under the 2009 *Roberts* decision, ineligible for luxury deregulation.

Following *Roberts*, the plaintiffs commenced an action seeking a declaration that notwithstanding DHCR's 1999 deregulation order, their combined apartment was in fact rent stabilized. The Supreme Court (York, J.) declared that the apartments were exempt, holding that notwithstanding *Roberts*, the 1999 deregulation order was final and binding, and "the court must respect the decision of DHCR in this type of proceeding." The plaintiffs then appealed to the Appellate Division, First Department.

All of these facts set up an intriguing issue: Would *Roberts* undo the 1999 deregulation order, or would that order—technically incorrect but unappealed—collaterally estop the plaintiffs from arguing years later that their apartment was in fact rent stabilized.

Finality

The Appellate Division, in a unanimous decision authored by Justice Dianne T. Renwick, held that the plaintiffs were collaterally estopped from challenging DHCR's 1999 deregulation order. The Court ruled that the issue of whether the apartment was rent stabilized had been squarely and fully litigated in the luxury deregulation proceeding, and that the plaintiffs could have, but did not, raise at that time the defense that ultimately succeeded in *Roberts*:

The receipt of J-51 benefits is a matter of public record. In addition, landlords have no affirmative duty to provide such written disclosure except to tenants who are subject to rent stabilization *solely* because of the receipt of J-51 benefits, which is not the situation here. In any event, DHCR made public its policy on the issue—namely that J-51 benefits had no bearing on a landlord's right to apply for luxury decontrol—when it issued an advisory opinion in 1996, which it incorporated into the RSC in 2000. Thus, since it appears that nothing prevented the plaintiffs from raising the J-51 benefits issue before DHCR, plaintiffs are now estopped from relitigating the issue 11 years later. (Internal citations omitted, italics in original).

The court then addressed the general principle of administrative law, embodied in §2527.8 of the Rent Stabilization Code (RSC), that an administrative agency may revoke a prior order issued as a result of illegality, irregularity in a vital matter, or fraud. The court ruled that such factors were not present herein:

However, '[o]nce an administrative agency has decided a matter, based upon a proper factual showing in the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final.' Although, as noted above, a remand may be appropriate where the agency has made the type of substantial error that constitutes an 'irregularity in vital matters,' a final administrative determination cannot be reopened to give a party an opportunity to make a new argument based on the existing administrative record. That is simply not one of the recognized exceptions to the principle of administrative finality. Thus, having failed to raise the new legal challenge to the former owner's initial application with DHCR, that theory cannot be made the basis of an administrative reconsideration eleven years later.

Retroactivity

In addition to arguing administrative finality, the owner in *Gersten*, argued that *Roberts* should only be applied prospectively. The court analyzed this issue under the three-pronged test set forth in *Gurnee v. Aetna Life & Cas. Co.*,[3] which the court summarized as follows:

'First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied…or by deciding an issue of first impression whose resolution was not clearly foreshadowed.' Second, a court should consider the history of the prior rule and examine the impact of retroactive application on the rule's purpose. Third, any inequity that would result from retroactive application should be considered. (Internal citations omitted).

The Appellate Division held that the facts in *Gersten* did not satisfy even the first prong of the *Gurnee* test, writing:

Although *Roberts's* interpretation of the statute is inconsistent with regulations promulgated by DHCR, the court has not enunciated a new principle of law. Instead, as in *Gurnee*, the decision in *Roberts* was based on a pure statutory analysis, 'dependent only on [an] accurate apprehension of legislative intent.' As such, *Roberts* did not establish a new legal principle, but rather 'merely construed a statute that had been in effect for a number of years.' (Internal citations omitted, material in brackets in original).

The Appellate Division's ruling that *Roberts* should be applied retroactively was in accord with the June 1, 2011, decision of the Appellate Term, First Department in *72 Realty Assocs. v. Lucas*.[4] In that case, The Appellate Term, citing *Gurnee*, held that *Roberts* did not constitute the creation of a new legal principle.

Statute of Limitations

The owner in *Gersten* also argued that the plaintiffs' challenge to the deregulated status of the apartments was tantamount to a claim for rescission of the 1999 deregulated lease, and was thus barred by the six-year statute of limitations set forth in CPLR 213 (2). The court rejected this claim, finding that the landlord-tenant relationship in *Gersten* was primarily governed by statute, not by any written agreement that could be subject to a claim of rescission. The court went on to rule that the more general four-year statute of limitations on rent overcharges did not apply where, as in *Gersten*, the issue was the stabilization status of the apartment, not its legal rent:

In our view, imposing [a statute of limitations] on determining rent regulatory status subverts the protection afforded by the rent stabilization scheme described above. Indeed, except as to limit rent overcharge claims, the legislature has not imposed a limitations period for determining the rent regulatory status of an apartment. (Material in brackets supplied).

Dicta?

The dispositive issue in *Gersten* was neither retroactivity nor the statute of limitations, but was in fact administrative finality. Thus, once the court ruled that the plaintiffs' regulatory status was governed by the unappealed 1999 order of decontrol, there was no need for the court to reach any of the other issues on appeal. Some might therefor consider the Appellate Division's rulings on retroactivity and statute of limitations to be dicta.

Ultimately, the dicta question may be a moot point in two respects. First, even if the Appellate Division's additional rulings qualify as dicta, the court has no doubt expressed its view on these matters, and lower courts will follow accordingly. Second, industry observers believe that most of the important post-*Roberts* issues will ultimately be decided by the Court of Appeals. Thus, whether the retroactivity and statute of limitations issues reach the Court of Appeals in this case or in some other case, the Court of Appeals is expected to have the last word. The Court of Appeals, of course, would not be bound by a ruling of the Appellate Division, dicta or not.

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Endnotes:

1. 13 N.Y.3d at 287.

2. Id.

3. 55 N.Y.2d 184, 448 N.Y.S.2d 145 (1982).

4. 32 Misc. 3d 47, __ N.Y.S.2d __ (App. Term 1st Dept. 2011).
