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RENT REGULATION

Luxury Decontrol: Is a J-51 Notice Required?


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Over the past several years, courts have struggled with the issue of whether an owner, in order to obtain high-rent high income luxury deregulation in a building that formerly received J-51 benefits, must first serve the tenant with a so-called J-51 notice (also known as a J-51 rider). This article will survey the relevant case law over the last four years.

Building Types

There are two types of rent-stabilized buildings that can receive J-51 benefits. The first type, which we will refer to as "Type A" buildings, are buildings that were first subject to rent stabilization for reasons that had nothing to do with the receipt of J-51 benefits, but received J-51 benefits thereafter, usually for minor work such as a new boiler/burner. The buildings at Stuyvesant Town and Peter Cooper Village are typical examples of Type A buildings.

The second type ("Type B" buildings) are buildings that were otherwise exempt from rent stabilization—such as buildings substantially rehabilitated as family units on or after Jan. 1, 1974—but became subject to stabilization solely because the owner took J-51 benefits in connection with the creation of the new units.

'Roberts'

When luxury deregulation was first enacted in 1993, it was widely understood that units in Type B buildings would never be subject to luxury deregulation. This is because the statute barred the luxury deregulation of "housing accommodations which became or become subject to" rent stabilization by virtue of receiving J-51 benefits. Conversely, it was widely accepted that units in Type A buildings were eligible for luxury deregulation, as these housing accommodations were in buildings that were first subject to stabilization for reasons other than the receipt of J-51 benefits.

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Peter Cooper Village and **Stuyvesant Town** buildings

In *Roberts v. Tishman Speyer*, 13 NY3d 270, 286 (2009), the Court of Appeals held that luxury deregulation was barred in both Type A and Type B buildings while benefits were being received. The court held that from the Legislature's standpoint, there was no difference between the two:

> Here, we conclude that defendants' interpretation of the exception to luxury decontrol for units that 'became or become' subject to rent stabilization 'by virtue of receiving' J-51 benefits conflicts with the most natural reading of the statute's language. Defendants essentially read these words as recognizing two categories of J-51-benefitted buildings—those, like the properties that were rent stabilized prior to receiving J-51 benefits, for which luxury decontrol became available in 1993; and those that only became rent stabilized as a condition of receiving J-51 benefits, for which luxury decontrol is unavailable (at least during the benefit period). But there is no language anywhere in the statute delineating these two supposed categories, and we see no indication that the Legislature ever intended such a distinction…

J-51 Notice Cases

Ironically, post-Roberts jurisprudence not only acknowledges the existence of these "two supposed categories," but has established distinct rules relating to both. These disputes concern RSL §26-504(c), which provides that once J-51 benefits expire, units in J-51 buildings will become automatically decontrolled if (1) the tenant vacates; or (2) the tenant received in each lease and each renewal thereof a notice "informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit…."

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Such notices, of course, could only be served on tenants in Type B buildings, as it was not the case that the mere expiration of J-51 benefits would deprive rent stabilized tenants in Type A buildings of their stabilized status. Thus, in Type A buildings, tenants would remain stabilized after the expiration of J-51 benefits, unless the owner successfully deregulated their apartments based on high-rent, high-income deregulation.

Inexplicably, question then arose as to whether, in Type A buildings, the service of a J-51 notice was a necessary predicate to high-rent, high income luxury deregulation. The first appellate case to address this issue was *73 Warren Street v. New York State Div of Housing and Community Renewal*, 96 AD3d 524 (1st Dept 2012). *73 Warren* concerned a Type B building that was unregulated until 1977, at which time the owner received J-51 benefits. The First Department correctly ruled that luxury deregulation was not available in Type B buildings, but went on to hold:

> …it is plain from the statue that the Legislature simply intended to provide that a building that is already regulated when it begins to receive J-51 benefits continues to be regulated for the original reason when the tax benefits expire and the apartment is vacated *or a non-vacating tenant receives the notice described in* [RSL §26-504(c)]. (italics and material in brackets supplied).[1]

Of course, "a building that is already regulated when it begins to receive J-51 benefits" is a Type A building. As such, it would make no sense to serve a J-51 notice on a tenant in such a building, as it would not be the case that such tenant would lose his or her stabilized status simply because J-51 benefits expired. Indeed, in the earlier case of *Gersten v. 56 7th Ave*, 8 AD3d 189, 194 (1st Dept 2011), the First Department clarified that the J-51 notice only had to be served upon tenants in Type B buildings:

> Where the building only became subject to rent regulation due to its participation in the J-51 program, RSL [Administrative Code] § 26-504(c) expressly provides that once the tax benefits terminate, the units may be deregulated in one of two ways. One way is for the owner to include a J-51 rider in the lease informing the occupant that the apartment will be deregulated upon the termination of the benefit. If the lease does not contain the requisite notice, occupied units remain subject to rent stabilization until a vacancy occurs after the expiration of the J-51 benefits. (material in brackets in original, internal citations omitted).

The First Department seemingly clarified matters in *72 Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept 2012), wherein it stated in a footnote:

> Rent Stabilization Law §26-504(c) provides in its last clause that if the dwelling unit would have been subject to rent stabilization in the absence of J-51 benefits, the unit, upon the expiration of the benefits, shall continue to subject to regulation as if that subdivision had never applied. Thus, the notice requirement plainly does not apply to dwellings, such as the one here, that were subject to rent regulation for a reason other than the receipt of J-51 benefits.…

In *Schiffren v. Lawlor*, 101 AD3d 456 (1st Dept 2012), decided just one week after *72A Realty*, the First Department held that in a Type A building, an owner is free to seek luxury deregulation once J-51 benefits have expired. The court, however, implied that a J-51 notice might be a predicate to such deregulation:

> While there is a collateral issue regarding whether tenant vacatur or notice in the lease is necessary to trigger reversion of a dwelling unit to the original rent-regulation regime, petitioner does not advance, and we do not decide, this issue on appeal. We only hold that luxury decontrol is not per se prohibited once the J-51 benefits expire on a dwelling unit that was subject to rent regulation before the tax benefits were obtained.

DHCR has ruled in no uncertain terms that once J-51 benefits expire in a Type A building, luxury deregulation can be effectuated without the service of a J-51 notice.

'Seamans' and 'Bramwell'

Notwithstanding the caselaw described above, DHCR has ruled in no uncertain terms that once J-51 benefits expire in a Type A building, luxury deregulation can be effectuated without the service of a J-51 notice. In *Matter of Seamans*, DHCR Adm. Rev. Dckt. No. CO-410017-RT, issued Jan. 20, 2015, DHCR rejected tenant's J-51 notice defense:

> Furthermore, the Commissioner notes that, pursuant to Section 26-504(c) of the RSL, the specified lease notice requirements pertaining to the automatic deregulation of an apartment upon the expiration of the J-51 tax benefits are not applicable to the subject apartment as they only apply to apartments, unlike the subject apartment, which became subject to rent stabilization solely as a result of the receipt of J-51 benefits. Therefore, since the subject apartment was rent stabilized prior to the receipt of the J-51 tax benefits, the fact that the tenant was not provided with the specified lease notices concerning the expiration of the J-51 benefits is not relevant and so does not preclude the subject apartment from qualifying for luxury deregulation, and the tenant's assertions concerning the absence of the specified lease notices are without merit.

Justice Alexander W. Hunter thereafter affirmed DHCR's order in *Seamans v. New York State Div of Housing and Community Renewal,* 2015 WL 7008053 (Sup. Ct. N.Y. Co.), holding that the "notice requirement is not applicable to dwellings that were subject to rent regulation for a reason other than receipt of the J-51 tax benefits."

DHCR ruled to the same effect in *Matter of Bramwell*, DHCR Adm. Rev. Dckt. No. CT-410019-RT, issued Feb. 4, 2015. Justice Joan B. Lobis thereafter affirmed DHCR's order in *Bramwell v. New York State Div of Housing and Community Renewal*, Sup. Ct. N.Y. Co. Index No. 100606/15 [n.o.r.], holding that the tenant's "notice" defense:

> …lacks merit because, as respondent and intervenor-respondent note, a building that was rent-stabilized prior to its receipt of J-51 benefits remains rent-stabilized and subject to luxury decontrol after the benefits expire. Notice is only required for apartments that are regulated by virtue of receiving tax benefits. (internal citations omitted).

Thus, for now, it appears that luxury deregulation is available in Type A buildings where J-51 benefits have expired, and that the service of a J-51 notice is not a predicate to an owner seeking high-rent, high-income luxury deregulation.

1. 96 AD3d at 529.