New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 88
WEDNESDAY, NOVEMBER 5, 2014

RENT REGULATION

'Ram I v. DHCR': Much Ado About Nothing?


By **Warren A. Estis**
And **Jeffrey Turkel**

In *Ram I, v. DHCR*, decided on Oct. 7, 2014, the Appellate Division, First Department unanimously held that once a building receives J-51 benefits, owners are forever barred from seeking to luxury deregulate rent-controlled apartments, even after J-51 benefits expire. In *Schiffren v. Lawlor*, 101 A.D.3d 456 (1st Dept. 2012), the First Department reached the opposite conclusion with respect to rent-stabilized apartments.

Ram I is the latest in a series of appellate losses for landlords following the 2009 Court of Appeals decision in *Roberts v. Tishman*, 13 N.Y.3d 270 (2009). The good news for landlords, however, is that the number of rent-controlled apartments actually affected by *Ram I* is miniscule, at most numbering in the hundreds.

In this article, we will discuss *Ram I*, and explain why the First Department held that with respect to most rent-stabilized apartments, a landlord regains the right to obtain luxury deregulation once J-51 benefits expire.

Rent Control

The apartment in *Ram I* is subject to the City Rent Law (CRL), i.e., rent control. CRL §26-403(e)(2)(j) governs the high income luxury deregulation of rent-controlled apartments. (Notably, there is no vacancy luxury deregulation under rent control, as a vacancy will, irrespective of the rent level, result in automatic decontrol.) Section 26-403(e)(2)(j) contains an exception to luxury deregulation, which reads as follows:

> Provided...that this exclusion shall not apply to housing accommodations which became or become subject to this law by virtue of receiving tax benefits pursuant to section four hundred eighty-nine of the real property tax law [i.e., J-51]" (material in brackets supplied).

The good news for landlords is that the number of rent-controlled apartments actually affected by 'Ram I' is miniscule, at most numbering in the hundreds.

'Ram I'

The rent-controlled apartment in *Ram I* has been continuously occupied by Phyllis Berk since 1958, and was presumably rent controlled before that. Some 36 years later, in 1994, the owner obtained modest J-51 benefits for the building, which benefits expired in 2005. The apartment was thus rent controlled before, during, and after the J-51.

In 2008, the owner sought to luxury deregulate the rent-controlled apartment. It was undisputed that the tenant's income was above the luxury deregulation threshold. DHCR issued an order of deregulation in 2010, but reversed itself in an October, 2011 order, finding that CRL §26-403(e)(2)(j) bars luxury deregulation for apartments which "became or become" subject to rent control by virtue of receiving J-51 benefits. DHCR held that although this apartment was rent controlled at the time J-51 benefits were received, such receipt caused the building to "become" subject to rent control a second time. This concept of a "second" layer of rent regulation being added by J-51 is derived from *Roberts*, and is discussed infra.

In the subsequent Article 78 proceeding, New York County Supreme Court Justice Geoffrey D. S. Wright reversed DHCR,[1] finding that DHCR's determination was written with a "Delphic imprecision" which constituted a "misreading and over extension" of *Roberts*. The court, however, did not analyze the various statutes, and simply ruled that deregulation was available because it was undisputed that (1) the tenant's income was over the luxury deregulation threshold, and (2) the J-51 benefits had expired before the owner sought luxury deregulation.

The First Department

On appeal, the First Department reversed the Supreme Court. Analyzing the "became or become" language in CRL §26-403(e)(2)(j), the court, in an opinion authored by Justice John W. Sweeny, wrote:

> The parties agree that this provision does not explicitly prescribe any time limitation for the applicability of the exemption. Rather, it simply provides that a housing unit qualifies for the exemption from luxury deregulation when it became subject to 'this law' by receiving J-51 benefits (the 'became or become clause').

WARREN A. ESTIS *is a founding member at Rosenberg & Estis.* JEFFREY TURKEL *is a member at the firm.*

That this apartment was subject to rent control before receiving J51 benefits does not prevent it from 'becoming' subject to regulation upon receiving J-51 benefits. As the Roberts court noted, albeit in the context of rent stabilization, an apartment can become subject to rent regulation for a second time when the building receives J-51 benefits" (citations omitted).

The court concluded:

Pursuant to the statute, the unit became subject to rent control 'for a second time' upon the advent of J-51 benefits, and nothing in Section 26-403(e)(2)(j) restored the availability of luxury deregulation after the expiration of J-51 benefits" (internal citations omitted).

As noted, the "second layer" of rent regulatory status derives from *Roberts*, where the Court of Appeals majority adopted the First Department's analysis of the words, found in the parallel luxury deregulation provision under the Rent Stabilization Law, "which became or become subject to this law by virtue of receiving tax benefits." The Court of Appeals in *Roberts* wrote:

> According to the Appellate Division, the words 'by virtue of' did not confine the exclusion from luxury deregulation to buildings that became subject to the RSL only because they received J-51 benefits; DHCR's interpretation of this provision was not entitled to deference because a pure issue of statutory reading and analysis was involved; if the Legislature had intended the provision to mean 'solely by virtue of,' as DHCR concluded, it would have used the word 'solely'; its interpretation was 'more consistent with the overall statutory scheme,' which made no overt distinction between properties 'subject to' the RSL solely as a result of the owner's receipt of J-51 benefits and those 'subject to' the RSL before receiving such benefits…
>
> ***
>
> Contrary to PCV/ST's and MetLife's argument, there is nothing impossible, or even strained, about reading the verb 'become' to refer to achieving, for a second time, a status already attained."[2]

In *Roberts*, Justice Susan P. Read, writing for the dissent, disagreed with the majority's premise that one can "become" something twice:

> As defendants point out, the words 'became' or 'become' mean to 'pass from a previous state or condition and come to be' or to 'take on a new role, essence, or nature.' The definition of 'subject' is 'one that is placed under the authority, dominion, control or influence of'; and the parties do not dispute that 'by virtue of' means 'because of' or 'by reason of.' Thus, buildings that 'became or become subject to [RSL] by virtue of' receiving J-51 tax benefits pass from their former state (unregulated) into a new state (rent-stabilized) because of their owners' receipt of these benefits. That did not happen here since the apartment buildings comprising Peter Cooper Village and Stuyvesant Town had been rent regulated since at least 1974, 18 years before any building in either complex is alleged to have received J-51 benefits. They did not 'become' rent stabilized by virtue of receiving J-51 benefits; they were already rent stabilized" (internal citations omitted).[3]

The dissent, obviously, did not carry the day in *Roberts*, thus explaining why in *Ram I*, the subject rent-controlled building 'became' subject to rent control again when the owner received J-51 benefits in 1994.

In "Ram I," the First Department held that with respect to most rent-stabilized apartments, a landlord regains the right to obtain luxury deregulation once J-51 benefits expire.

'Schiffren'

As discussed supra, the First Department ruled in *Schiffren* that for most rent stabilized apartments (i.e., those in buildings that did not become subject to rent stabilization solely by virtue of receiving J-51 benefits), an owner's right to obtain luxury deregulation resumes once J51 benefits expire. The question that arises: how did rent stabilized apartments escape the unhappy fate of the rent-controlled apartment in *Ram I*?

The answer is RSL §26-504(c), a provision which has no analog under the CRL. That section, added pursuant to Local Law No. 60 of 1975, states that all apartments in buildings receiving J-51 benefits where the J-51 application was filed after Jan. 1, 1976 (the effective date of the Local Law) shall be subject to rent stabilization. The section further states that once J-51 benefits expire (at least in those buildings that were rent stabilized before the receipt of such benefits), such apartments shall:

> …continue to be subject to this chapter or the emergency tenant protection act of nineteen hundred seventy-four to the same extent and in the same manner as if this subdivision had never applied thereto.

In other words, once benefits expire, these rent-stabilized apartments are treated just like any other rent-stabilized apartment, and are thus eligible for luxury deregulation. Thus, in *Ram I*, the court cited RSL §26-504(c) when explaining why rent-controlled and rent-stabilized apartments would not be treated the same:

> Administrative Code §26-504(c), which clearly mandates the resumption of the rent-stabilized status the unit was subject to prior to receiving J-51 benefits, has no counterpart in the RSL.

Effect

The effect of *Ram I* is minimal. There are approximately 20,000 rent-controlled apartments left in New York City. Of these, only a tiny percentage have rents over $2,500, the minimum threshold for luxury deregulation. Of those apartments, only a small percentage are occupied by tenants whose incomes are $200,000 per year, the minimum necessary for luxury deregulation.

Thus, while Berk was able to avoid luxury deregulation in *Ram I*, very few of her fellow rent controlled tenants will be able to benefit from the First Department's ruling.

1. *Ram I, LLC v. New York State Division of Housing and Community Renewal*, 2012 WL 11914294 (Sup. Ct. New York County).
2. 13 NY3d at 283-84, 286.
3. Id. at 289.