New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 2
WEDNESDAY, JANUARY 4, 2017

RENT REGULATION

The 'Altman' Conundrum (Continued)


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

In *Altman v. 285 W. Fourth, LLC*, 127 AD3d 654 (1st Dept 2015), the First Department held that to effectuate luxury deregulation of an apartment that became vacant between 1997 and 2011, the legal regulated rent had to be above the statutory deregulation threshold at the time the outgoing tenant vacated. The First Department held that it was not enough for the legal rent to be above the statutory threshold at the time the incoming tenant moved in.

In *Aimco 322 E. 61st Street v. Brosius*, 50 Misc3d 10 (App Term 1st Dept. 2015), Appellate Term called *Altman* into question. In *233 E. 5th St. LLC v. Smith*, decided on Dec. 8, 2016, Appellate Term reiterated its position.

This article will examine how the Appellate Division and the Appellate Term have arrived at differing interpretations of the same statutory scheme.

The Statute

Pursuant to the Rent Regulation Reform Act of 1993 (L 1993, ch 253), the Legislature amended the Rent Stabilization Law to add new Section 26-504.2. That section allowed for vacancy deregulation of apartments which rented for $2,000 or more per month between July 7, 1993 and Oct. 1, 1993, and which became vacant on after July 7, 1993. The New York City Council thereafter amended the statute to eliminate the various dates, such that an apartment could be vacancy deregulated if it rented for at least $2,000 per month and became vacant on or after April 1, 1994.

In 1997, the city council took a dramatic step. It amended the statute to provide that with respect to vacancies occurring on or after April 1, 1997, vacancy deregulation would only apply if the outgoing tenant actually paid a legal rent of $2,000 or more. Shortly thereafter, the New York State Legislature amended Section 26-504.2 pursuant to the Rent Regulation Reform Act of 1997 (L 1997, ch 116). The Legislature retained the city council's restrictive 1997 language, but added that the definition of "housing accommodations" shall not include "any housing accommodation which is or becomes vacant on or after the effective date of the Rent Regulation Reform Act with a legal regulated rent of $2,000 or more per month."

> The apparent split of authority will not be resolved until the issue comes before the Appellate Division.

In June of 2011, the Legislature amended RSL Section 26-504.2 to read as follows:

> 'Housing Accommodations' shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven *and before the effective date of rent act of 2001* and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month; or for any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 *and before the effective date of the rent act of 2011, with a legal regulated rent of $2,000 or more per month* (material added by L 2011, ch 97, pt B, §12 in emphasis).

The statute, as amended, consisted of two distinct clauses, separated by the word "or." The first clause states that for any housing accommodation that became vacant between April 1, 1997 and June 24, 2011, vacancy deregulation will only be effective where the rent is $2,000 or more per month at the time the outgoing tenant vacates. The second clause creates a different rule, stating that for apartments that became vacant between June 18, 1997 and June 24, 2011, vacancy deregulation will only attach where the rent was $2,000 or more per month at the time the incoming

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

tenant takes occupancy. The confusion was further exacerbated by the fact that with the exception of apartments that became vacant between April 1, 1997 and June 18, 1997, the two clauses covered the exact same 170.5 month period of time.

'Altman'

In *Altman*, the apartment in question was renting for $1,829 per month when the tenant vacated in 2005. Because the existing rent, when increased by the statutory vacancy allowance, exceeded $2,000 per month, the owner treated the apartment as luxury deregulated.

Supreme Court (Mills, J.), citing the second clause in Section 26-504.2, held that the apartment was exempt. In an opinion dated April 28, 2015, the First Department disagreed, relying on the first clause in Section 26-504.2:

> The motion court erred in dismissing plaintiff's complaint, and declaring that the apartment is not subject to the rent stabilization law. Although defendant was entitled to a vacancy increase of 20 percent following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000 (internal citations omitted).

Altman, however, seemingly contradicted two prior decisions. In *Jemrock Realty v. Krugman*, 13 NY3d 924 (2010), the Court of Appeals held that rent increases taken before the new tenant moved in, such as increases for individual apartment improvements, could "bring the legal rent above the luxury decontrol threshold." In *Roberts v. Tishman Speyer Props.*, 62 AD3d 71 (1st Dept. 2009), the First Department itself stated that vacancy deregulation attaches when "the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more."

'Curbeam'

The vacancy deregulation issue arose in *Curbeam v. 245 W. 51st Street Realty*, 2015 WL 9942151 (Sup. Ct. N.Y.Co.). In his July 17, 2015 decision, Justice Geoffrey Wright declined to follow *Altman*:

> The plaintiff rests her argument on the holding of the Appellate Division in the matter of *Altman v. 245 W. Fourth, LLC*, now three months old, which holds that the rent for the outgoing tenant must have reached $2,000.00, before the apartment can be deregulated.
>
> * * *
>
> However, the Altman decision…is in inherent conflict with the Appellate Division's own decision in *Roberts v. Tishman Speyer Properties*, which, in pertinent part reads: 'The high rental luxury decontrol provisions of the RRRA, as amended in 1997, now exclude housing accommodations …when…the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more' (internal citations omitted).

'Aimco'

In *Aimco*, a vacancy occurred in 2001. Post-vacancy increases pushed the rent above the deregulation threshold, and the landlord treated the incoming tenant as deregulated. In its November 12, 2015 decision, Appellate Term determined that there were triable issues as to the extent of individual apartment improvements. Notwithstanding, the court distinguished *Altman*, citing, among other things, the seemingly inconsistent rulings in *Jemrock* and *Roberts*. Refusing to focus on the first clause in RSL §26-504.2, Appellate Term relied on the second clause, which allows for luxury deregulation where the unit "is or becomes vacant…with a legal regulated rent of $2,000 or more per month."

The Appellate Division and the Appellate Term were now at odds.

'233 East Fifth Street'

The issue next arose in *233 East 5th Street LLC v. Smith*, a Civil Court case decided by Judge Jack Stoller on April 5, 2016. Stoller ruled for the tenant, citing *Altman*. Holding that "this Court does not lightly find that an Appellate Division decision was wrongly decided," Stoller ruled that the seemingly contradictory Roberts decision did not squarely consider the proper interpretation of the two overlapping clauses in RSL Section 26-504.2. With respect to *Aimco*, Stoller observed that the "Appellate Term is bound to follow the precedent set by the Appellate Division." Stoller added, "[t]he stubborn fact…is that the Appellate Division ruled the way that it did, and this Court is bound by the ruling of the Appellate Division."

Appellate Term, however, reversed, citing second clause in RSL Section 26-504.2, in addition to *Jemrock* and *Roberts*. The court also relied upon an executive memorandum of the Governor in connection with the passage of the RRRA of 1997, which stated:

Also repealed is a provision recently added by the N.Y. City Council that only allows consideration of the apartment's rent level at the time of the vacancy. The City Council's amendment had the effect of preventing rent increases that ordinarily take place after a vacancy—such as vacancy allowances and increases attributable to apartment improvements—from being considered in determining whether the $2,000 threshold was reached.

The apparent split of authority will not be resolved until the issue comes before the Appellate Division. Notably, the First Department in *Altman* denied the landlord's motion for leave to appeal to the Court of Appeals.