SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOHN R. DENZA, et al.,

Plaintiffs,

- against -

INDEPENDENCE PLAZA ASSOCIATES, LLC, and WB/STELLAR IP OWNER, L.L.C.,

Defendants.

Index No.: 117673/05

DECISION/ORDER

This is a declaratory judgment action brought by plaintiff-tenants for a determination as to the rent regulated status of their apartments at Independence Plaza North ("IPN"), a former Mitchell-Lama complex in lower Manhattan. Plaintiffs became tenants of vacant renovated units at IPN under fair market leases entered into after June 28, 2004 ("exit date"), the date on which IPN exited the Mitchell-Lama program. Plaintiffs contend that IPN was receiving J-51 tax abatement benefits at the time they became tenants, and that their units are therefore subject to the Rent Stabilization Law. Defendant-owners contend that the City retroactively terminated the benefits as of the exit date, and that plaintiffs' units never became subject to rent stabilization. Plaintiffs move for a preliminary injunction restraining defendants from commencing summary holdover proceedings against plaintiffs during the pendency of this action. Defendants cross-move for summary judgment dismissing the complaint.

It is undisputed that IPN was constructed in 1974 and was rent regulated under the Mitchell-Lama program pursuant to Article 2 of the New York State Private Housing Finance

Law ("PHFL"), commonly known as the Mitchell-Lama Law. In 1998, while IPN was rent regulated under the PHFL, it began to receive a J-51 tax abatement based on a qualifying major capital improvement. After 20 years, IPN exercised its option, pursuant to PHFL § 35 (2), to dissolve and exit the Mitchell-Lama program. Plaintiffs submit copies of records obtained from the New York City Department of Finance ("DOF") website, showing that J-51 abatements were initially granted in tax year 1998/1999, and that such benefits were granted, after IPN's June 28, 2004 exit from the Mitchell-Lama program, through tax year 2005/2006. (Ex. H to Ps.' Motion.) Plaintiffs also submit records from the same website describing March 29, 2006 as a "change date," with the "comment" that J-51 benefits were "terminated 6/28/04." (Ex. J to Ps.' Motion.) The issue in this action is the effect, if any, of the receipt and termination of the J-51 benefits on coverage of plaintiffs' apartments by the Rent Stabilization Law.

J-51 benefits are authorized and governed by the Real Property Tax Law ("RPTL"), the Administrative Code of the City of New York ("Administrative Code"), and the Rules of the City of New York. RPTL §489 (1)(a) authorizes municipalities to exempt from taxation increases in the assessed valuation of real property resulting from qualifying alterations or improvements. Administrative Code § 243 (formerly Administrative Code § J 51-2.5) is the local legislation that provides for tax exemptions for qualifying improvements pursuant to the RPTL. The Rules of the City of New York §§ 5-01 et seq. (28 RCNY) implement the local legislation. More particularly, Administrative Code § 11-243 (d)(2) makes J-51 benefits applicable to "any building or structure which is converted to a class A multiple dwelling or to any existing dwelling which is substantially rehabilitated, * * * provided that the rents subsequent to conversion or substantial rehabilitation shall not exceed such amount as may be fixed" pursuant

to enumerated rent regulation, including regulation pursuant to the PHFL and rent stabilization. 28 RCNY § 5-03 (f) requires a building receiving J-51 benefits to be subject to rent regulation during the period of receipt of such benefits. Under this section, dwelling units in the building may be subject to any of the enumerated alternative forms of rent regulation – namely, the Rent Control Law, the Rent Stabilization Law, the Private Housing Finance Law, any federal law providing for rent supervision or regulation by any federal agency, and the Emergency Tenant Protection Act of 1974.

Here, it is undisputed that IPN qualified for receipt of J-51 benefits starting in 1998 by virtue of the fact that IPN units were rent regulated under Article 2 of the Private Housing Finance Law as a Mitchell-Lama project; and there is no claim by plaintiffs that the receipt of J-51 benefits while IPN remained in the Mitchell-Lama program subjected IPN units to rent regulation under the Rent Stabilization Law. The parties' agreement ends here.

As a threshold matter, they dispute even whether defendants continued to receive J-51 benefits after the Mitchell-Lama exit date. Relying on the Department of Finance website documents, plaintiffs contend that defendants unquestionably received such benefits, although it appears that they were retroactively terminated. Relying on the same website documents, defendants assert that they never received J-51 benefits after the exit date. However, this position is a legal fiction based solely on defendants' claim that the benefits were retroactively terminated. Thus, defendants assert in their memorandum of law in opposition to plaintiffs' motion that "IPN's J-51 benefits were revoked nunc pro tunc to the Exit date by the City of New York. THUS, IPN NEVER RECEIVED ANY POST EXIT J-51 ABATEMENT." (Ds.' Memo. In Opp. at 4 [second sentence in bold type in original].) They later acknowledge, also in a

memorandum of law, that the DOF "carried" a J-51 credit on IPN's tax bills following its exit from the Mitchell-Lama program, but assert that the DOF retroactively removed the credits accruing on or after the June 28, 2004 exit date. (Ds.' Supp. Reply Memo. at 2-3.)

As defendants rely solely on the DOF website documents annexed to plaintiffs' moving papers, there is no competent evidence in the record of defendants' post-exit filings, if any, with the City regarding IPN's J-51 benefits, or of the orders, if any, that the City issued terminating the post-exit J-51 benefits. While defendants suggest that the post-exit benefits were terminated because they were "inadvertently" granted (see Ds.' Supp. Reply Memo. at 2-3), defendants fail to submit an affidavit on personal knowledge explaining the circumstances under which the post-exit J-51 benefits were granted to them or terminated by the City. [1]

Defendants' assertion that they never "received" J-51 benefits cannot be countenanced on this record. Any voluntary waiver of J-51 benefits as a means of avoiding rent regulation would be void. (See 28 RCNY § 5-03 [f][3][ii] ["Rent regulation shall not be terminated by the waiver or revocation of tax benefits."].) Thus, the circumstances under which the post-exit J-51 benefits

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[1]In opposing plaintiffs' motion, defendants submit a letter from IPN to the DOF, dated June 28, 2004, which by its terms gives notice pursuant to 28 RCNY § 3-14 (i)(12) of the dissolution of IPN effective as of June 28, 2004, and advises: "In connection with such dissolution, the Property shall forthwith be restored to a full taxpaying position effective as of the dissolution Date." However, defendants' affidavit fails to set forth the date on which this letter was sent. (Aff. Of Ofer Shaul [Chief Operating Officer of Ds.' Managing Agent], ¶ 9.) More importantly, the letter is silent as to J-51 benefits.

The Mitchell-Lama program provides certain tax exemptions as a means of encouraging the development of low and middle income housing. (See PHFL §§ 11, 33; KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal, 5 NY3d 303 [2005].) As 28 RCNY § 3-14 (i)(1) further makes clear, upon dissolution of a Mitchell-Lama project, the provisions of Article 2 of the PHFL become inapplicable, "and any tax exemption granted with respect to such project pursuant to [§ 33 of the Private Housing Finance Law] shall cease and terminate." [brackets in original]. There is no authority for defendants' contention that the above letter is anything other than a notice of IPN's ineligibility, as a result of its dissolution, for the tax benefits provided to Mitchell-Lama projects under the PHFL, as opposed to J-51 tax benefits received under the RPTL.

were granted and terminated is critical. The court should not determine what effect the receipt of such benefits – albeit, apparently only temporary – had on the rent regulated status of plaintiffs' units, in the absence of any competent evidence as to why the benefits continued to be granted post-exit for nearly two years, whether defendants knowingly or inadvertently received the benefits, how the benefits ultimately came to be terminated effective as of the exit date, and whether defendants repaid the taxes that were the subject of the post-exit J-51 credits.

As defendants correctly point out, the J-51 regulatory framework appears to contemplate that J-51 benefits will be terminated by the City of New York where the building ceases to be subject to the form of rent regulation that qualified it for receipt of the J-51 benefits. 28 RCNY § 5-07 (f) thus provides, with exceptions not here relevant, that the Commissioner of the Department of Finance or of the Department of Housing Preservation and Development "shall withdraw tax exemption and tax abatement granted to a building pursuant to the [RPTL] Act upon the happening of any of the following events: (3) The building ceases to be subject to the rent regulatory provisions of law set forth in § 5-03 (f)(1)." While it may ultimately prove to be the case that the post-exit award of J-51 benefits was simply the result of bureaucratic delay in reflecting that IPN had ceased to be subject to the PHFL regulation that had qualified it for the J-51 benefits, such a finding should be based on evidence, not on supposition based on a record that is both conspicuously and inexplicably silent as to the particular circumstances under which the J-51 benefits continued to be granted or were terminated.

In holding that defendants are not entitled to summary judgment on this record, the court rejects defendants' contention that even if IPN received J-51 benefits after its exit from the Mitchell-Lama program, such benefits could not as a matter of law have subjected plaintiffs'

units to regulation under the Rent Stabilization Law. In support of this contention, defendants rely on RPTL § §489 (7)(b)(2). This statutory provision authorized localities to adopt legislation providing that if a dwelling unit was subject to rent regulation on or before its effective date, June 19, 1985, as a result of receiving J-51 benefits, then the unit shall remain subject to regulation until the first vacancy after the J-51 benefits are no longer being received unless the leases of the tenant in occupancy have given the tenant notice that the unit will be deregulated at the end of the J-51 benefit period. Defendants argue that because IPN first received J-51 benefits after June 19, 1985, its receipt of the J-51 benefits does not subject it to rent stabilization under this RPTL provision. (See Ds.' Supp. Memo. of Law at 6.) Defendants also argue that this provision does not apply to IPN because it was not subject to rent regulation "as a result of" its receipt of J-51 benefits, but rather qualified to receive J-51 benefits because it was subject to rent regulation under the PHFL. (Id. at 11-13.)

By its terms, RPTL § 489 (7)(b)(2) applies only if J-51 tax benefits were received before its June 19, 1985 effective date. (See Walsh v Wusinich, 32 AD3d 743 [1st Dept 2006] [dictum].) While this provision is thus of limited application, defendants' arguments based upon the provision ignore that it is part of a larger regulatory scheme which extends rent stabilization coverage to other buildings receiving J-51 benefits. Although the rent laws have long been characterized as "an impenetrable thicket confusing not only to laymen but to lawyers" (LaGuardia v Cavanaugh, 53 NY2d 67, 70 [1981] [internal quotation marks and citation omitted] [superseded by statute on other grounds]), close review of the applicable provisions leaves no doubt that buildings, like IPN, which were constructed after January 1, 1974, may become subject to the Rent Stabilization Law after exiting the Mitchell-Lama program, as a result of the

subsequent receipt of J-51 benefits.[2]

Prior to the enactment of RPTL § 489 (7)(b)(2), the receipt of J-51 benefits subjected dwelling units in a building to rent regulation only during the period in which the J-51 benefits were received. (See L 1985, ch 288 § 6 [b][2].) The enactment of this provision authorized localities to provide enhanced regulatory protection (i.e., vacancy decontrol) to tenants in buildings which had first become subject to regulation as a result of receipt of the J-51 benefits prior to the June 1985 effective date. At the time the State legislature enacted RPTL § 489 (7)(b)(2), it also added a vacancy de-stabilization amendment to the Rent Stabilization Law, providing that rent stabilization would continue for dwelling units in J-51 buildings upon the expiration of J-51 benefits until the occurrence of the first vacancy after the benefits were received or upon expiration of the benefits if the leases of the tenant in occupancy had given the tenant notice that rent stabilization would expire at the end of the J-51 benefit period. (See L 1985, ch 288 § 7[c] as amended, amending Rent Stabilization Law of 1969 [Administrative Code] § YY51-3.0 [c], now § 26-504 [c].)[3]

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[2]It is undisputed that dwelling units in buildings constructed or rehabilitated before January 1, 1974 and regulated under the PHFL become subject to rent stabilization after the PHFL regulation is terminated. (See Rent Stabilization Code § 2520.11 [c].)

[3]RPTL § 489 (7)(b)(2) provides:

> Any dwelling unit subject to rent regulation on or before the effective date of this subparagraph [June 19, 1985] as a result of receiving a tax exemption or abatement pursuant to this section shall be subject to such regulation until the occurrence of the first vacancy of such unit after such benefits are no longer being received at which time such unit shall be deregulated or if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period; unless such unit would have been subject to regulation under the rent stabilization law of nineteen hundred sixty-nine or

Significantly, however, effective as of January 1, 1976, the Rent Stabilization Law has contained a provision extending rent stabilization coverage to dwelling units in a building receiving J-51 benefits, without regard to the date of receipt of such benefits. The first sentence of section 26-504 (c) thus provides that the Rent Stabilization Law shall apply to: "Dwelling units in a building or structure receiving the benefits of section 11-243 or section 11-244 [formerly J-51] of the code * * *, not owned as a cooperative or as a condominium [with exceptions not here relevant] and not subject to chapter 3 of this title [Rent Control]." (Loc L 1975, No 60, § 12 [adding this provision to former Administrative Code § YY51-3.0, the substantially identical predecessor of section 26-504 [c]].) This provision is subject to section

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the emergency tenant protection act of nineteen seventy-four.

The 1985 amendment to Rent Stabilization Law § 26-504 (c) provides in pertinent part:

> Upon the expiration or termination for any reason of the benefits of section 11-243 or section 11-244 of the code [J-51] * * * any such dwelling unit shall be subject to this chapter until the occurrence of the first vacancy of such unit after such benefits are no longer being received or if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period; provided, however, that if such dwelling unit would have been subject to this chapter or the emergency tenant protection act of nineteen seventy-four in the absence of this subdivision, such dwelling unit shall, upon the expiration of such benefits, continue to be subject to this chapter or the emergency tenant protection act* * *.

This amendment to Rent Stabilization Law § 26-504 (c) does not by its terms extend vacancy de-stabilization only to dwelling units in buildings that received J-51 benefits prior to June 19, 1985 or became subject to rent stabilization as a result of receipt of J-51 benefits. The Rent Stabilization Code, which implements the Rent Stabilization Law, does include a provision, section 2520.11 (o) (9 NYCRR), which more closely conforms to RPTL § 489 (7)(b)(2) by limiting vacancy de-stabilization to buildings originally made subject to regulation solely as a condition of receiving J-51 benefits. On this motion, the court need not reach the effect of these inconsistencies.

It is noted that RPTL § 489 (7)(b)(2) and Rent Stabilization Law § 26-504 (c) both expressly provide that a dwelling unit in a building that is otherwise subject to rent stabilization does not become de-stabilized upon the first vacancy after J-51 benefits terminate.

26-504 (a)(1)(b), which exempts from rent stabilization coverage dwelling units in a building subject to regulation under the PHFL. Sections 26-504 (a)(1)(b) and 26-504 (c), read together, extend rent stabilization coverage to units in buildings based on receipt of J-51 benefits only if the building is no longer rent regulated under the PHFL.

Defendants do not explicitly argue to the contrary and, indeed, acknowledge that in specific limited circumstances, including where "the owner of a fair market (i.e., post December 31, 1973, non PHFL) building" makes building wide major capital improvements and "applies for J-51 benefits based on those qualifying MCI costs," then "the owner must agree to have [the] building enter and remain in the rent stabilization system for the full duration of the J-51 abatement period." (Ds.' Supp. Memo. of Law at 18.) Defendants' argument is that, here, after IPN exited the Mitchell-Lama program and ceased to be regulated under the PHFL, it never "applied for" such benefits. As held above, this factual assertion is simply not supported by any competent evidence in the record. The court agrees that it is questionable whether IPN could have become subject to rent stabilization if the J-51 benefits that it received after the exit date were merely the same benefits that it had qualified for while under PHFL regulation, assuming that they were inadvertently granted and were re-paid. However, as also held above, this issue, with its wide-ranging impact, should not be decided on a record that lacks even minimal competent evidence as to the specific circumstances under which the post-exit date J-51 benefits were received. Defendants' cross-motion will accordingly be denied, with leave to defendants to renew the motion after plaintiffs have had a reasonable opportunity to conduct discovery.

The branch of plaintiffs' cross-motion for a stay of eviction proceedings pending determination of this action should be granted. A preliminary injunction is proper to maintain

the status quo, given plaintiffs' showing of irreparable harm in the absence of an injunction. (See State of New York v City of New York, 275 AD2d 740 [2d Dept 2000]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626 [2d Dept 1988].) Plaintiffs have demonstrated that they would be subject to blacklisting that could make finding a new rental apartment difficult, based on the court administration practice of selling Housing Court eviction case data. (See Weisent v Subaqua Corp., 2007 NY Slip Op 51428[U], 16 Misc 3d 1115[A] [Sup Ct, New York County 2007] [extensively discussing the effects of sale of such information].)

It is accordingly hereby ORDERED that plaintiffs' motion is granted to the following extent:

1) Defendants and their agents are hereby enjoined and restrained, pending the hearing of this action, from commencing summary holdover proceedings against any plaintiff based on the expiration of the term of such plaintiff's lease, on condition (a) that such plaintiff pays, within five days after service of a copy of this order with notice of entry, all rent accrued to date and, if the lease has already expired, all use and occupancy accrued after the expiration of lease to date; and (b) that such plaintiff pays future rent or, if the lease has already expired, future use and occupancy as and when it accrues. For purposes of this preliminary injunction, use and occupancy for any plaintiff whose lease has expired shall be set at the last rent reserved in such plaintiff's lease, together with any increases that would be authorized for a renewal lease if the plaintiff's dwelling unit were rent stabilized. All payments shall be without prejudice to the rights of both parties; and

2) Plaintiffs are granted leave to serve upon the New York City Department of Finance and the New York City Department of Housing Preservation & Development the subpoenas

duces tecum annexed to plaintiffs' motion as exhibits A and B, respectively, provided that plaintiffs submit copies of such subpoenas to Part 57 for so ordering within five days of the date of entry of this order, and serve such subpoenas within five days after so ordering; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied in its entirety, without prejudice to renewal after discovery is completed on the circumstances regarding IPN's receipt of J-51 benefits after its exit from the Mitchell-Lama program and the termination of such benefits ("J-51 issue"); and it is further

ORDERED that the parties shall appear in Part 57 of this Court on October 4, 2007 at 2:30 p.m. for a conference regarding any requests for discovery on the J-51 issue in addition to the above subpoenas. If there are no additional requests, the parties shall notify the court by conference call in advance of such date.

This constitutes the decision and order of the court.

Dated: New York, New York
September 26, 2007

MARCY FRIEDMAN, J.S.C.