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Court Decisions Begin to Favor Tenants in Rent Regulation Cases

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Last week, a unanimous Appellate Division, First Department, panel handed down the latest in a series of rulings in the wake of the Court of Appeals' landmark 2009 decision in *Roberts v. Tishman Speyer*, 13 NY3d 270, that is reshaping New York landlord-tenant law.

The new decision, *73 Warren Street v. State of New York Division of Housing and Community Renewal*, 116585/09, held that under certain circumstances an apartment that was rent stabilized because it received New York City tax benefits would not only remain stabilized after the benefits ended, but would remain exempt from luxury deregulation. It offers yet more evidence, say attorneys, that after 15 years in which rent deregulation went mostly unchallenged, courts have begun to apply the brakes.

The trend toward deregulation began with a 1993 law allowing rent-stabilized apartments to become deregulated when their rent rose above a set limit and they become vacant. It also provides for so-called luxury decontrol of an apartment when the rent is above the limit and its tenant's income exceeds a set threshold. According to data collected by the city's Rent Guidelines Board, more than 190,000 apartments—about 15 percent of the total—left rent stabilization between 1994 and 2009.

Apartment buildings at 73 Warren Street (right) and 501 W. 110th St. (below) were the subject of recent court decisions clarifying New York rent regulation laws. *NYLJ/Rick Kopstein*

The current reversal is due largely to a pair of rulings from the Court of Appeals that have left trial and appellate courts throughout the state grappling with a changed landscape, with new rules that are still being hashed out case by case.

Roberts, the first of those decisions, concerned the so-called J-51 program. J-51 allows landlords to receive tax benefits if they undertake certain improvements to their property and put their rental units under rent stabilization. Since the 1990s, it had been common practice for landlords to deregulate individual units in J-51 buildings when it became possible through luxury decontrol and then claim a proportionately smaller tax benefit.

In *Roberts*, however, the Court of Appeals said the arrangement, though sanctioned by the Division of Housing and Community Renewal, was illegal. As

long as a building received J-51 benefits, every unit in it must remain rent stabilized. The decision caused about 4,000 units in Stuyvesant Town that had been deregulated to become rent stabilized once again (NYLJ, March 6, 2009). The case arose from a class action filed by tenants in lower Manhattan's Stuyvesant Town, which Tishman Speyer Properties bought from MetLife in 2006.

The Rent Guidelines Board said in its most recent report that the ruling could cause formerly deregulated apartments throughout the city to become rent stabilized. It did not estimate the number of those units, since landlords and tenants are still fighting over the effect of *Roberts* in court.

Menachem Kastner of Cozen O'Connor, who represents landlords, said that *Roberts* was the first decision to override a Division of Housing and Community Renewal (DHCR) policy on the grounds that it contradicted the language of the law. Before that, he said, courts had been more deferential to the DHCR, and had tried to reconcile disparate housing statutes—for example, by holding that landlords could exit J-51 apartment by apartment.

"*Roberts* may have been the first case that said, 'Look at the statute,'" he said. "What's happened is because some courts have used one statutory scheme to apply another statutory scheme, trying to read them both together, the appellate courts have said, 'Read the statute.'"

The decision left open several important questions: whether it would apply retroactively; whether a landlord could unwind its participation in J-51 by giving back past tax benefits; and how to calculate the new rent in units that suddenly became rent stabilized. Courts that have reached the first two questions have sided with tenants. In *Gersten v. 56 7th Ave.*, 603878/09, the First Department ruled that *Roberts* was retroactive, and in *Dugan v. London Terrace Gardens*, 603468/09, the First Department held that J-51 participation could not be unwound (*NYLJ*, Aug. 19, 2011 and May 12, 2011).

Most J-51 cases have not yet reached the last question, which may be affected by another landmark Court of Appeals ruling in October 2010, *Grimm v. Division of Housing and Community Renewal*, 15 N.Y.3d 358.

In *Grimm*, which affirmed a First Department decision, the court held that the four-year statute of limitations on rent overpayment actions, known as the "four-year rule," did not apply if the tenant could show the initial rent, however long ago, was based on a fraud (NYLJ, Oct. 20, 2010).

The Court of Appeals issued another ruling on the same day, *Cintron v. Calogero*, 15 N.Y.3d 347, addressing the scope of that fraud exception. It said that, if a tenant alleged fraud, the DHCR had an obligation at least to review rent reduction orders for the apartment going back before the four-year statutory period.

Though *Cintron* provided some clues, the rulings appeared to leave a lot of uncertainty about what exactly could constitute a fraud.

Grimm made itself felt in court as recently as this month. In *Olsen v. Stellar West*, 107800/10, the First Department was confronted with a case in which the tenants argued that their landlord had committed fraud simply by failing to tell them when they signed their lease that their unit had previously been rent-controlled. When a rent-controlled apartment becomes vacant, a new rent is calculated based on a number of factors, and the unit may or may not become rent stabilized depending on that rent. The landlord argued that the case should have been dismissed because the statute of limitations expired in 2005. The First Department, however, said that was a question for the DHCR, and remanded the case.

The *73 Warren* decision came only one week later. In that case, the tenant, like most in J-51 buildings, was never told his unit was rent stabilized because of J-51, so when the building stopped receiving J-51 benefits, his apartment remained rent stabilized. That much was settled law. The question before the court was whether, in light of the *Roberts* decision, his apartment would be subject to luxury decontrol after the landlord's J-51 participation had ended. The First Department ruled that it would not.

"*Warren* is a huge, huge decision," said William Gribben of Himmelstein, McConnell, Gribben, Donoghue & Joseph, who represents tenants. He said that it means that most J-51 apartments will remain rent stabilized even if their landlords' participation in J-51 ends.

Reversal of Fortune

As in *Roberts*, Gribben said, the landlord in *73 Warren* argued that it had simply relied on DHCR policy.

"*Roberts* and the *Warren* court both said, 'No, we don't care about that,'" Gribben said. "Following administrative agencies' misinterpretation of the law doesn't give you the right to misinterpret the law."

Magda Cruz of Belkin & Burden, who represents landlords, said she sees *Roberts* and *Grimm*, and the series of decisions following them, as a reversal of fortune for landlords that is unlikely to change.

"Apartments that were not regulated are now regulated," she said. "That was a major setback for deregulation."

The *Grimm* case, in particular, had opened up a new era of uncertainty, she said.

"In my practice what I do see is many tenant attorneys raising an allegation of fraud, but the cases don't seem to be winding themselves very quickly through the courts," she said. "The claims are arising much, much more often."

Seth Miller of Collins, Dobkin & Miller, who represents tenants, similarly said he believed uncertainty would be the rule for a long time, but that the overall trend favored tenants.

"I think the landlords are losing at least part of the battle," he said. "The point they've been trying to make is that the rents for these [J-51] apartments should be determined differently for these apartments than for other rent-stabilized apartments."

That, Miller said, was a reversal of the trend that had held sway since the 1990s, with courts generally accepting the four-year rule in all cases and thus allowing large numbers of apartments to become deregulated without reviewing whether the landlord had committed fraud.

"What we're seeing now is the courts are finally coming around to seeing how absurd some of these results were," Miller said.

Meanwhile, he said, the uncertainty over the four-year rule, and the scope of the fraud exception, so far favors neither landlords nor tenants.

"It's immensely more complicated to litigate overcharge cases than it used to be," he said. "It's fine for tenant lawyers and landlord lawyers, because it makes a lot of business for us, but it's an area of law that needs a lot of simplification."

Miller said he expected to see more decisions remanding rent determinations to DHCR as courts are confronted with the fallout of *Roberts* and *Grimm*.

"The courts are getting very frustrated with the task of trying to calculate rents," he said. "The rules have gotten to be so complicated that they don't want to calculate rents anymore."

Gribben said that, while the string of recent decisions had shifted the balance in favor of tenants, it had done so only as a result of adhering more strictly to statutes than past courts had.

"The courts are not doing anything other than what they should do, which is read the statute and apply the statute," he said.

One case currently on appeal to the First Department could upset the trend.

Last October, in *Downing v. First Lenox Terrace*, 100725/10, a J-51 rent-overcharge case, Justice Charles Ramos denied plaintiffs' motion for class certification on the grounds that class status was not available for overcharge cases.

Since many J-51 buildings are large complexes, and the J-51 cases that have succeeded so far have all been class actions, an appellate court ruling that such cases cannot be brought as class actions could make them more difficult in the future.

Gribben, whose firm represents the tenants in that case, acknowledged it would make litigating overcharge cases more difficult in practice.

Still, he said, "it would eliminate the element of class, but it wouldn't eliminate the underlying legal claims."

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