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RENT REGULATION

'Roberts v. Tishman': What's New?


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In *Roberts v. Tishman Speyer* (13 NY3d 270 [2009]), the Court of Appeals held that luxury deregulation is unavailable with respect to apartments in buildings receiving J-51 benefits. This article will explore recent case law addressing issues stemming from *Roberts*, including fraud, treble damages, rent freezes due to failure to register, and an owner's right to seek luxury deregulation for stabilized apartments after J-51 benefits expire.

Fraud

Many tenants in post-*Roberts* cases allege that the owner engaged in a fraudulent scheme to deregulate the apartment, apparently believing that owners should have known better than to abide by DHCR's interpretation of law. The significance of a finding of fraud is that the tribunal, in order to determine the legal rent, can examine the rental history of the apartment prior to the four-year period preceding the overcharge complaint (*see Grimm v. New York State Div. of Hous. & Community Renewal*, 15 NY3d 358, 365 [2010]). Breaching the four-year look-back period usually results in a lower rent and a larger refund.

The courts and DHCR have been reluctant to find fraud in post-*Roberts* cases because it was the accepted wisdom pre-*Roberts* that luxury deregulation was available with respect to an apartment in a building receiving J-51 benefits, at least where the apartment had been rent-stabilized prior to such receipt. For example, in *Park v. New York State Div. of Hous. & Community Renewal* (15 AD3d 105, 115 [1st Dept 2017]), the First Department, affirming DHCR, wrote:

> DHCR properly concluded that the owner did not engage in fraud when it removed the apartment from rent regulation in 2005 because it was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations.

(*See also Stulz v. 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017]).

This is not to say that a finding of fraud is impossible in a post-*Roberts* case. For example, an owner who honestly believed that an apartment in a building receiving J-51 benefits was eligible for luxury deregulation could still have inflated the cost of improvements to raise the rent above the deregulation threshold. In *Taylor v. 72A Realty Associates* (151 AD3d 95, 102-03 [1st Dept 2017]), the court rejected as speculation "plaintiffs' assertions of possible fraud in connection with the apartment improvements made in 2000." But had the tenants proved those assertions, the court may well have found a fraudulent scheme to deregulate.

Willfulness

Tenants in post-*Roberts* cases frequently allege that the owner willfully overcharged them. Where an owner fails to rebut the presumption of willfulness, treble damages are assessed (*see* RSL § 26-516[a]). Courts usually decline to find willfulness in post-*Roberts* cases for the same reason that they decline to find fraud: Owners relied in good faith on DHCR's advice when they deregulated these apartments. As the Court of Appeals held in *Borden v. 400 E. 55th Street Assoc.*, 24 NY3d 382, 398 [2014]):

> As the lower courts noted, treble damages would be unavailable to the tenants because a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the unit so there is little possibility of a finding of willfulness. Only after the *Roberts* decision did the DHCR's guidance become invalid. (internal citation omitted).

That view may be changing, because it has been several years since "DHCR's guidance became invalid." In *Taylor*, *supra*, the First Department held that there was a question of fact as to whether the owner's failure to take corrective steps in the years following *Roberts* constituted willfulness:

> We have recognized that at least by March 2012 the law clearly required the retroactive return of apartments like these to rent regulation. In the

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Lucas decision involving this very Owner and the same building, we made it clear that an improperly deregulated apartment was required to be returned to rent stabilization and that the base date rent should not have been set at the market rate. The Owner here failed to register apartment 5M and readjust the rent until 2014 when faced with this litigation. These facts preclude any determination at this time about whether an overcharge, if any, was willful, and the Owner should be allowed the opportunity to explain the reasons for such delay and the steps, if any, it undertook to bring itself into compliance.

Thus, what may have been an unintentional overcharge at first may be deemed willful years later if the owner did not take steps to comply with *Roberts*.

In *Matter of Messina* (DHCR Adm. Rev. Dckt. No. ER-410066-RT, issued Dec. 22, 2016), the tenant alleged that she should have been awarded treble damages because the owner "continued to collect market rents and did not register the apartment for four years after the *Roberts* decision was issued." DHCR—perhaps mindful of the bad advice it gave to owners—declined to award treble damages, stating:

> In the absence of a clearly defined 'grace period' for not requiring an owner to self-apply the *Roberts* decision, the Commissioner finds that it would be impractical for the agency to determine on a case-by-case basis when a particular owner should have self-applied *Roberts*. Furthermore, the courts may be better equipped to make such findings because they may refer to the oral court testimony of the litigants.

Failure to Register

Tenants in post-*Roberts* cases will often allege that because the owner illegally deregulated the apartment and stopped annually registering the unit, there should be a rent freeze pursuant to RSL § 26-517(e). In *Park*, *supra*, the First Department rejected this argument:

> When the owner treated the apartment as deregulated in 2005 and discontinued rent registrations with DHCR, it did so based on a justifiable belief that the apartment was no longer subject to rent regulation and such filings were unnecessary. Preventing the owner from charging what is otherwise a legal rent, solely based on the lack of registration filings during the period before *Roberts* and *Gersten* were decided, would unfairly penalize the owner for action that was taken in good faith, relying on DHCR's own interpretation of the law, without furthering any legitimate purpose of the rent stabilization laws.

In their Rent Regulation column, Warren Estis and Jeffrey Turkel explore recent case law addressing issues stemming from 'Roberts v. Tishman,' including fraud, treble damages, rent freezes due to failure to register, and an owner's right to seek luxury deregulation for stabilized apartments after J-51 benefits expire.

In *Matter of Korn* (DHCR Adm. Rev. Dckt. Nos. CX-410046-RT and CX-410007-RO, issued July 28, 2015), DHCR ruled to the same effect:

> In the instant matter, the owner's failure to file annual registrations was due to its adherence to DHCR policy, which was later deemed unlawful by the court. It is the DHCR's practice not to impose a rent freeze in a case such as this where the owner's failure to register was due to an erroneous interpretation of the law by the DHCR.

The courts and DHCR have been largely forgiving of landlords caught up in the *Roberts* snare. But as the years progress, an owner's failure to reduce rents, make refunds, or register rents may be viewed as willful conduct, warranting treble damages and related penalties.

J-51 Expiration and Notices

In buildings that were subject to rent stabilization before the receipt of J-51 benefits, it has been settled since 2012 that once those benefits expire, luxury deregulation is once again available (*see Matter of Schiffren v. Lawlor,* 101 AD3d 546, 547 [1st Dept 2012]). The First Department recently reaffirmed this principle in *Taylor, supra, Park, supra, and Bramwell v. New York State Div. of Hous. & Community Renewal* (147 AD3d 556 [1st Dept 2017]).

Another issue recently clarified is whether the owner of such a building, as a prerequisite to luxury deregulation, was required to serve the tenant in occupancy with a so-called J-51 notice. In *73 Warren Street, LLC v. New York State Div. of Hous. & Community Renewal* (96 AD3d 524, 527 [1st Dept. 2012]), the First Department intimated that such service was necessary. In *72 Realty Assoc. v. Lucas* (101 AD3d 401, 402 [1st Dept 2012]), the First Department, albeit in a footnote, held that no such notice need be served. More recently in *Bramwell, supra*, the First Department held that where a unit was subject to rent stabilization before J-51 benefits were received, an owner is "not required to serve a J-51 notice/J-51 rider…to trigger reversion of [a] rent stabilized apartment to the original rent-regulation regime," under which luxury deregulation is permitted.