

Real Estate Litigation

Expert Analysis

‘Roberts’: Issues Yet to Be Decided, Part II

The parties in *Roberts v. Tishman Speyer Properties*, may have settled,¹ but thanks to the Court of Appeals’ landmark 2009 decision in the case, reversing nearly two decades of uniform practice in the New York City apartment rental industry,² *Roberts* leaves a legacy of active litigation and precedent-making jurisprudence. Just as the court predicted, its holding in *Roberts* spawned a host of “issues yet to be decided,” that the lower and intermediate appellate courts have been grappling with for three years now.

In our Aug. 29, 2012 Law Journal column, we reviewed the First Department’s treatment of three such issues: the retroactivity of the *Roberts* rule, the statute of limitations for bringing claims for rent overcharges based on the rule’s application and the collateral estoppel effect of prior administrative orders and stipulations on post-*Roberts* claims. In this column, we address three more issues recently resolved by the First Department: the calculation of overcharges based on a “*Roberts*” violation, treble damages and the question of whether any unit in a building caught in the *Roberts* snare can ever be eligible for high-rent/high-income (“luxury”) deregulation.

Calculations

The First Department’s most recent pronouncement on a post-*Roberts* issue in *72A Realty Assoc. v. Lucas*³—that, in calculating rent overcharges following a determination that a landlord improperly deregulated a unit while receiving J-51 benefits, a court must examine “any available record of rental history necessary to set the proper base date rent”⁴—is easily its most jolting.

The Rent Regulation Reform Act of 1997 amended the Rent Stabilization Law (RSL) expressly to “preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a[n overcharge] complaint.”⁵ Applying this express statutory restriction, New York courts, including the First Department, have consistently held that, in determining whether and how much a landlord has overcharged a tenant,



By
**Todd E.
Soloway**



And
**Luisa K.
Hagemeyer**

the “base date” rent upon which overcharges will be determined is the registered rent in effect four years prior to the overcharge claim, regardless of whether there is clear evidence that the rent was improperly set prior to that date.⁶

The highly limited exceptions to that rule, carved out by the Court of Appeals (over dissent), are where the tenant alleges fraud by the landlord in evading rent regulation (as, for instance, by creating an illusory tenancy)⁷ and where a rent-reduction order issued prior to the four-year limitations period continues to be in effect at the time of the overcharge complaint.⁸ In such cases, it is permissible to look back further than four years for the last regulated rent prior to the fraud that brought about the lease’s deregulation or, alternatively, to employ the “default formula” used by DHCR to set the base-date rent where no reliable records are available.⁹

When it comes to post-*Roberts* cases, the subject unit may often have been deregulated so long ago (and without challenge, given that landlords and tenants alike have assumed in good-faith reliance on DHCR’s universally-accepted interpretation for over a decade that units could be luxury deregulated notwithstanding the receipt of J-51 benefits) that no regulated rent was registered four years prior to the overcharge complaint. While recognizing that the situation eludes a perfect answer, the courts in *72A Realty*,¹⁰ resolved the quandary by looking back four years prior to the commencement of the overcharge action, and holding that the rent in effect on that date—whether market rate or stabilized—set the base-date rent.¹¹

In doing so, and in rejecting the tenant’s contention that there should be a further look-back or that the “default formula” should be employed, the court reasoned that:

[the landlord] is not guilty of fraud, or any inten-

tional evasion of the RSL, such as the landlord in *Thornton v. Baron* (5 NY3d 175 [2005]). Rather, [the landlord], in setting an unregulated rent for respondent, was simply acting in a manner then consistent with Rent Stabilization Code (9 NYCRR) §2520.11 (r) (5) and (s) (2) that the Court of Appeals later ruled, in *Roberts*, to be a DHCR misinterpretation of RSL §§26-504.1 and 26-504.2 (a). Thus, there is no reason the four-year statute of limitations for a rent overcharge claim (CPLR 213-a) should not be applied to the parties herein.... Thus, the base date rent for this purpose is the rent in effect in October 2004, in the amount of \$2,250 per month, pursuant to the lease between the parties commencing September 1, 2004.¹²

Courts seemed largely to be following the lead of Civil Court and the Appellate Term in *72A Realty*.¹³ And, expounding even slightly further, the Supreme Court in *Baron v. Laurence Towers Co.*¹⁴ reasoned that:

The effect of plaintiffs’ position would be to punish the defendants based upon their failure to register an apartment they, in good faith, believed was luxury decontrolled. This court has already rejected the failure to register as the basis for the calculation of the overcharged rent in *Roberts* situations. *Rosenzweig v. 305 Riverside Corp.*, supra; *Dodd v. 98 Riverside Drive, LLC.*, supra.

Roberts overcharge cases, such as this one, are not really about registration compliance; they are, in a broader sense, about the reach and application of the rent stabilization laws and how to now calculate a legal rent. At the time defendants would have been required to register a rent stabilized rent under *Roberts*, the DHCR did not even require such registration. Fixing the rent stabilization rent in hindsight based solely on defendants’ failure to register would be unduly punitive for what was action otherwise taken in good faith, relying upon the agency’s own interpretation of the law.¹⁵

On Dec. 4, however, the First Department seems to have put an abrupt halt to any trend that may have been developing along these lines by reversing in *72A Realty*, holding that in setting the base date rent, courts must examine any available rent history for signs of fraud or impropriety, apparently regardless of when and regardless of whether or not

fraud is alleged by the tenant (from the lower court decisions, no such allegation appears to have been made by the 72A Realty plaintiff). The “available rent history” to which the First Department would have the courts look included the circumstances under which the unit’s rent was first raised over the \$2,000 (in a lease with a previous tenant) six years prior to the commencement of the plaintiff’s overcharge action.¹⁶ This holding appears to be directly at odds with the First Department’s own pre-*Roberts* precedent.¹⁷

Treble Damages

In 72A Realty, the First Department also reversed the lower courts’ dismissal of the plaintiff’s claim for treble damages. Such damages may be awarded on overcharge claims only where the overcharge is found to have been willful.¹⁸ Until now, as expressed by the courts below in 72A Realty, the prevailing view of courts assessing claims for treble damages on post-*Roberts* overcharge claims was that a landlord charging market rent despite receiving J-51 benefits prior to *Roberts* could not have been acting “willfully” because it was relying in good faith in DHCR’s universally-accepted interpretation.¹⁹ Accordingly, such courts have dismissed treble damages claims.

By looking back to the initial deregulation of the subject unit, whenever that might have occurred, the First Department in 72A Realty effectively sidestepped this reasoning, making the treble damages determination not about the willfulness of the “*Roberts*” violation, but rather about the initial setting of the rent over the deregulation threshold. In 72A Realty, those circumstances involved major capital improvements seven years prior to the commencement of the overcharge action that the court found questionable. The court therefore reinstated the tenant’s claim for treble damages and remanded for a determination as to “whether the overcharge was not willful, but rather the result of reasonable reliance on a DHCR regulation.”²⁰

Luxury Deregulation

The First Department’s recent jurisprudence also suggests the possibility that luxury deregulation (as contrasted with vacancy deregulation) may never be available once a landlord has received J-51 benefits.

First, a unit subject to rent stabilization based on the landlord’s receipt of J-51 benefits may not be deregulated unless the tenant’s lease and all renewal leases contain a rider (a “J-51 rider”) informing the tenant that the unit will be deregulated upon the termination of the benefit and advising when that will be.²¹ If the lease does not contain the required notice, occupied units will remain subject to rent stabilization until a vacancy occurs after the benefits expire.²² Prior to *Roberts*, landlords would have had no reason to put J-51 riders in market-rate leases.

Second, a landlord may not “unwind” its participation in the J-51 program, as some tried to do after *Roberts* was handed down, based upon the realization that the benefits of participating in the J-51 program generally pale by comparison to those of charging market rent. Such landlords sought an

order binding on DHCR and tenants allowing its participation in the J-51 program to be “unwound” by repaying any benefits received, voiding the entitlement to tax benefits ab initio and declaring that the landlord is not subject to any rent stabilization laws that would not have applied but for the receipt of J-51 benefits. With the landlord’s J-51 status thus effectively cleansed, so too would its units’ eligibility for luxury deregulation.

The First Department put the kibosh on any such maneuverings in *London Terrace Gardens v. City of New York*,²³ affirming Supreme Court’s holding that the denial by DHCR and HPD of the landlord’s unwinding proposal was not arbitrary and capricious. Like Supreme Court, the First Department rejected the theory that the arrangement could be “rescinded” because participation in the J-51 program did not create contractual rights, but rather was participation in a tax benefit program. Furthermore, neither the J-51 program nor the New York City Administrative Code permitted the unilateral withdrawal from a tax benefit program and, furthermore, the termination of rent regulation by virtue of the waiver or revocation of tax benefits was expressly prohibited.²⁴

Finally, it may be the case that luxury deregulation is not available at all for units caught in the *Roberts* snare, based on a convergence of two factors. The first, discussed above, is the virtually certain absence of a J-51 rider in market-rate leases entered into prior to *Roberts*. The second, as expounded upon by the First Department in *73 Warren Street, LLC v. State of New York DHCR*, is found in RSL §26-504(c), which provides in relevant part that:

[u]pon the expiration or termination for any reason of the benefits of [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 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.

Indeed, the First Department in *73 Warren St.* appears to have held that, based on a second statute, RSL §26-504.1, that luxury deregulation is not possible even if the lease does contain a J-51 rider. That statute provides that housing accommodations that are (1) occupied by persons with a total annual income exceeding the deregulation income threshold and (2) with a legal regulated monthly rent in excess of the deregulation threshold are excluded from rent regulation (i.e., subject to luxury deregulation):

Provided, however, that this exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section four hundred twenty-one-a or four hundred eighty-nine [the enabling statute for J-51 benefits] of the real property tax law, except as otherwise provided in subparagraph (i) of paragraph (f) of subdivision two of section four hundred twenty-one-a of the real property tax

law [applying to new dwellings], or (b) by virtue of article seven-C of the multiple dwelling law.²⁵

The First Department held that RSL §26-504.1 applied, that neither of the statutory exceptions did, and that the court below was therefore correct in upholding DHCR’s determination denying the landlord’s petition for administrative review of its order dismissing the luxury decontrol proceeding.

Conclusion

Roberts v. Tishman Speyer Props. has settled, but not without creating multitudinous hard questions and far-reaching consequences for New York landlords, tenants and courts. The Court of Appeals itself has not yet addressed the “issues to be decided” that have now been decided by the lower and intermediate appellate courts. It will be interesting to see what the court does when they reach its doorstep.

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1. See B. Pierson, “Settlement Reached in Stuyvesant Litigation,” NYLJ, (Dec. 3, 2012) (reporting Nov. 29, 2012 preliminary approval of settlement by court).
2. *Roberts v. Tishman Speyer Props.*, 13 N.Y.3d 270 (2009).
3. 2012 N.Y. Slip Op. 08241, No. 570514/10 (App. Div. 1st Dept. Dec. 4, 2012).
4. *Id.* at 4 (emphasis added).
5. See RSL §26-516(a)(2).
6. See *In the Matter of Tockwotten Assocs. v. New York State DHCR*, 7 A.D.3d 453 (1st Dept. 2004); *Hatanaka v. Lynch*, 304 A.D.2d 325 (1st Dept. 2003); *In the Matter of AVJ Realty v. New York State DHCR*, 8 A.D.3d 14, 18 (1st Dept. 2004); *Silver v. Lynch*, 283 A.D.2d 213, 214 (1st Dept. 2001).
7. See *Grimm v. State of N.Y. DHCR*, 15 N.Y.3d 358 (2010); *Thornton v. Baron*, 5 N.Y.3d 175 (2005).
8. See *Cintron v. Calogero*, 15 N.Y.3d 347 (2010).
9. *Grimm*, 15 N.Y.3d at 365-66; *Thornton*, 5 N.Y.3d at 181 & n.5. Pursuant to the “default formula, the base date rent will be set at the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date.” *Thornton*, 5 N.Y.3d at 180 n.1.
10. 28 Misc. 3d 585, *aff’d*, 32 Misc. 3d 47 (App. Term 1st Dept. 2011).
11. See 28 Misc. 3d at 591; 32 Misc. 3d at 50.
12. 28 Misc. 3d at 591.
13. See, e.g., *Dodd v. 98 Riverside Dr.*, 2011 N.Y. Slip Op. 32708 (Sup. Ct. N.Y. Co. Oct. 18, 2011), adhered to in relevant part on renewal and reargument, 2012 N.Y. Slip Op. 31653, No. 106968/10 (Sup. Ct. N.Y. Co. June 21, 2012) (“the allowable rent for each apartment, shall be the rent agreed to in the lease in effect four years immediately preceding the filing of the action, along with the periodic rent stabilization guideline increases available over the term of the tenancies”); *Rosenzweig v. 305 Riverside*, 2012 N.Y. Slip Op. 51103 (Sup. Ct. N.Y. Co. June 7, 2012) (applying 72A Realty Supreme Court/Appellate Term formula for determining overcharge as one that “makes the most sense”).
14. 2012 NY Slip Op 32177 (Sup. Ct. N.Y. Co. April 14, 2012).
15. *Id.* at 4.
16. *Id.* at 3-4.
17. See n.6, *supra*.
18. See RSC §2526.1(a).
19. See, e.g., *Dodd*, 2011 N.Y. Slip Op. 32708; *Rosenzweig*, 2012 N.Y. Slip Op. 51103; *Casey v. Whitehouse Estates*, 2012 N.Y. Slip Op. 51471 (Sup. Ct. N.Y. Co. Aug. 6, 2012) (“treble damages for fraudulent or willful evasion of the RSC are precluded in the instant action based upon *Roberts v. Tishman* and its progeny”); 72A Realty, 28 Misc. 3d at 592.
20. 72A Realty, 2012 N.Y. Slip Op. 08241, at 4.
21. RSC §2520.11(o).
22. See *East W. Renovating v. New York State DHCR*, 16 A.D.2d 166 (1st Dept. 2005).
23. 2012 N.Y. Slip Op. 07078, Nos. 109121-22/10 (App. Div. 1st Dept. Oct. 23, 2012).
24. See *id.*
25. See *id.* at 4, quoting RSC §26-504.1 (emphasis added).