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Post-'Roberts': How Issues 'Yet to Be Decided' Were Decided

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Shock waves rippled through the New York City apartment rental industry in October 2009 when the Court of Appeals held, in *Roberts v. Tishman Speyer Properties*,[1] that units in buildings receiving "J-51 benefits" may not be removed from rent regulation, even if deregulation would otherwise be permissible (the *Roberts* rule). The court's view that its holding was dictated by the clear language of the Rent Stabilization Law to the contrary, the *Roberts* rule was a clear departure from DHCR's unchallenged interpretation, upon which over a decade of industry practice had been based.

Dismissing predictions of dire ramifications for the industry, the court counseled that the scope and application of the *Roberts* rule depended on the resolution of "issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants."[2] The First Department has thus far ruled on the retroactivity of the *Roberts* rule, the application of the statute of limitations on claims brought in its aftermath, and the collateral estoppel effect of administrative orders and stipulations preceding *Roberts*. This article reviews the state of the law on these three issues.

Retroactive Effect

Shortly after the Court of Appeals' decision, MetLife moved in *Roberts* to dismiss the claims against it on the ground that the decision should be applied only prospectively, based on the analysis set forth in *Gurnee v. Aetna Life & Casualty*.[3] In *Gurnee*, the Court of Appeals had held that, although judicial interpretations of statutes are generally to be applied retroactively, an exception should be made "where there has been such a sharp break in the continuity of law that its impact will wreak more havoc in society than society's interest in stability will tolerate."[4] To determine whether a decision meets that standard, the *Gurnee* court adopted the test set forth by the U.S. Supreme court in *Chevron Oil v. Huson*, pursuant to which:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear precedent on which litigants may have relied…or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, the prior history of the rule at issue and the impact of retroactive application upon its purpose and effect should be considered. Finally, the court should take into account any inequity that would be created by retroactive application.[5]

> Perhaps the most interesting point to come out of courts' post-'Roberts' consideration of statute of limitations issues, is that there is no statute of limitations on the claim that an apartment is subject to rent stabilization.

MetLife argued that *Roberts* established a new principle of law by deciding an issue of first impression whose resolution was not clearly foreshadowed. Furthermore, it contended that the history of the rule, i.e., 13 years of uniform contrary agency interpretation relied upon industry-wide, favored only prospective application. Likewise, neither the purpose of the rule, of the J-51 program, of luxury decontrol or of the Rent Stabilization Law in general would be served by retroactive application of the *Roberts* rule.

Under the last prong of the *Gurnee* test, MetLife contended that retroactive application of the *Roberts* rule would be inequitable to landlords, who had charged market rents for units in buildings that were rent stabilized prior to receiving J-51 benefits in good-faith reliance on DHCR's unchallenged interpretation of the luxury decontrol provisions of the Rent Stabilization Law. It further argued that applying the *Roberts* rule only prospectively would not be inequitable to tenants in these units, because such tenants were not otherwise entitled to the protections of rent stabilization (having household income in excess of $175,000 and lawfully-increased rent over $2,000 per month). Thus, these tenants had no legitimate expectation that the units would remain rent stabilized, and would simply reap a windfall if *Roberts* was applied retroactively. Additionally, MetLife argued, retroactive application would violate the Due Process Clause of the state and federal constitutions.

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The Supreme Court denied the motion, holding that the *Roberts* rule applied retroactively based on its finding that the decision did not create a new principle of law, which it held constituted a "'threshold question'"[6] obviating the need for, or even propriety of, any analysis under the other prongs of the *Gurnee* analysis. The *Roberts* rule was not a new rule of law, the court found, but merely the Court of Appeals' "construc[tion of] a statute that had been in effect for a number of years"[7] that was "more than foreshadowed; it was expressly acknowledged at the inception of the statute [and] also foreshadowed by 'the plain text.'"[8] For the same reasons, the court rejected MetLife's contention that retroactive application of the *Roberts* rule would violate the Due Process Clause.[9]

The Appellate Division affirmed, diverging from the lower court opinion only to comment that, though "courts sometimes engage in a tripartite analysis [under *Gurnee*] even after deciding that a case whose retroactivity is at issue did not establish a new rule of law," it need not do so.[10] Interestingly, three months earlier, in *Gersten v. 56 7th Ave.*,[11] the Appellate Division did perform a full *Gurnee* analysis (albeit in dictum), notwithstanding its conclusion that *Roberts* did not create a new rule of law, and declared that the equities did not favor prospective-only application because retroactive application would protect tenants from increases in excess of the RSL, while the opposite result would be to permit landlords to collect rents in excess "based upon a faulty statutory interpretation."[12]

An interesting wrinkle in the First Department's treatment of the retroactivity of the *Roberts* rule emerged in *Latipac v. BMH Realty*.[13] There, a buyer entered into an agreement to purchase a building based on a rent roll indicating that nine units were not subject to rent stabilization. Just days before the deal was set to close, the Court of Appeals rendered its decision in *Roberts*. Retroactive application of the *Roberts* rule would cause these units to be rent stabilized and subject the purchaser to rent overcharge claims, and so the purchaser sought to rescind the agreement on the ground that the seller had breached the contract by providing a rent schedule that was materially false.

The First Department held that *Roberts* would not be given retroactive effect for the purpose of nullifying the purchase agreement, but rather only in a "proper case, for example, where a tenant, on an appropriate set of facts, invokes the holding in a timely-commenced proceeding seeking to restore an apartment to rent stabilization."[14] The court reasoned that the rent stabilization laws were enacted to protect tenants, not prospective landlords, and thus "there is no need to read back into a previous time a subsequent judicial decision that, although it construed unchanged statutory language, radically altered the legal landscape against which the parties contracted."[15]

> Whether and how the "defenses" and "other issues" contemplated by the Court of Appeals actually will limit the predicted negative ramifications of 'Roberts' for the industry remains to be fully seen.

Statute of Limitations

The jurisprudence developed around the applicable statute of limitations for bringing post-*Roberts* claims clarifies that the four-year period prescribed for overcharge claims in CPLR 213-a is a limitation on recovery, rather than a statute of limitations in the traditional sense. On something approximating a continuing violations theory, a tenant's failure to assert an overcharge claim within four years of entering into an unlawfully deregulated lease does not bar the tenant from bringing suit.[16] At the same time, absent a showing of fraud by the landlord (and courts seem to be finding fraud absent where a landlord was relying in good faith on DHCR's interpretation of the luxury decontrol provisions), a tenant may not recover for any overcharge that occurred more than four years prior to the commencement of suit.[17] Likewise, absent fraud, courts have held that the "base date" for setting the new regulated rent is four years prior to commencement of the overcharge action.[18]

Perhaps the most interesting point to come out of courts' post-*Roberts* consideration of statute of limitations issues, is that *there is no statute of limitations on the claim that an apartment is subject to rent stabilization.* In *Gersten*, where the Appellate Division was asked to determine whether CPLR 213(2)'s six-year statute of limitations for rescission actions barred a tenant's claim that a unit was unlawfully destabilized, the court concluded (again, in dictum) that, "[u]nder the circumstances, a tenant should be able to challenge the deregulated *status* of an apartment at any time during the tenancy."[19] "In our view," the court wrote, "imposing such limitations on determining rent regulatory status subverts the protection afforded by the rent stabilization scheme.... [E]xcept as to limit rent overcharge claims, the Legislature has not imposed a limitations period for determining the rent regulatory status of an apartment."[20]

Collateral Estoppel

The same principle that defeated the argument for prospective-only application of the *Roberts* rule—that *Roberts* did not create a new legal principle, but merely interpreted plain statutory language—appears also to have precluded tenants from challenging pre-*Roberts* administrative orders and voluntary stipulations on the basis of the rule. Indeed, notwithstanding the First Department's conclusions in *Gersten* that the *Roberts* rule is retroactive and that the plaintiffs' claims were not time-barred, it dismissed the claims for this reason.

The plaintiffs in *Gersten* had lived in a unit for many years, when both the rent and their income reached amounts in excess of the statutory thresholds for luxury decontrol. The owner filed a luxury deregulation petition with DHCR, which DHCR granted in an order in 1999, thus deregulating the apartment. The parties entered into and subsequently extended a market lease for the premises. The plaintiffs never challenged the DHCR order by administrative appeal or Article 78 proceeding.[21]

The owner was receiving J-51 benefits during this period. After *Roberts* was

issued, the plaintiffs commenced an action seeking to have the 1999 DHCR order declared void ab initio based on *Roberts* and, accordingly, to be awarded overcharges and a rent-stabilized lease.[22]

Supreme Court dismissed the claims on the ground that the DHCR's deregulation order was binding and that it lacked jurisdiction to set it aside.[23] The Appellate Division affirmed dismissal on that ground. It found that the plaintiffs had had a full and fair opportunity to litigate whether their apartment was subject to luxury decontrol, and that nothing had prevented them from raising the J-51 benefits issue before DHCR in 1999.[24] It further found absent the circumstances necessary to empower DHCR to alter a prior determination on remission— i.e., "'illegality, irregularity in vital matters, or fraud.'"[25] Rather, because the "facts required for revocation of the original DHCR determination (the receipt of J-51 benefits) were available from the public record, and explicitly disregarded by DHCR as irrelevant to luxury decontrol because, pursuant to the DHCR policy discussed above, the receipt of J-51 benefits was not the 'sole reason' for the imposition of rent regulation," the principle of administrative finality barred DHCR's reconsideration.[26]

The Appellate Term of the First Department reached a similar result with respect to a two-attorney stipulation in *SAP V/Atlas 845 WEA Assocs. NF v. Janelli*.[27] There, while the landlord was receiving J-51 benefits, the plaintiffs leased premises pursuant to a lease under which the landlord charged a market rent pursuant to an unchallenged DHCR order (with respect to a prior tenant) determining that the unit was exempt from rent regulation. Sometime after the expiration of the J-51 benefits, the plaintiffs renewed the lease and, upon its expiration, the plaintiffs remained in occupancy as month-to-month tenants. In February 2009, the landlord served a termination notice.

While the parties were negotiating a resolution, the Appellate Division decided *Roberts*, and then granted leave to appeal to the Court of Appeals. In August, the parties entered into a two-attorney stipulation of settlement providing that: the tenants consented to the entry of a final judgment of possession by a date certain in favor of the landlord; a warrant of eviction would be issued forthwith; the tenants would continue to pay the market rent provided in the expired renewal lease; and the tenants had reviewed the stipulation with counsel and entered into it knowingly and willingly.

Shortly before they were re-quired to vacate the apartment, the tenants moved to vacate the stipulation on the ground that, under *Roberts*, the apartment was rent stabilized when they entered into occupancy because the landlord was receiving J-51 benefits, and that the stipulation was void against public policy because it did not reflect that the apartment was rent stabilized and had the effect of waiving rent stabilization rights.

Civil Court granted the motion to vacate the stipulation, but the Appellate Term reversed. First noting that courts favor the enforcement of stipulations of settlement, the court found that there was no fraud, collusion, mistake, accident or an agreement offending public policy, as would be necessary for vacating a stipulation. The court further cited the fact that the stipulation did not provide that the tenants were waiving any rights under the Rent Stabilization Law,[28] and was mutually beneficial to the parties. Finally, the court noted that the *Roberts* litigation was extant and highly publicized during the parties' negotiations.

Conclusion

As the Court of Appeals correctly predicted, its decision in *Roberts* precipitated and necessitated consideration of a host of issues regarding its scope and application. At this point, whether and how the "defenses" and "other issues" contemplated by the Court of Appeals actually will limit the predicted negative ramifications of *Roberts* for the industry remains to be fully seen. Two years later, the First Department has ruled on less than a handful of these important questions, with a decision regarding the appropriateness of class action treatment of post-*Roberts* claims currently pending, and other issues wending their way through the lower courts.

1.13 N.Y.3d 270 (2009).
2. Id. at 287.
3. 55 N.Y.2d 184 (1982). See Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint as to the MetLife Defendants in *Roberts v. Tishman Speyer Props.*, Index No. 100956/07 (Sup. Ct. N.Y. Co.), Motion Sequence No. 5 (filed June 2, 2010) (hereinafter, "MetLife Memo").
4. *Gurnee*, 55 N.Y.2d at 191, quoting *Gurnee*, 55 N.Y.2d at 191, quoting *Gager v. White*, 53 N.Y.2d 475 (1981).
5. Id. at 192.
6. *Roberts v. Tishman Speyer Props.,* 100956/07, NYLJ 1202464317392, SUPNY (Sup. Ct. N.Y. Co. July 30, 2010), quoting *Matter of Americorp Sec. v. Sager*, 239 A.D.2d 115, 117 (1st Dept. 1997).
7. Id., quoting *Roberts*, 13 N.Y.3d at 285.
8. Id.
9. Id.
10. *Roberts v. Tishman Speyer Props.*, 89 A.D.3d 444, 447 (1st Dept. 2011).
11. 88 A.D.3d 189 (1st Dept. 2011). The court's conclusions regarding retroactivity (and also the applicable statute of limitations, see infra) proved to be dicta, as its holding was based on the collateral estoppel effect of a previous unchallenged destabilization order by DHCR.
12. See id. at 198; see also *72A Realty v. Lucas*, 28 Misc. 3d 585 (Civ. Ct. N.Y. Co. 2010) (retroactive application of *Roberts* rule protects those who were meant to be protected by the Rent Stabilization Law), aff'd, 32 Misc. 3d 47 (App. Term 1st Dept. 2011).
13. 2012 N.Y. Slip Op. 00737 (1st Dept. 2012).
14. Id.
15. Id.
16. See *Gersten*, 88 A.D.3d at 199; see also *72A Realty*, 28 Misc. 3d at 589; *Sandlow v. 305 Riverside*, 2012 N.Y. Slip Op. 30788(U), Index No. 106025/11 (Sup. Ct. N.Y. Co. March 26, 2012) (citing *Gersten*); *Dodd v. 98 Riverside Drive*, 2011 N.Y. Slip Op. 32708 (Sup. Ct. N.Y. Co. Oct. 18, 2011) ("Since an overcharge may be an ongoing event, the cause of action is not deemed to have finally accrued at the time a tenant takes occupancy. As overcharges continue, the claims continue to accrue").
17. See *72A Realty*, 32 Misc. 3d at 50.
18. See, e.g., *72A Realty*, 28 Misc. 3d 585, In taking this position, courts have rejected tenants' contention that the base date for calculating an overcharge should be determined based on the formula set out in *Thornton v. Baron*, 5 N.Y.3d 175 (2005), in which the Court of Appeals held that, where the rent was established through fraudulent means (there, an illusory tenancy), the base rent would be the rent charged to the tenant immediately preceding the fraudulent illusory tenancy. But see, e.g., *Dignam v. 305 Riverside*, 2012 NY Slip Op 31019(U), No. 105503/2010 (N.Y. Sup. Ct. N.Y. Co. 2012) (unexplained rent escalation more than four years preceding commencement of action is sufficient to require further inquiry re possible "fraud" warranting application of *Thornton* formula), citing *Grimm v. DHCR*, 15 N.Y.3d 358, 362 (2010).
19. 88 A.D.3d at 199 (emphasis added); see also *72A Realty*, 28 Misc. 3d at ("the status of [a] tenancy…cannot be time-barred.…The regulatory status of an apartment pertains based upon extrinsic facts. Such circumstances do not 'expire' because of a four-year statute of limitations. Rather, the status of the apartment is a continuing circumstance that remains until different facts or events occur that change the status of an apartment. Waiver, estoppel, or a statute of limitations do not change the issue of whether or not an apartment is subject to rent regulation").
20. *Gersten*, 88 A.D.3d at 200-01.
21. Id. at 192-94.
22. Id.
23. Id. at 193-94.
24. Id. at 202-03.
25. Id. at 205, quoting *Matter of Sherwood 34 v. DHCR*, 309 A.D.2d 529, 531 (1st Dept. 2003) (additional citation omitted).
26. Id.
27. 2010 N.Y. Slip Op. 20531, Index No. 570656/10 (App. Term 1st Dept. 2010).
28. The court likely found this fact relevant to distinguish the scenario at issue from the circumstances in the "key money" cases, such as *Thornton v. Baron*, 5 N.Y.3d at 179, in which the Court of Appeals held that "[a] lease provision purporting to exempt an apartment from rent regulation in exchange for an agreement not to use the apartment as a primary residence is against public policy and void."