

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

PRESENT: _____
Justice

PART 56

Amy D. Roberts

INDEX NO. 100956/07

MOTION DATE 6/9/10

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

Tushman Spitzer

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/30/10

RICHARD B. LOWE III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

AMY L. ROBERTS, THOMAS I. SHAMY,
DAVID AND ANNMARIE HUNTER, MARGARET
CARROLL, KELLEY AND TONY LANNI, EVAN
HORISK, and BETH ROSNER GIOKAS, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

Index No. 100956/07

-against-

TISHMAN SPEYER PROPERTIES, L.P.,
PCV ST OWNER LP, METROPOLITAN
INSURANCE AND ANNUITY COMPANY, and
METROPOLITAN TOWER LIFE INSURANCE
COMPANY,

Defendants.

-----X

RICHARD B. LOWE, III, J.:

This purported class action is based upon defendants allegedly taking advantage of the luxury decontrol provisions of New York's Rent Stabilization Law (RSL) by charging tenants of Stuyvesant Town and Peter Cooper Village rents exceeding permissible stabilized rent levels, while at the same time receiving tax benefits under section 11-243 of the New York City Administrative Code, commonly referred to as J-51 tax benefits. The first cause of action of the two-count first amended consolidated class action complaint seeks damages of \$215 million, including interest and attorneys' fees, for improper rent overcharges. The second cause of action seeks a declaration that plaintiffs' apartments will continue to be subject to rent stabilization as long as defendants receive J-51 tax benefits.

Defendants Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company (together, MetLife) now move (in motion sequence number 006) to dismiss the amended complaint for failure to state a cause of action and based upon documentary evidence. MetLife's motion is based upon the argument that the recent Court of Appeals decision in this action, *Roberts v Tishman Speyer Prop.* (13 NY3d 270 [2009]) (Decision), should not be applied retroactively. In the Decision, the Court held that defendants were not entitled to deregulate apartments under the luxury decontrol provisions of the Rent Stabilization Law while simultaneously receiving J-51 tax benefits.

Specifically, the Court of Appeals determined that this case involved a "question ... of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" *Id.* at 285. The relevant statutes are the luxury decontrol provisions of the RSL, sections 26-504.1 and 26-504.2 (a), which exclude from decontrol "housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section ... four hundred eighty-nine of the real property tax law" The Court of Appeals reasoned that the word "become" can refer to "achieving, for a second time, a status already attained." *Roberts*, 13 NY3d at 286. The practical effect of this interpretation is that, although the apartments at Stuyvesant Town and Peter Cooper Village (Property) were initially subject to rent stabilization since 1974, they became subject to rent stabilization, for a second time, when MetLife applied for and received J-51 benefits for the Property in 1992, thereby triggering the luxury decontrol exclusion.

The facts of this case were stated in detail in the Decision, the First Department's decision in *Roberts v Tishman Speyer Prop.* (62 AD3d 71 [1st Dept 2009]), and in this court's

decision in *Roberts v Tishman Speyer Prop.* (2007 NY Slip Op 32639[U] [Sup Ct, NY County, Aug. 16, 2007]). Therefore, the court presumes familiarity with the facts and the facts are not repeated here. Defined terms in this court's August 16, 2007 decision shall have the same meaning when used herein.

Discussion

MetLife argues that the Decision should not apply retroactively to periods before the date of the Decision (October 22, 2009), and therefore does not apply to any period during which MetLife owned the Property, because MetLife sold the Property to defendant PCV ST Owner LP on November 17, 2006 and no longer collects any rents from the Property. In opposition, plaintiffs argue that MetLife fails to satisfy the threshold requirement of a retroactivity analysis, because the Decision does not constitute a new legal principle.

MetLife's argument relies heavily upon *Gurnee v Aetna Life and Cas. Co.* (55 NY2d 184 [1982]), a decision that clearly supports the retroactive application of the Decision. In *Gurnee*, the Court of Appeals considered the retroactive application of *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451 [1980]), where the Court considered "a question of first impression ... concerning the construction of the phrase 'first party benefits' as used in article 18 of the Insurance Law (§§ 670-678), New York's Comprehensive Automobile Insurance Reparations Act, which provides no-fault insurance protection to 'covered persons'." *Kurcsics*, 49 NY2d at 454. The *Kurcsics* Court held that,

under section 671 [of the Insurance Law], a covered person injured in a motor vehicle accident who sustained lost earnings of more than \$1,000 per month can recover as first-party benefits 80% of his or her actual lost earnings up to a maximum of \$1,000 per month. The court rejected the Superintendent of Insurance's

interpretation of section 671 as limiting recovery for lost earnings to a maximum of 80% of \$1,000, or \$800.

Gurnee, 55 NY2d at 190.

In *Gurnee*, the plaintiffs were injured in separate accidents in 1975 and 1977 (thereby pre-dating the 1980 *Kurcsics* decision), involving vehicles insured by the defendant insurers. Both plaintiffs claimed lost wages exceeding \$800 per month, but their recoveries were limited to \$800 per month in accordance with State Insurance Department regulations. The *Gurnee* plaintiffs commenced actions, claiming they were entitled to the maximum \$1,000 per month. In both cases, the Supreme Court granted the defendants' motions to dismiss for failure to state a cause of action, holding that *Kurcsics* should not be applied retroactively.

The Court of Appeals began its analysis by stating that,

[i]n determining whether the holding of *Kurcsics* is applicable to other claims that arose before the decision was handed down, it is questionable whether retroactivity analysis is relevant with respect to the application of the first decision of the State's highest court interpreting a new statute. Such analysis is traditionally used where there has been an abrupt shift in controlling decisional law. In *Kurcsics*, this court merely construed, at its first opportunity to do so, the language of a statute that had been in effect since 1974.

Id. at 191.

This is precisely what happened in the instant action, where, as stated in the Decision, “the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent” *Roberts*, 13 NY3d at 285, quoting *Kurcsics*, 49 NY2d at 459. The Court of Appeals cited the legislative history of the Rent Regulation Reform Act (RRRA), where “[t]he RRRA’s sponsor stated that luxury decontrol was unavailable to building owners who ‘enjoy[ed] another system of general public assistance’ such as J-51 benefits.” *Id.* at

286, citing NY Senate Debate on Assembly Bill A8859, July 7, 1993, at 8214. The sponsor went on to say that, ““should the exemptions contained in section 489 end, that’s — those J.51s and 489s end, then they would be subject so that at no point do you have the [luxury] decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned.”” *Id.* The Court of Appeals then concluded that “the sponsor’s answer ... plainly indicates that ‘at no point’ would the luxury decontrol provisions apply to buildings which ‘received’ tax exemptions being discussed, including J-51 benefits.” *Id.* at 287. Thus, the Court merely interpreted the statute in accordance with the Legislature’s intent at the time the statute was enacted. In other words, there was never “an abrupt shift in controlling decisional law,” but rather, the Court of Appeals “merely construed ... the language of a statute that had been in effect since [1993].” *Gurnee*, 55 NY2d at 191. Therefore, it is questionable whether MetLife’s proposed retroactivity analysis is relevant with respect to the Decision.

In any event, even under what the *Gurnee* Court describes as a “traditional retroactivity analysis” (*id.*), the Decision should be accorded full retroactive effect. Under *Gurnee*, the general rule is that “a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process’ [citations omitted].” *Id.* An exception exists where “the decision to be applied nonretroactively ... establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed.” *Id.* at 192. “[W]hether the ruling at issue is really a new rule of law” is a “threshold question.” *Matter of Americorp Sec., Inc. v Sager*, 239 AD2d 115, 117 (1st Dept 1997). The court should then consider “the prior history of the rule at issue and the impact of retroactive application upon its purpose and effect,”

and “any inequity that would be created by retroactive application.” *Gurnee*, 55 NY2d at 192.

As discussed above, the Decision did not establish a new principle of law by overruling clear past precedent. Rather, “[i]t merely construed a statute that had been in effect for a number of years.” *Id.* As stated by the Court of Appeals in *Gurnee*, “[a] judicial decision construing the words of a statute ... does not constitute the creation of a new legal principle.” *Id.*; *see also* *People v Hill*, 85 NY2d 256, 262 (1995) (same); *People v Favor*, 82 NY2d 254, 262-63 (1993) (same); *Matter of Taihem F.*, 222 AD2d 322 (1st Dept 1995) (same).

MetLife argues that DHCR has uniformly held, without objection from HPD, that buildings on the Property were permitted to utilize luxury decontrol, and that DHCR’s unchallenged interpretation of the luxury decontrol statutes presents a situation where the Court’s Decision construing a statute may be properly applied nonretroactively. However, the Court of Appeals rejected a similar argument in *Gurnee*, where “the Insurance Department had promulgated regulations based on a construction of section 671 contrary to that subsequently articulated by [the Court of Appeals].” *Gurnee*, 55 NY2d at 192. Therefore, MetLife’s argument is unpersuasive.

MetLife argues that the established meaning of the RSL arose not only from DHCR regulation, but also from DHCR adjudications and orders. “DHCR has jurisdiction to adjudicate luxury deregulation petitions” (*Matter of Power v New York State Div. of Housing and Community Renewal*, 61 AD3d 544, 544 [1st Dept 2009]; RSL §§ 26-504.3 [b] and [c]), and MetLife submits examples of deregulation orders issued by DHCR (Micarelli Aff., Ex. E). However, *Matter of Hilton Hotels Corp. v Commissioner of Fin. of City of N.Y.* (219 AD2d 470 [1st Dept 1995]), the sole post-*Gurnee* New York case cited by MetLife in support of this

argument, did not involve a judicial decision interpreting a statute. Rather, it involved an administrative agency's decision to retroactively reverse its own policy. Therefore, *Hilton Hotels Corp.* is distinguishable on its facts.

Moreover, MetLife's argument that the Decision was not clearly foreshadowed is undermined by the Court of Appeals' reliance upon the RRRRA sponsor's express statements at the senate debate. In other words, the Decision was more than foreshadowed; it was expressly acknowledged at the inception of the statute. The Decision was also foreshadowed by "the plain text" (*Roberts*, 13 NY3d at 285) and "most natural reading of the [statute]" (*id.* at 286).

MetLife argues that "DHCR's first interpretation" of luxury decontrol "was issued in January 1996, over 13 years before the [Decision] in this case" (MetLife Opening Brief, at 16), and that "DHCR's consistent and unchallenged interpretation" of the luxury decontrol statute was that "the exclusion applied only to buildings that voluntarily opted in to rent regulation by accepting J-51 benefits on an unregulated building" (*id.* at 17). However, the January 1996 correspondence referred to by MetLife, and submitted by MetLife in support of its motion, was an advisory opinion from DHCR, which DHCR issued *after* issuing Operational Bulletin 95-3 on December 18, 1995. Significantly, the Operational Bulletin stated that the deregulation of high-rent housing accommodations "shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits pursuant to sections 421-a or 489 of the Real Property Tax Law, *until the expiration of the tax abatement period.*" (Emphasis added.) This too foreshadowed the Decision.¹

¹ The court notes MetLife's arguments that "landlords ... relied in good faith on the unchallenged interpretation of the [RSL] by DHCR regarding the application of luxury decontrol" (MetLife Opening Brief, at 19) and that the Decision "reversed a consistent,

Furthermore, MetLife's argument that HPD never objected to DHCR's position is undermined by HPD's September 27, 2000 letter to DHCR. Specifically, HPD wrote to "express [its] concern" and to request that DHCR "reconsider" its proposed 2000 amendment (RSC § 2520.11[s]) to the extent that it "does not apply to rent stabilized units that became regulated solely due to receipt of tax incentives," because DHCR's proposal "appears to permit the deregulation of units that were not intended to be deregulated." 9/27/00 HPD Letter, Schmidt Aff., Ex. 5. Moreover, the New York State Register reveals that the passage of RSC §§ 2520.11(r) and (s) was raised as a "major substantive issue[]" during public commentary, with the specific issue raised that "RRRA-97 never intended deregulation of premises subject to regulation solely because of 421-a or J-51 benefits." NY Reg, Dec. 20, 2000, at 18. This further supports the conclusion that the Court of Appeals' statutory interpretation in the Decision was foreshadowed. For the foregoing reasons, MetLife fails to make the threshold showing that the

unobjected-to interpretation of the [RSL] that had been followed by DHCR and the entire industry" (*id.* at 13). However, the above-referenced advisory opinion was requested by the landlord law firm Belkin Burden Wenig & Goldman, LLP (Belkin Burden), now defendant Tishman's attorneys, concerning the interpretation of the "by virtue of" language of the luxury decontrol statutes. DHCR responded on October 19, 2005, presumably unfavorably, based upon Belkin Burden's follow-up letter dated December 14, 2005 and DHCR's January 16, 1996 response to Belkin Burden's December 14th letter. DHCR's January 16th letter states that DHCR "reconsidered [its] earlier opinion in view of the arguments set forth in [Belkin Burden's] submission." 1/16/96 DHCR Opinion Letter, Schmidt Aff., Ex. 3. DHCR deemed Belkin Burden's "interpretation of the [RRRA] provisions excluding housing accommodations receiving 'J-51' tax abatement benefits from high rent and high income decontrol" to be "a *feasible alternative*" (*id.* [emphasis added]), thereby supporting the conclusion that the statute could be – and, in fact, was – read another way by DHCR previously. Moreover, the letter states that, while it is an opinion letter, it "is not a substitute for a formal agency order issued upon prior notice to all parties and after having afforded all parties an opportunity to be heard." *Id.* Implicit in the January 16, 1996 letter is that landlords were aware of DHCR's initial interpretation in Operation Bulletin 95-3 and correspondence leading up to and including DHCR's January 1996 opinion letter, thereby further foreshadowing the Decision.

Decision is a new rule of law. None of the cases cited by MetLife in support of its arguments warrants a different result.

MetLife next argues that retroactive application of the Decision would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, section 6 of the New York Constitution. MetLife's argument is based upon its assertion that the Decision was unforeseen. For the reasons discussed above, the Decision was not unforeseen. Moreover, as discussed above, the Decision did not create new law, but rather, merely interpreted a statute. Therefore, the retroactive application of the Decision is neither "unexpected and indefensible by reference to the law as it then existed" (*Rogers v Tennessee*, 532 US 451, 464 [2001]), nor an "arbitrary change[] in the law" (*Lynce v Mathis*, 519 US 433, 440 [1997]), as is argued by MetLife.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendants Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company are directed to serve an answer to the first amended consolidated class action complaint within 20 days after service of a copy of this order with notice of entry.

Dated: July 30, 2010

ENTER:



J.S.C.