

**Matter of 73 Warren St., LLC v State of New York  
Div. of Hous. and Community Renewal**

2010 NY Slip Op 31955(U)

July 16, 2010

Supreme Court, New York County

Docket Number: 116585/09

Judge: Judith J. Gische

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SCANNED ON 7/26/2010

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.  
*Justice*

PART 10

Index Number : 116585/2009  
**73 WARREN STREET LLC**  
vs.  
**STATE OF NEW YORK D.H.C.R.**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

Dated: 7/16/10

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

Supreme Court of the State of New York  
County of New York: Part 10

-----  
In the matter of the application of  
73 Warren Street LLC.,

Petitioner,

for a judgment pursuant to Article 78  
of the Civil Practice Law and Rules

Decision/Order  
Index# 116585/2009  
Mot. Seq. # 001

-against-

State of New York Division of  
Housing and Community Renewal  
and Victor Schragar,

Respondents.

-----  
Present: Hon. Judith J. Gische

Recitation, as required by CPLR §2219(a), of the papers considered in the review of  
this (these) motion(s):

<b>PAPERS</b>	<b>NUMBERED</b>
Notice of Petition, Verified Petition, exhibits.....	1
VS verified Answer with counterclaim, exhibits.....	2
DHCR verified Answer, exhibit.....	3
Petitioner's Reply, Verified Reply to counterclaim.....	4
Return.....	5

*Upon the foregoing papers the decision and order of the Court is as follows:*

Petitioner, 73 Warren Street LLC ("73 Warren"), is the owner of a building located at 73 Warren Street, New York, New York ("building"). Respondent, Victor Schragar ("Schragar"), is the lease tenant of apartment 2 located at the building ("apartment"). On or about June 6, 2008, 73 Warren filed a petition with respondent, State of New York Division of Housing and Community Renewal ("DHCR"), for high rent/ high income rent deregulation (sometimes "luxury decontrol") of the apartment. The Rent Administrator denied the petition on June 15, 2009. 73 Warren then filed a Petition for Administrative

Review ("PAR") which was also denied by Opinion and Order dated October 1, 2009 ("DHCR 10/1/09 order"). In denying the petition and PAR, the DHCR never reached the disputed factual issue about whether Schragers income exceeded the statutory threshold required for deregulation. Instead, the DHCR held that, as a matter of law, no luxury decontrol was available for any apartment at this building. This Article 78 proceeding challenges the DHCR 10/1/09 order.

The relevant facts are stated below:

The building is a multi-family residential apartment building located in Manhattan. In or about 1977, 73 Warren rehabilitated the building and participated in the J-51 program. RPTL §489. As a result, 73 Warren received a tax abatement and the building, which previously was unregulated, became subject to Rent Stabilization. The tax abatement expired in 1990.

Schragers has been a lease tenant of the apartment since at least 1984. The most recent renewal lease expires on 2/28/11. None of the leases provided to Schragers contain any rider or notice that the apartment was rent stabilized only because the building was receiving a J-51 tax abatement and that, upon expiration of the tax benefit to 73 Warren, the apartment would be deregulated ("J-51 rider"). Rent Stabilization Law ("RSL") § 26-504( c).

The DHCR determined that, where as here, a building initially becomes subject to rent stabilization due to its participation in the J-51 program and the leases do not contain a J-51 rider, the individual apartments remain subject to stabilization even after the tax abatement expires, but may be deregulated as each apartment becomes vacant. The DHCR further found that under the regulatory scheme, luxury decontrol is not a viable

expertise of the administrative agency. Roberts v. Tishman Speyer Properties, LP, supra.

The Court's analysis, under such circumstances, is whether the agency's interpretation of the statutes is affected by an error of law. CPLR §7803. The Court of Appeals has recently held that the interpretation and interrelationship of the J-51 program and the luxury decontrol laws is one of pure statutory interpretation. Roberts v. Tishman Speyer Properties, LP, supra.

#### The Underlying Statutes

73 Warren qualified for certain tax incentives, for a specified period of years, in connection with the improvement or rehabilitation of its building under what is commonly referred to as the J-51 program. The J-51 program is authorized by RPTL §489 and §§ 11-243 and 11-245 of the Administrative Code of the City of New York.

RSL § 26-504 generally provides which housing accommodations are subject to the rent stabilization laws. RSL § 26-504.c expressly includes housing accommodations that are currently receiving J-51 benefits. It also provides that:

Upon the expiration or termination for any reason of the benefits of section 11-243 or section 244 of the [Administrative] code ... 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 being received or if such 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 be come subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which the tax benefit is scheduled to expire, such dwelling unit shall be deregulated at the end of the tax benefit period: provided, however, that if such dwelling unit would have been subject to this chapter or the emergency tenant protection act of nineteen seventy-four in the absence of this subdivision, such dwelling shall, upon the expiration of such benefits, continue to be subject to this chapter or the emergency tenant protection act of nineteen seventy four to the same extent and in the same manner as if the subdivision had never applied thereto.

The Rent Regulation Reform Act of 1993 was the first time the rent stabilization laws included the right of a property owner to deregulate certain apartments that were considered "luxury apartments" based upon the rents charged and/or the income of the tenant. The luxury decontrol provisions of the Rent Stabilization Laws are codified in RSL §§26-504.1; 26-504.2 and 26-504.3. 73 Warren bases its luxury deregulation petition on the fact that the apartment has a legal rent greater than \$2,000 per month, coupled with its claim that Schragger's annual income exceeded \$175,000 in each of the two consecutive calendar years preceding the filing of petition for deregulation.

Insofar as pertinent to the instant dispute, RSL § 26-504.1 provides:

Upon the issuance of an order by the division, 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income in excess of one hundred and seventy five thousand dollars per annum for each of the two preceding calendar years, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, and (2) have a legal regulated rent of two thousand dollars or more per month. 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 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 law, or (b) by virtue of article seven-c of the multiple dwelling laws (emphasis added).

In the Rent Stabilization Code ("RSC") (§2520.11) and DHCR's official publications (DHCR Fact Sheet 36) DHCR has interpreted these statutes to mean that where a building becomes subject to rent stabilization solely because it obtained a J-51 tax exemption, none of individual apartments in the building may be deregulated under luxury decontrol. Consistent with that position, the DHCR denied 73 Warren's petition to decontrol the apartment in this case, without ever reaching the underlying dispute about

[\* 6] .  
whether facts otherwise justify luxury decontrol.

Legal Analysis

For the reasons that follow the Court agrees with the DHCR that, where, as here, a building becomes subject to rent stabilization solely because of its participation in the J-51 program, luxury decontrol is not available, even after the tax benefits expire. In this regard, the Court notes at the outset, that this case does not involve any question left open by the Court of Appeals in Roberts v. Tishman Speyer Properties, LP, *supra*. In Roberts, the Court held that where a building was subject to Rent Stabilization and then participated in the J-51 tax benefit program, the owner could not petition for luxury decontrol as long as the owner was still receiving the tax benefits. The Court of Appeals did not answer the question about whether luxury decontrol would be available after the benefits has expired. See: *Hershey-Webb, Gribben, In the Wake of the 'Roberts' Decision, What Next?*, NYLJ 12/1/09. The facts at bar are immediately distinguishable from those in Roberts because the building in this case is only subject to any form of rent regulation by virtue of having participated in the J-51 program.

Where, as here, the building only became subject to rent regulation due to its participation in the J-51 program, RSL §26-504( c) expressly provides that once the tax benefits terminate, the units may be deregulated in one of two ways. One way is for the owner to include a J-51 rider in the leases informing the occupant that the apartment would be deregulated upon the termination of the benefit. There is no claim made in this case that Schragers leases included the J-51 rider. The second way to decontrol an apartment is when first vacancy occurs following the termination of the benefits. At bar, there is no dispute that Schragers was the lease tenant when the J-51 benefits terminated.

There is no claim that Schragar has vacated the apartment.

When the legislature enacted luxury decontrol in 1993, the laws concerning the J-51 program already existed. As expressly codified in RSL §26-504.1, the luxury decontrol provisions do not apply to buildings that became regulated solely by having participated in the J-51 program. Thus, the DHCR's decision not to consider luxury decontrol under the circumstances of this case is consistent with the applicable laws.

73 Warren argues that because luxury decontrol is permitted when the tax benefits under a similar program expire, the statutes should be interpreted *in pari materia*, so that luxury decontrol is permitted upon the expiration of J-51 benefits. RPTL §421-a authorizes a similar tax incentive program ("421-a program") to the J-51 program contained in RPTL §489, except that the former involves "new dwellings" (as that term is statutorily defined) while the latter involves rehabilitated properties (as rehabilitation is statutorily defined). Properties that are part of the 421-a program become subject to rent regulation as part of the *quid pro quo* for the tax benefit. Pursuant to RSL §26-504.1, luxury decontrol does not apply to properties that are part of the 421-a program, except as provided in RPTL § 421-a(2)(f)(i). Whereas RPTL § 421-a(2)(f)(i) expressly permits luxury decontrol after the expiration of the benefit period, there is no similar express provision for the J-51 program.

*In pari materia* is a legal concept that laws relating to the same subject matter must be interpreted with reference to one another. It is not a rule of universal application, however, and is resorted to only in search of legislative intent. The rule should not be invoked to construe a statute that is otherwise clear and unambiguous. McKinney's Cons. Laws of NY, Book 1, Statutes, §221, see also: BLF Realty Holding Corp., v.

Kasher, 299 AD2d 87 (1<sup>st</sup> dept. 2002).

The doctrine of *in pari materia* has no application in the interpretation of the statutes involved in this proceeding. While J-51 and 421-a programs have similar benefits and serve many of the same objectives, they are not identical. They do not pertain to the same properties, they do not provide for an identical period of exemption benefits and they have other differences as well. Consequently, the statutes at issue do not concern the same subject matter. Even were this hurdle surmountable, the J-51 statutes at issue are not ambiguous. The luxury decontrol laws expressly prohibit luxury decontrol where buildings are subject to rent regulation only by virtue of participating in the J-51 program, without exception. The same statute (RSL § 26-054.1) that expressly prohibits luxury decontrol for buildings participating in the J-51 program, provides an exception for buildings participating in the 421-a program, as permitted in RPTL §421-a.

While 73 Warren also claims in this proceeding that the building was subsequently rehabilitated in 1985, no viable arguments are raised regarding how that fact, if true, would change the result at bar. In any event, the DHCR has shown that its rejection of this claim was neither arbitrary nor capricious.

#### Counterclaims

Schrager has interposed a counterclaim for attorneys fees. Although Article 78, in general, permits the filing of counterclaims (CPLR §7804[d]), the instant counterclaim concerns a contractual and statutory dispute about whether Schrager as a tenant can recover legal fees from 73 Warren as a landlord. See: Gottlieb v. Such, 293 AD2d 267 (1<sup>st</sup> dept. 2002); Bunny Realty v. Miller, 180 AD2d 460 (1<sup>st</sup> dept. 1992). The public issues in the underlying Article 78 proceeding are not really relevant to the counterclaim

and the DHCR is a completely unnecessary party in the legal fee dispute. Under these circumstances, the Court finds that the counterclaim should be severed and continued as a plenary action. CPLR §§ 407, 602; District Council No. 9 Intern Brotherhood of Painters & Allied Trades v. MTA, 115 Misc2d 810 (Sup. Ct. N.Y. Co. 1982) affd. 92 AD2d 791 (1<sup>st</sup> dept. 1983); Gowanys Industrial Park, Inc. v. Grannis, 22 Misc3d 1127 (A) (Sup. Ct. Kings Co. 2009).

**Conclusion**

In accordance herewith, it hereby

ORDERED, DECLARED AND ADJUDGED that the petition is denied and the underlying Article 78 petition is dismissed and it is further

ORDERED, DECLARED AND ADJUDGED that respondent Victor Schragers counterclaim is severed and continued as a plenary action, provided that Victor Schragers obtain a new index number and file a new RJL within 30 days of the date of this decision and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, NY  
July 16, 2010

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1740).

SO ORDERED:

J.G. J.S.C. 