

**Matter of Fifth Lenox Terrace Assoc., LLC v New
York State Div. of Hous. & Community Renewal**

2019 NY Slip Op 32399(U)

August 7, 2019

Supreme Court, New York County

Docket Number: 160066/2017

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

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**In the Matter of the Application of FIFTH LENOX
TERRACE ASSOCIATES, LLC,**

Petitioner,

Index No.: 160066/2017

**For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules,**

DECISION/ORDER

-against-

**NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,**

Respondent.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this Article 78 proceeding, petitioner seeks to a set aside a determination that the subject apartment 15K, located at the subject building, 470 Lenox Avenue, New York, New York, is subject to the rent stabilization laws since its legal rent did not exceed the luxury deregulation threshold.

Factual and Procedural Background

Apartments in the subject building have been subject to the Rent Stabilization Law (“RSL”) since it was constructed prior to 1974, and because petitioner/owner received J-51 tax benefits from July 1, 1996 through June 30, 2008.

The last registered regulated rent for the subject apartment was \$644.07 on August 8, 2005, when the apartment was rented to tenant Sharon Hines.

In 2005, after Hines vacated the apartment, the owner performed numerous individual apartment improvements which, added to the vacancy increase, raised the legal rent to \$2,313.57.

However, in September 2005, tenant Sharon Folta signed a non-regulated one-year lease for a monthly rent of \$1,450.00. Folta's lease neither indicated that she was the first non-regulated tenant, nor that she was receiving a preferential rent.

On September 26, 2006, the owner registered the apartment as high rent vacancy exempt.

In November 2006, tenant Terri Ann Davis took possession of the apartment pursuant to a one-year lease. Davis was charged a monthly rent of \$1,775.00. Davis's lease did not indicate that she was receiving a preferential rent.

In February 2008, tenant Peter Turnley took possession of the apartment pursuant to a one-year non-regulated lease and was charged a monthly rent of \$1,950.00.¹ In Turnley's February 2009 renewal lease, his rent was reduced to \$1,900.00 per month, and in his February 2010 renewal lease his rent was again reduced to \$1,700.00. According to the rent ledger the owner submitted to the DHCR, Turnley paid \$1,700.00 in rent until October 2011. None of Turnley's leases indicated that he was receiving a preferential rent, nor did they provide him with notice, pursuant to RSL 26-504, that the apartment was subject to deregulation upon the expiration of the J-51 tax benefits.

In November 2011, tenants Brandi Thompson and Adma Ullian took possession of the premises pursuant to a one-year non-regulated lease at a monthly rent of \$1,900.00. Thompson and Ullian's lease did not indicate that they were receiving a preferential rent.

In June 2013, tenant Andrew Davidson took possession of the apartment pursuant to a one-year non-regulated lease at a monthly rent of \$2,150. Davidson's lease did not indicate that he was receiving a preferential rent.

¹ The owner submitted Turnley's 2008 lease to the DHCR, but did not submit the 2009, 2010, or 2011 leases to the DHCR.

The owner did not file rent registrations for the apartment from 2007-2012. In June 2015, the owner filed late rent registrations for the years 2007-2012 which indicated that preferential rents were paid by tenants during those years.

On July 2, 2014, tenant Davidson commenced this rent overcharge proceeding with the DHCR claiming that the overcharge occurred because the subject apartment had been improperly deregulated while the building was receiving J-51 tax benefits.

In response to the complaint, the owner argued that in 2005 the legal rent for the apartment, \$2,313.57, exceeded the then luxury deregulation threshold. Therefore, the apartment was deregulated in 2005, by operation of law. However, since the building was receiving J-51 tax benefits until 2008, the apartment could not be formally deregulated until the expiration of the J-51 tax benefits or the expiration of a lease which provided notice pursuant to RSL 26-504(c).² Since Turnley's lease did not provide the 26-504 notice, the apartment remained subject to rent regulation until he vacated the apartment in 2011. According to the owner's interpretation of RSL 26-504, when Turnley vacated the apartment in 2011, the apartment essentially became deregulated as if it was deregulated in 2005, when the legal rent was \$2,313.57, which exceeded the luxury deregulation threshold. The owner then submitted retroactive computations for the legal rent for the apartment from 2005 to 2011 arguing that the legal rent in 2011 was \$3,493.00 in excess of the luxury deregulation threshold.

The owner also argued that prior to the 2009 Court of Appeals decision of *Roberts v*

² RSL 26-504(c) provides that notice be given to rent regulated tenants in buildings receiving J-51 benefits, that the building is receiving J-51 tax benefits, that the unit is regulated solely due to receipt of the J-51 tax benefits, and that the unit shall be deregulated at the end of the tax benefit period.

Tishman Speyer Props., L.P. (13 NY3d 270 [2009]), which determined that buildings receiving J-51 tax benefits remained regulated until the expiration of the J-51 tax benefits, it believed the subject apartment became deregulated in 2005 and it could charge any rent it wanted after that date. The owner argues that in 2005-2009, it could not have known that *Roberts* was going to be decided, therefore, it could not have known that it was supposed to offer tenants rent regulated leases or to include a preferential rent rider to any of the pre-2009 leases. Moreover, the owner argues that since 2005 it offered all tenants non-regulated leases; therefore, the tenants were on notice that the legal rent for the apartment exceeded the luxury regulation threshold amount.

On December 3, 2015, the DHCR Rent Administrator (“RA”) issued an order granting the tenant’s complaint (see Ullman affirmation, exhibit B). The order also found that no rent overcharge had even been collected from the tenant and that the apartment was subject to the RSL. The RA calculated the legal rent beginning with the rent charged on the base date (see RSC § 2521.2 [base date defined as four years prior to the date the tenant’s complaint was filed]) and applied a “waiver rule” finding that the owner had waived the right to the recalculated legal rent because the higher rent was not preserved in leases executed during the J-51 benefit period. The RA found that legal rent charged and collected on July 2010, the base date, was \$1,700.00. Therefore, since the legal rent did not exceed the luxury deregulation threshold, the apartment was still subject to rent regulation.

On January 6, 2016, the owner filed a Petition for Administrative Review (“PAR”), challenging the DHCR’s RA’s Administrative Order (see Ullman affirmation, exhibit C). In its PAR the owner argued that the RA improperly calculated the legal rent by using the actual rent charged on the base date, rather than the recalculated legal rent for the apartment; that the RA

improperly refused to apply the legal rent for the apartment on the base date and beyond; that the RA improperly held that the owner waived the higher legal rent; and that the RA improperly found the apartment is still subject to the RSL.

On July 12, 2016, the DHCR's Commissioner issued an order denying the owner's PAR. The July 12, 2016 order found that the rent charged on the base date is the legal rent and that there was no higher legal rent for the apartment, thus the apartment was not deregulated (see Ullman affirmation, exhibit D).

On September 6, 2016, the owner commenced an Article 78 proceeding, *Fifth Lenox Terrace Associates v DHCR*, Index No. 101424/2016.

On January 5, 2017, the owner and DHCR entered into a stipulation agreeing that the matter was to be remitted to the DHCR for further consideration (see Ullman affirmation, exhibit E).

On July 17, 2017, the owner filed additional submissions, arguing that upon the occurrence of a vacancy in September 2005, prior to the June 30, 2008 expiration of the J-51 tax benefits, the legal rent for the apartment exceeded \$2,000.00 (the then applicable luxury deregulation threshold), and thereafter the apartment remained subject the RSL by virtue of the fact that the building was receiving J-51 tax benefits. Therefore, in 2011 upon the expiration of the J-51 tax benefits, the apartment became deregulated as if it was deregulated in 2005 (see Ullman affirmation, exhibit F).

On September 20, 2017, the DHCR issued an order granting in part the owners petition for administrative review and finding that although no actual overcharge occurred, the apartment continues to be subject to the RSL because the legal rent being charged \$2,150.00 (the rent Davidson was charged in his 2013 lease) was below the deregulation threshold. The PAR was only

granted to the extent that DHCR reviewed the rent history prior the base date (see Ullman affirmation, exhibit A).

The owner commenced this Article 78 proceeding on November 7, 2017, claiming that the September 20, 2017 order is arbitrary and capricious and must be annulled. In support of its petition, the owner argues that the apartment was registered as “permanently exempt” in 2006 due to high rent vacancy. The owner argues that it established that the vacancy allowance and the individual apartment improvements, completed prior to April 1, 2006, brought the legal rent to \$2,313.57; well above the then luxury deregulation threshold of \$2,000.00. However, since in 2006, the building was still receiving J-51 benefits, the apartment remained subject to the RSL solely due to the J-51 tax benefits. The owner also notes that the overcharge complaint was brought by tenant Davidson who took occupancy pursuant to a vacancy lease on June 15, 2013, well after the apartment was deregulated. The owner notes that Davidson’s lease contained a deregulation rider as required by the RSL.

The owner argues further, that *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), in which the Court of Appeals held that luxury decontrol provided for in RSL §§ 26-504.1, 26-504.2 and 26-540.3, is not available for apartments receiving J-51 tax benefits while such benefits remaining effect, was not decided until 2009; after the expiration of J-51 benefits for the subject building. Moreover, it was not until 2011, when the First Department in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]), ruled that *Roberts* applied retroactively. The owner argues that the apartment became deregulated in 2005, and the first vacancy post-deregulation was in 2008, before *Roberts* was decided. Therefore, it should not be penalized for not complying with the *Roberts* holding since in 2008 it had no way of knowing how *Roberts* would be decided.

The owner argues that in its order the DHCR erroneously held that, in 2005, the apartment did not become deregulated as a matter of law, pursuant to RSL 26-504(c). The owner argues that in 2005, while the building was receiving J-51 tax benefits, the legal rent was \$2,313.57, exceeding the then \$2,000 deregulation threshold. Therefore, citing *Matter of Lubin*, DHCR Admin. Rev. Docket No. BU-41003-RT at 4 (August 5, 2014), the owner argues that the apartment was deregulated as a matter of law in 2005. However, since none of Turnley's leases provided the prior notice pursuant to RSL 26-504(c), the apartment remained subject to the RSL until Turnley vacated in 2011.

In answer to the owner's petition, the DHCR argues that it properly established the legal rent of \$2,150.00, since the owner failed to preserve the legal rent for the apartment. The DHCR notes that pursuant to RSC § 2521.2, in order to preserve a legal rent that is higher than the rent being charged to the tenant, the owner must provide a tenant with a lease that sets forth the preferential rent and the legal rent. According to the DHCR, the owner failed to do so. The DHCR argues that it is undisputed that *Roberts* was to be applied retroactively. Further, it is uncontroverted that Turnley was a rent stabilized tenant throughout his tenancy, ending in 2011. The DHCR argues that, despite the fact that the owner acknowledges that Turnley was a rent stabilized tenant, it did not provide Turnley with rent stabilized leases, did not indicate he was receiving a preferential rent, and did not preserve the higher legal rent. Moreover, the owner did not file rent registrations with the DHCR until after the commencement of this current overcharge proceeding. Finally, the DHCR notes that the owner was not penalized by DHCR's order since it did not find a rent overcharge or direct a refund or award treble damages.

The DHCR argues that its determination was proper based upon the evidence before it and

was not arbitrary and capricious.

Discussion

Where such administrative determinations are made by the agency responsible for the administration of the law, the court is not to substitute its judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis (see *Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]; *Matter of Plaza Mgt. Co. v City Rent Agency*, 48 AD2d 129 [1st Dept 1975], *affd* 37 NY2d 837 [1975]). It is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference and must be upheld if reasonable (see *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425 [1st Dept 2007] *affd* 11 NY3d 859 [2008]).

Here, the owner claims the legal rent reached the deregulation threshold in 2005, when the legal rent reached \$2,313.57; therefore, the apartment automatically became luxury deregulated in 2005. The owner acknowledges, however, that the apartment remained rent stabilized solely due to the building's receipt of J-51 tax benefits. Therefore, according to the owner, any tenancies after 2006 when tenant Folta vacated the apartment, were not subject to the RSL, and the DHCR's determination is therefore arbitrary and capricious. Further, the owner argues that the rent waiver applied by DHCR is inapplicable since the apartment was deregulated in 2005 allowing it to charge any rent it desired.

In support of this argument, the owner relies on two cases *Matter of Lubin*, DCHR Adm.

Rev. Dckt. No. BU-410033-RT (August 5, 2013) and *Shapiro*, DHCR Docket No. BR-410539-LD, which it contends contains almost identical facts to this case, and in which the DHCR found that the statutory exemption from rent stabilization provided for in RSL 26-504(c) was applicable to buildings.

In *Lubin*, the apartment in question was rent stabilized prior to the owner's receipt of J-51 tax benefits and would have thereafter, in 2004, become deregulated by virtue of high rent deregulation but for the owner's receipt of the J-51 benefits. Notably, in *Lubin* the DHCR found that there was evidence in the record that the legal rent for the unit exceeded \$2,000 in 2004, the time the tenant moved in, but the apartment was nevertheless subject to rent regulation because the building was still receiving J-51 tax benefits. The DHCR found that since the relevant leases, including the one in effect at the time the J-51 benefits expired, did not contain the specific requisite notice provisions set forth in RSL 26-504(c), for an apartment to become automatically deregulated upon the expiration of the J-51 benefits, the apartment remained rent regulated until that tenant vacated.

In *Shapiro*, the DHCR held that because the tenants' leases in effect at the expiration of the J-51 tax benefits did not contain the requisite notice provisions of RSL 26-504-1[c]; therefore, the apartment would remain rent stabilized until the tenants vacated their apartments.

Contrary to the owner's arguments, the facts of *Lubin* and *Shapiro* are not identical to the fact herein. Here, the owner claims that in 2005 when the legal rent reached \$2,313.57, the apartment became automatically deregulated. However, the J-51 benefits did not expire until 2008, so the apartment remained subject to rent regulation. Moreover, in 2005 when tenant Folta took possession of the apartment, while it was still subject to rent regulation, she was charged a rent of

\$1,450.00. Folta's lease made no mention that her rent was a preferential rent or the amount of the legal rent, nor did it provide her with notice that she was the first tenant post-deregulation. The owner asserts that since *Roberts* was not decided until 2009, the owner was not on notice that it had to provide such rent regulated leases. However, while *Roberts* was decided in 2009, the owner did not provide Turnley with any rent stabilized leases, even though Turnley remained in possession of the apartment until October 28, 2011, well after *Roberts* was decided. Thus, while it is true that an apartment may be automatically luxury deregulated upon the expiration of J-51 tax benefits, that is only the case if the apartment's legal rent exceeds the luxury deregulation threshold. Here, by failing to provide any tenants, from 2005 through Turnley's tenancy ending in 2011, with notice of the legal rent it could have charged for the apartment, the owner failed to preserve that legal rent while the apartment was subject to rent regulation.

Moreover, contrary to owner's arguments, the fact that *Roberts* was not decided until 2009 is of no moment since *Roberts* was not new law, but merely construed a statute that was in effect for many years. Nevertheless the owner contends that when the apartment was deregulated in 2005, since *Roberts* was not decided, it should not be penalized. However, Turnley took possession of the apartment in February 2008, and because he was not provided with notice of the J-51 benefits (see Rent Stabilization Law § 26-504[c]), it is undisputed that Turnley was a rent stabilized tenant until he left the apartment in October 2011. Thus, during the pendency of Turnley's regulated tenancy, *Roberts* was decided, yet the owner did not provide Turnley with a rent stabilized lease or notice that Turnley was being charged a preferential rent and notice of the legal rent for the apartment. Further, notwithstanding the fact that *Roberts* was decided in 2009, the owner did not file rent registrations with the DHCR until after this rent overcharge case was commenced.

Moreover, in November 2011, when Brandi Thompson and Adma Ullian became tenants of the apartment, the first post-*Roberts* vacancy, for a monthly rent of \$1,900.00, the lease did not recite the higher legal rent, or that the apartment was luxury deregulated (*id.*). However, in *Gersten v 56 7th Ave., LLC*, 88 AD3d 189, 198 [1st Dept 2011]), which was decided in August 2011, the First Department held that *Roberts* applied retroactively. Thus, there was no question that Thompson and Ullian's tenancy was the first post de-regulation, yet the lease offered to Thompson and Ullian provided them with no notice of de-regulation. Nevertheless, the owner contends that in 2011, the legal rent it could have charged was \$3,493.00, well in excess of the luxury deregulation threshold.

However, the RSC § 2521.2 (b) provides that that preferential rent and the legal rent must be set forth in the lease, and section (c) provides that where a preferential rent is charged, the owner shall be required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four-year period preceding the filing of a complaint. However, the owner did not do so. The owner failed to establish that during Turnley's tenancy, from 2008 though 2011, he was being charged a preferential rent, nor did Turnley's leases set forth the legal rent. Thus, the owner failed to establish that the legal rent for the apartment exceeded the luxury deregulation threshold and, has thereby waived any difference between rent it allegedly could have charged and the actual rent charged to its tenants (*see Matter of Rania Mesiskli, LLC v. New York State Div. of Hous. & Community Renewal*, 166 AD3d 625, 627 [2nd Dept 2018]; *Matter of North Carolina Leasing Corp. v New York State Div. of Hous. & Community Renewal*, 156 AD2d 452, 454 [2d Dept 1989] ["The base rent upon which future increases may be computed cannot be increased to reflect prior

permissible increases which the owner failed to charge”)).

Accordingly, this Court holds that the DHCR’s order is supported by the record and is not arbitrary and capricious (*see Matter of North Carolina Leasing Corp.*, 156 AD2d at 453-54; *Matter of Lexington House LLC v New York State Div. of Hous. & Community Renewal*, 31 Misc 3d 1215[A], 2011 N.Y. Slip Op. 50686[U], *6-7 [Sup Ct, NY County][“as petitioner failed to submit to DHCR any documentation showing that the \$875 rent constituted a preferential rather than the legal regulated rent or that the legal regulated rent had been previously established, and thus failed to meet its burden”])).

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent.

DATED: August 7, 2019

ENTER:



Hpn. **SHLOMO S. HAGLER, J.S.C.**