

Warner v New York State Div. of Hous. & Community Renewal
2013 NY Slip Op 31156(U)
May 13, 2013
Supreme Court, New York County
Docket Number: 101280/2012
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 101280/2012
WARNER, ERIC
vs.
NEW YORK STATE D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for vacate respondent's determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2-3</u>
Replying Affidavits _____	No(s). <u>4-5</u>

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants the petition, vacates the 12/7/11 determination by respondent New York State Division of Housing and Community Renewal, and remands the proceeding to that respondent pursuant to the accompanying decision. C.P.L.R. §§ 7803(3), 7806.

FILED
MAY 29 2013
NEW YORK
COUNTY CLERKS OFFICE

Dated: 5/13/13

Lucy Billings, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT 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 46

-----x

ERIC WARNER, FRANCINE WARNER, and
ABIGAIL WARNER,

Index No. 101280/2012

Petitioners,

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

- against -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and MAYFLOWER
DEVELOPMENT CORP.,

Respondents

-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

FILED
MAY 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Petitioners ask the court to vacate the determination December 7, 2011, by respondent New York State Division of Housing and Community Renewal (DHCR), which denied reconsideration of the high income rent deregulation of petitioners' apartment, as arbitrary and without a rational or lawful basis. C.P.L.R. §§ 7803(3) and (4), 7806. Petitioners rent an apartment owned by respondent Mayflower Development Corp. for which it receives a New York City "J-51" tax abatement under New York Real Property Tax Law § 489(1)(a) and New York City Administrative Code §§ 11-243 and 11-244 (formerly §§ J51-2.5 and J51-5).

The high income deregulation provisions of the New York City Rent Control Law and Rent Stabilization Law allow a landlord to

remove an apartment from rent control or stabilization and charge market rent when tenants' incomes exceed specified thresholds.

N.Y.C. Admin. Code §§ 26-403.1, 26-504.3. On May 29, 2008, based on petitioners' combined income, DHCR granted Mayflower Development high income rent deregulation of the apartment rented to petitioners. On June 4, 2008, petitioners filed a Petition for Administrative Relief (PAR) challenging the effective date of the deregulation, but not the deregulation itself. In response, on August 1, 2008, DHCR modified its initial determination so that deregulation would not take effect until June 1, 2009. N.Y.C. Admin. Code § 26-403.1(b).

On April 7, 2009, following the Appellate Division's decision in Roberts v. Tishman Speyer Props., L.P., 62 A.D.3d 71 (1st Dep't Mar. 5, 2009), aff'd, 13 N.Y.3d 270 (Oct. 22, 2009), petitioners sought reconsideration and revocation of the deregulation itself. That decision held that, where landlords receive a J-51 tax exemption or abatement for their apartments, the apartments are subject to rent regulation, N.Y.C. Admin. Code §§ 11-243(i)(1), 26-504(c), and the high income deregulation provisions do not apply. N.Y.C. Admin. Code §§ 26-403(e)(2)(j) and (e)(2)(k), 26-504.1, 26-504.2(a). Before the rulings in Roberts v. Tishman Speyer Props., L.P., however, DHCR's Rent Stabilization Code and its Rent and Eviction Regulations for rent controlled units, interpreting the high income deregulation statutes, allowed landlords to avail themselves of high income deregulation of apartments that already were rent stabilized or

controlled when the landlord began receiving a J-51 tax exemption or abatement for those apartments.

Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 285-86, determined that this regulatory interpretation, 9 N.Y.C.R.R. § 2520.11(r)(5)(i) and (s)(2)(i), of the Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-504.1 and 26-504.2(a), was contrary to the statutes' terms that a landlord may not avail itself of high income deregulation where the apartment "became subject to" rent stabilization "by virtue of receiving" a J-51 tax exemption or abatement. The statutory terms prohibiting high income deregulation of rent controlled apartments receiving J-51 tax benefits, N.Y.C. Admin. Code § 26-403(e)(2)(j) and (e)(2)(k), are identical to §§ 26-504.1 and 26-504.2(a), just as DHCR's regulations misinterpreting each statute are comparable. 9 N.Y.C.R.R. §§ 2200.2(f)(19)(v) and (20)(ii), 2520.11(r)(5)(i) and (s)(2)(i).

In a response dated May 7, 2009, to petitioners' request to revoke the deregulation order, DHCR initially denied their request, but in an order dated May 20, 2009, DHCR rescinded its denial of May 7, 2009, and stayed enforcement of the prior deregulation order. 9 N.Y.C.R.R. § 2208.13(a). See 9 N.Y.C.R.R. § 2527.8; Porter v. New York State Div. of Hous. & Community Renewal, 51 A.D.3d 417, 418 (1st Dep't 2008); Sherwood 34 Assoc. v. New York State Div. of Hous. & Community Renewal, 309 A.D.2d 529, 531-32 (1st Dep't 2003); Waverly Place Assocs. v. New York State Div. of Hous. & Community Renewal, 292 A.D.2d 211, 212 (1st

Dep't 2002); Hakim v. New York State Div. of Hous. & Community Renewal, 273 A.D.2d 3, 4 (1st Dep't 2000). Respondent Mayflower Development never appealed this rescission order. E.g., Best Payphones v. Department of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30, 34-35 (2005); Essex County v. Zagata, 91 N.Y.2d 447, 453-54 (1998); Aymes v. NYC Dept. of Hous. Preserv. & Dev., 37 A.D.3d 306, 307 (1st Dep't 2007); Town of Riverhead v. County of Suffolk, 78 A.D.3d 1165, 1166 (2d Dep't 2010). See Livingston Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 220 A.D.2d 504, 505 (1st Dep't 1995); People v. Rhodehouse, 88 A.D.3d 1030, 1031 (3d Dep't 2011); Guido v. Town of Ulster Town Bd., 74 A.D.3d 1536 (3d Dep't 2010); Adams v. Schoenstadt, 57 A.D.3d 1073, 1074 (3d Dep't 2008).

Two years later, in a further order dated May 6, 2011, DHCR granted petitioners reconsideration and reopened the administrative proceeding. DHCR acknowledged that deregulation of petitioners' apartment without waiting for "the final determination by the New York courts in the concurrently pending Roberts case" had been "an illegality . . . contrary to the principles of law." V. Pet. Ex. I, at 5. Therefore the deregulation of petitioners' apartment would "be reconsidered in light of the final determination of the Roberts case by the Court of Appeals." Id. at 6. See 9 N.Y.C.R.R. §§ 2208.13(a), 2527.8; Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 203-204 (1st Dep't 2011); Porter v. New York State Div. of Hous. & Community Renewal, 51 A.D.3d at 418-19; Sherwood 34 Assoc. v. New York

State Div. of Hous. & Community Renewal, 309 A.D.2d at 531; Hakim v. New York State Div. of Hous. & Community Renewal, 273 A.D.2d at 4. Mayflower Development never appealed this order either. See Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 205.

DHCR then delayed its final determination until this court (Torres, J.), in a prior proceeding by petitioners pursuant to C.P.L.R. Article 78, ordered DHCR to issue a final determination. V. Pet. Ex. L, Warner v. New York State Division of Housing, Index No. 105405/2011 (Sup. Ct. N.Y. Co. Oct. 24, 2011). DHCR did not raise any defense that the agency had not validly reopened the administrative deregulation proceeding. See Peckham v. Calegro, 12 N.Y.3d 424, 429-30 (2009); Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 207.

One of the issue the Court of Appeals in Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 287, left to be determined was the extent to which landlords' unlawful deregulation of apartments when tenants' incomes exceeded the thresholds for high income deregulation, despite the landlords' receipt of a J-51 tax exemption or abatement, must be remedied retroactively, requiring landlords to repay past overcharges to tenants. In August 2011, the Appellate Division, First Department, held that Roberts applies retroactively absent collateral estoppel. Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 201, 203. As a result of DHCR having reopened its determination, stayed deregulation, and delayed a new determination, without appeal from any part of those orders, from May 20, 2009, until DHCR issued its determination December

7, 2011, no DHCR order in effect had finally determined the deregulation of petitioners' apartment. Although Mayflower Development might have sought review of DHCR's authority for its reopening or stay of May 20, 2009, or its further order of May 6, 2011, expanding on its prior order, see, e.g., Sedore v. Epstein, 56 A.D.3d 60, 64-65 (2d Dep't 2008); Schmitt v. Skovira, 53 A.D.3d 918, 920-21 (3d Dep't 2008), because Mayflower Development did not seek such review, the deregulation of petitioners' apartment remained an open and unresolved issue. Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 201-202.

Given Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 201, and the absence of any DHCR order with preclusive effect, DHCR's subsequent final determination in December 2011, was contrary to the applicable appellate authority governing the retroactivity of Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 285-86. C.P.L.R. § 7803(3). Here, deregulation never took effect and, even if deregulation did take effect until DHCR reopened the original deregulation order, according to Roberts and Gersten, it was always unlawful and thus prohibited. The court therefore remands the proceeding to DHCR for a new determination in accordance with that authority and this order. C.P.L.R. § 7806.

DATED: May 13, 2013

FILED
 MAY 29 2013
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