Henry 85 LLC v Roodman
2017 NY Slip Op 31606(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 154499/2015
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Shlomo S. Hagler **PART** 17
Justice

Index Number : 154499/2015
HENRY 85 LLC
vs
ROODMAN, JOEL
Sequence Number : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 12 **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-P-2 **No(s).** 1-2
Answering Affidavits — Exhibits Notice of Cross-Motion-3, A-S-4 Memorandum of Law-5 **No(s).** 3-5
Replying Affidavits Affidavit in Opposition-6 Exhibits A, 1-5-7, Exhibit A-9 Memorandum of Law-10 Exhibits 1-8-11, Reply Affirmation **No(s).** 6-7, 8-11
Tr. Oral Argument-12 12

Upon the foregoing papers, it is ordered that this motion is

Decided in accordance with the attached Decision/Order

FILED
MAY 15 2017
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 2, 2017

_____, J.S.C.
SHLOMO HAGLER
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

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

----------X

HENRY 85 LLC,

Plaintiff, **Index No.: 154499/2015**

-against-

JOEL ROODMAN and JILL TAFRATE, **DECISION/ORDER**

Defendants.

----------X

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

Introduction

This case involves the complex interplay between Real Property Tax Law ("RPTL") § 421-g and the luxury deregulation of rent stabilized apartments under the Rent Stabilization Law ("RSL"), New York City Administrative Code §26-504.2, so as to determine whether a three-bedroom duplex penthouse apartment with two private terraces, known as PH-1 at 85 John Street, in Lower Manhattan ("Apartment" or "Penthouse"), that was initially rented in 2001 for $6,800.00 per month, was subject to luxury deregulation. There are two cogent Housing Court decisions that are diametrically opposed to each other, and no Supreme Court or appellate authority, on this knotty issue.

Procedural History

Plaintiff Henry 85 LLC ("plaintiff" or "Landlord"), the owner/landlord of the subject building, commenced this declaratory judgment action seeking a declaration that the Apartment is deregulated due to luxury deregulation, and for a money judgment against defendants Joel Roodman and Jill Tafrate ("defendants" or "Tenants"), the current tenants of the Apartment, for all past and future outstanding rent and/or use and occupancy payments in an amount to be

determined at a hearing (First Amended Complaint dated July 16, 2015, Exhibit "M" to the Motion). Defendants interposed an answer to the First Amended Complaint and asserted three counterclaims for an award of attorney's fees pursuant to Real Property Law ("RPL") § 234, a retaliation claim pursuant to RPL § 223-b, and an award of rent overcharges, including treble damages, pursuant to RSL § 26-512(a), in an amount to be determined at a hearing (Answer to First Amended Complaint & Counterclaims dated August 12, 2015, Exhibit "N" to the Motion). Plaintiff interposed a reply to the counterclaims (Reply to Counterclaims dated August 24, 2015, Exhibit "O" to the Motion).

Plaintiff now moves (sequence number #001) for an order pursuant to CPLR 3212 granting it summary judgment as follows: 1) declaring that the Penthouse is luxury deregulated and not subject to the Rent Stabilization Law; and 2) granting it a money judgment against defendants for past due arrears and rent and/or use and occupancy that becomes due during the pendency of this action. Defendants oppose the motion and cross-move for an order pursuant to CPLR 3212 granting them summary judgment on their counterclaims "in the form of a finding or declaration that their apartment is subject to rent stabilization, that Defendants are rent stabilized tenants thereof, and that the rents charged to Defendants since the commencement of their tenancy have been and continue to be unlawful."

After the motion and cross-motion were orally argued and fully submitted, defendants moved by order to show cause (sequence number #004) to "supplement the summary judgment record...and to file the supplemental Affirmation of New York State Senator Martin Connor..., the affidavit of former New York State Assembly Member Edward Sullivan..., and additional evidence that has come to light subsequent to the filing of the briefs and oral arguments in the

case sub judice." Plaintiff opposes the motion.

Both sequence numbers #001 and #004 are consolidated herein for disposition.

Background

In 2000, plaintiff purchased a vacant 16 story building at 85 John Street, New York, NY (the "Building") with the intention of converting it to residential use due to various generous inducements contained in former New York City Mayor Rudolph W. Giuliani's ("Mayor Giuliani") "Lower Manhattan Revitalization Plan" ("Plan"), including real estate tax abatements under RPTL § 421-g (Exhibit "D" to the Motion). One of the main purposes of the Plan was to promote the establishment of a "24-hour" community in Lower Manhattan which did not exist in the 1990's (*Id.*). As such, the City of New York strongly encouraged the Legislature to sponsor a "so-called Lower Manhattan Revitalization Bill" which included the language of the current RPTL § 421-g (Senate Debate Transcripts, L. 1995, Chapter 4, at p. 12362, Exhibit "C" to the Motion). New York State Senator Martin Connor ("Senator Connor"), the sponsor of the bill, explicitly stated that an avowed purpose of the bill was to convert under-utilized commercial office buildings in his Lower Manhattan district to residential use as follows:

> The bill also contains provisions recognizing the inevitable that literally tens of thousands of square feet of office space in Lower Manhattan simply, no matter what we do, will never be filled with commercial tenants. So there is a provision for some conversion to residential property with a tax abatement program. However, that is capped. All of the buildings in Lower Manhattan can't suddenly become luxury housing.

(Id. at 12366).

Plaintiff then spent approximately $18,000,000.00 to convert the Building from commercial to residential use. Plaintiff gut renovated the Building, installed all new heating, cooling, electric and plumbing systems, and created about 160 new luxury apartments. In 2002,

as part of its application process to obtain tax abatements under RPTL § 421-g, plaintiff registered 25 apartments as rent stabilized, and the remaining 135 apartments as permanently exempt due to luxury deregulation, including the subject Apartment (Exhibits "H" and "I" to the Motion). Effective on July 1, 2002, plaintiff received its final "421-g Certificate of Eligibility" to obtain tax abatements benefits under RPTL § 421-g (421-g Certificate of Eligibility, Exhibit "J" to the Motion).

On August 31, 2001, plaintiff filed an "Initial Apartment Registration" with the New York State Division of Housing and Community Renewal ("DHCR") for the Apartment checking off boxes indicating that it was "exempt" due to "High-Rent, Vacancy Deregulation" (Initial Apartment Registration, Exhibit "K" to the Motion). The initial registration provided that Jonathan Falcone was the initial tenant of record for a lease term of August 15, 2001 through August 31, 2002, at a rent of $6,800.00 per month (*Id.*, and Initial Apartment Lease dated July 20, 2001, Exhibit "L" to the Motion). After the filing of the initial registration of a permanent exemption in 2001, plaintiff subsequently registered the Apartment as "exempt" for years 2002 through 2014 (Exhibit "I" to the Cross-Motion). It is uncontroverted that the initial tenant vacated the Apartment and several other tenants occupied the Apartment at various times under certain leases (Exhibit "L" to the Motion).

On December 1, 2007, defendants first moved into the Apartment pursuant to a two year lease term of December 1, 2007 through November 30, 2009, at a rent of $6,700.00 per month (Lease dated November 27, 2007, Exhibit "D" to the Cross-Motion). The Lease specified that it was "For Apartments Not Subject to Rent Stabilization" and did not contain a rider notifying defendants that the Landlord was, or had been, receiving RPTL § 421-g tax abatements (*Id.*).

After the expiration of the initial Lease, defendants entered into three successive renewal leases ending on May 31, 2015, at a final monthly rent of $7,250.00 per month (Lease Renewal Forms, Exhibit "E" to the Cross-Motion). None of the renewal leases contained any notice that the Landlord was, or had been, receiving RPTL § 421-g tax abatements (*Id.*). Plaintiff then allegedly sought to increase the monthly rent for the Penthouse to $9,500.00 per month, which was not acceptable to defendants.

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Ctr.*, 64 NY2d 851 [1985]). Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983]). It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959)]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539, 543-544 [1975]).

Luxury Deregulation

In 1993, the New York State Legislature enacted the Rent Regulation Reform Act of 1993 ("RRRA") (L. 1993, ch 253), which, for the first time, provided for luxury deregulation of rent stabilized apartments under two circumstances: 1) "which is or becomes vacant" where the legal regulated rent was $2,000.00[1] per month or more; and 2) in occupied apartments where the legal regulated rent was $2,000.00 per month or more, and the combined annual income of all occupants exceeded $250,000 for each of the two preceding years (RSL §§ 26-504.1, 26-504.2). In 1997, the Legislature amended the RRRA to lower the annual income threshold from $250,000 to $175,000 (L. 1997, ch 116). In 2003, the Legislature again amended the RRRA to permit luxury deregulated apartments to remain deregulated even if a subsequent owner charges less than $2,000 per month (L.2003, ch 82).

In *Noto v Bedford Apts. Co.*, 21 AD3d 762, 765 [1st Dept 2005], the Appellate Division, First Department, summarized the Legislative intent and rationale behind the enactment of luxury deregulation laws in the RRRA as follows:

> Moreover, we observe that the Rent Regulation Reform Act of 1993 was an 'attempt to restore some rationality' to a system which 'provides the bulk of its benefits to high income tenants' (Mem. of Sen. Kemp Hannon, 1993 N.Y. Legis. Ann. at 175). The Act recognizes that '[t]here is no reason why public and private resources should be expended to subsidize rents for these households' (id.). To that end, these rent laws specifically provide for deregulation of high-rent accommodations upon vacancy or when occupied by high-income tenants (see Administrative Code §§ 26–504.1, 26–504.2, 26–504.3). Clearly, these laws were not intended to protect a high-income tenant who insists on rent stabilization for an extremely spacious multi-room apartment....

---

[1]Almost a quarter of a century has passed since the Legislature established that a rent of $2,000 per month constitutes the threshold for luxury housing. While that may have been true in 1993, it appears today that the average monthly rent in New York City is above $2,000 per month. Therefore, it is respectfully suggested that it is due time to revisit that artificial number which may be out-dated.

However, the legislative history is clear that the Legislature never intended to apply luxury deregulation to those apartments receiving RPTL §§ 489 (authorizing the J-51 program) and 421-a tax abatements as part of the luxury deregulation laws of the RRRA. Specifically, Senator Hannon, the sponsor of the bill, directly stated:

> So long as there are tax exemptions or abatement[s] contained in Section 421 or Section 489, then the decontrol provisions would not apply, but once those abatements or exemptions end, and if the rest of the eligibility standards of this statute are present, then they would apply.

(Senate Debate, L. 1993, ch. 253, p. 8215, Exhibit "Q" to the Cross-Motion).

To reflect this clear legislative intent, the RRRA explicitly excluded RPTL §§ 489 and 421-a tax abatements from luxury deregulation of rent stabilized apartments (RSL §§26-504.1, 26, 504.2) .

RPTL § 421-g

In 1995, about two years after the enactment of the RRRA,, the Legislature enacted the New York City's Plan to revitalize Lower Manhattan as more fully described above, which included new tax abatements under RPTL § 421-g. RPTL § 421-g (6) provides, in pertinent part, as follows:

> Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four, the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law, unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit, for the entire period for which the eligible multiple dwelling is receiving benefits pursuant to this section...

For comparison, the language of RPTL § 421-a is virtually identical to the above language as follows:

> Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four, the rents of a unit shall be fully subject to control under such local law or such act, unless exempt under such local law or such act from control by reason of the cooperative or condominium

status of the unit, for the entire period during which the property is receiving tax benefits pursuant to this section....(RPTL § 421-a [2][f]).

Arguments

The thrust of Tenants' argument is that this is a repetition of the landmark case of *Roberts v Tishman Speyer Props., L.P.*, 13 NY 3d 270 [2009] ("Roberts") in that the administrative agencies, HPD and DHCR, have incorrectly interpreted RPTL § 421-g for more than two decades by permitting luxury deregulation in the face of a clear and unambiguous statutory construction to the contrary. Tenants read RPTL § 421-g in three parts: the first part (Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four) and the second part (the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law) both make eligible dwelling units, which would otherwise not be eligible for rent stabilization including luxury deregulation, subject to rent stabilization for the entire period the property is receiving 421-g tax abatements; the third part (unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit) is the exemption clause which only provides for one exclusion from coverage- cooperative or condominium status.

For all and intents and purposes, according to Tenants, the entire body of exclusions of the Rent Stabilization Law and ETPA, as amended, including the *sine qua non* of rent regulation such as primary residency, are inapplicable except for the lone exclusion of cooperative or condominium status. Tenants find support for this interpretation from one of the two unreported decisions in Housing Court, *W. Associates, LLC v Scott*, Index No. L& T 73831/09 [Civil Court, Housing Part, New York Co., Scheckowitz, J., 2010]. In a well-written decision, Judge Scheckowitz opined that the Legislature intended to confer rent stabilization coverage to

dwelling units receiving 421-g tax benefits, which would be thwarted if luxury deregulation was applicable as follows:

> Further, most if not all, of the apartments completed or substantially rehabilitated pursuant to the 421-g program received initial rents in excess of $2,000 per month. Consequently, under [the Landlord's] interpretation, the entire legislative intent of conferring rent stabilization coverage on dwelling units in buildings receiving 421-g benefits is eviscerated.

Finally, Tenants argue that even if the Apartment is subject to luxury deregulation, deregulation would not be applicable to such an apartment rented for the very first time, and allegedly not properly registered with the DHCR.

Landlord argues that *Roberts* is inapplicable to this case as the statutory construction and the legislative intent demonstrate that luxury deregulation applies to RPTL § 421-g. In essence, Landlord also, though differently, reads RPTL § 421-g in three parts: the first part (Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four) brings eligible dwelling units within the ambit of rent stabilization, and the second part (the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law) with much emphasis on the words, "shall be **fully subject to control,**" provides for both the inclusionary and exclusionary (i.e., luxury deregulation) provisions of rent stabilization . The third part, as analyzed by Landlord (unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit) is not the only exemption clause, but simply clarifies that there are two general classes of residential units such as rental and cooperative /condominium units. Landlord further posits that it was unnecessary to specifically exclude newly created cooperative /condominium units because existing law already exempted

them from rent stabilization (*Fasa Properties, N.V. v Freidus*, 103 AD2d 729 [1st Dept 1984]).

More importantly, Landlord heavily relies on several letters in August 1995, between Mayor Giuliani, and Majority Leader Senator Joseph L. Bruno ("Senator Bruno"), which were made part of the legislative record and will be stated in greater detail below, that provides that the legislative intent was to specifically permit luxury deregulation of apartments covered by RPTL § 421-g (Letters from Mayor Giuliani and Senator Bruno, Exhibits "A" and "B" to the Motion). In addition, Landlord argues that the legislative debate in the Senate reflected such uncontradicted opinions of Mayor Giuliani and Senator Bruno. Landlord rejects Tenants' position that the Apartment was improperly deregulated as it filed with DHCR an "Initial Apartment Registration" clearly noting it was "exempt" due to "High-Rent, Vacancy Deregulation" (Initial Apartment Registration, Exhibit "K" to the Motion) and subsequently registered the Apartment as "exempt" for years 2002 through 2014 (Exhibit "I" to the Cross-Motion).

Landlord points to two well-reasoned unreported decisions from the same Housing Court Judge in *UDR 10 Hanover LLC v Aaron*, Index No. L& T 69437/15 [Civil Court, Housing Part, New York Co., Stoller, J., 2016], for support of its interpretation of RPTL § 421-g.

Analysis

Interpretation of Rent Regulation can be an "Impenetrable Thicket"

As famously stated by several of our Chief Judges, the rent control laws have been described as an "impenetrable thicket" of legislation that still confounds the neophyte to the most learned and proficient (*Matter of 89 Christopher v Joy*, 35 NY2d 213, 220 [1974, Breitel, Ch. J.]; *City of New York v New York State Div. of Hous. & Community Renewal*, 97 NY2d 216 [2001,

Kaye, Ch. J.]).

Statutory Construction and Interpretation

In the *Roberts* decision, the Court of Appeals reviewed the principles that courts must adhere to when interpreting certain rent laws and regulations that the DHCR has administered (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). The courts would defer to the DHCR in interpreting the rent laws since it has "specialized knowledge and understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom" unless its interpretation is "irrational or unreasonable" (*Id.* at 285, quoting *Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005], quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] [internal quotation marks omitted]). Of course, "if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*Id.*).

When construing a statute, the courts must first look to the language of the statute. If the language is clear and unambiguous, the courts must follow the plain meaning of the statute. If, however, the language is ambiguous, the courts resort to examination of the underlying legislative intent and purpose of the statute (*Id.*).

The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92[a]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000]). The legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124; *Riley v County of Broome*, 95 NY2d at 463).

A basic canon of statutory construction is that every word of a statute must be construed to give meaning to each word (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 231; *Skanska USA Building Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1 [1st Dept 2016]). "In construing a statute, a court must attempt to harmonize all its provisions and to give meaning to all its parts, considered as a whole, in accordance with legislative intent" (*Matter of Kittredge v. Planning Bd. of Town of Liberty*, 57 AD3d 1336, 1339 [2008]).

Finally, "it is true that, where the practical construction of a statute is well known, the Legislature may be charged with knowledge of that construction and its failure to act may be deemed an acceptance" (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d at 287 citing *Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd.*, 41 NY2d 84, 90 [1976]).

Interpretation of RPTL § 421-g

In this case, this Court must initially determine if the language of RPTL § 421-g is clear and unambiguous. The plain reading of the language is seemingly redundant and susceptible to varying interpretations. The manner in which Tenants interpreted the statute raises, at least, two significant problems: 1) there was no necessity to provide for the only exclusion for cooperative or condominium status because existing law already exempted them from rent stabilization at the time of the enactment of RPTL § 421-a (see *Fasa Properties, N.V. v Freidus*, 103 AD2d 729 [1st Dept 1984]); and 2) the primary residency requirement would be obviated for covered rent stabilized dwelling units which is contrary to the avowed purpose of rent regulation (*Matter of Patton Industries Ltd v New York City Conciliation and Appeals Bd.*, Index No. 2495/83 [Supreme Court, New York Co., Schwartz, J., 1983] *aff'd* 97 AD2d 716 [1st Dept 1983] [rent regulated tenant in building receiving RPTL § 421-a tax benefits must maintain primary

residence]; *Sommer v Ann Turkel, Inc.*, 137 Misc 7, 10 [App Term 1st Dept 1987] ["An acknowledged purpose of the Rent Stabilization Law is to secure in rental accommodations, those tenants who actually require and actively use their apartments for dwelling purposes. Persons '... who live outside New York but who reserve a New York address for secondary purposes of convenience and occasional use when they visit the city, cannot fairly cloak themselves with the protections of extended stabilized status]). Thus, this interpretation necessarily means that there is just one exclusion for cooperative or condominium status, even though that was not necessary under existing law, and tenants need not occupy the rent stabilized covered dwelling units as their primary residence in contravention of the entire regulatory scheme.

On the other hand, the interpretation of the statute by Landlord, as supported by Judge Stoller, would mean that the inclusionary and exclusionary provisions of rent stabilization regulatory scheme would be enforced including luxury deregulation. That interpretation would lead to the truism that most of the apartments covered under RPTL § 421-g would effectively be luxury deregulated in the first instance as the apartments rented for more than the $2,000 threshold for luxury deregulation. In fact, plaintiff registered only 25 apartments in this Building as rent stabilized, and the remaining 135 apartments as permanently exempt due to luxury deregulation, including the subject Apartment (Exhibits "H" and "I" to the Motion).

While the decisions from the Housing Court are persuasive authority, unlike Judge Scheckowitz, Judge Stoller was presented with a fuller legislative record which included the letters from Mayor Giuliani and Senator Bruno (Exhibits "A" and "B" to the Motion), and portions of the Senate legislative debate (Exhibit "C" to the Motion), which he relied upon in his

decisions and ultimate conclusion that luxury deregulation is permitted under RPTL§ 421-g. Judge Stoller actually rejected affidavits from Senator Connor and an undisclosed former member of the Assembly, who for the first time opined that they intended to exclude luxury deregulation in the legislation, as their opinion post-dated the enactment of the statute about twenty years ago.

Legislative Intent

Presented with competing Housing Court decisions and the so-called "impenetrable thicket" surrounding the interpretation of the plain meaning of this statute, this Court must resort to examination of the underlying legislative intent and purpose of the statute. The legislative history is important to ascertain the intention of the Legislature in enacting RPTL§ 421-g.

An examination of the legislative history shows that there was no public debate in the Assembly, just in the Senate (Senate Debate Transcripts, L. 1995, ch. 4, Exhibit "C"). It appears therefrom that there was debate among several senators concerning the applicability of luxury deregulation to the enactment of the Plan. Senator Franz Leichter, who was the only senator who opposed the Plan, argued against the passage of the proposed legislation because he was concerned that taxpayer's money would be utilized to subsidize owners to create luxury apartments in Lower Manhattan, which ultimately will be deregulated due to high-rent vacancy deregulation, as follows:

> Why should we subsidize the conversion of commercial space to residential space which is going to be luxury housing? This is going to rent inevitably well above $2,000 a month an apartment. Senator Bruno, who I understand was worried about some aspects of rent regulations, is not going to have to worry because under the rent laws those buildings are not going to be controlled anyhow.
>
> Clearly, the aim of many of the developers is going to be creating residential housing.

> Donald Trump, who either has bought or is about to buy 40 Wall Street... to create beautiful condos....That's great. Let Donald Trump do that. I think that's fine, but should it be done with my taxpayer's money? Should government fund that? I find no justification for that whatsoever (Exhibit "C" at p. 12377-8).

In response to this argument, and to clarify whether luxury deregulation was available under RPTL§ 421-g, Senator Vincent L.Leibell specifically read into the record Mayor Giuliani's letter, dated August 16, 1995, to Senator Bruno as follows:

> When this legislation came before us in June, Senator Bruno and I expressed some concerns regarding some provisions of the original bill. I understand now that the Mayor has contacted us and cleared up this concern, and I would like to have the opportunity, if I might, to just read in ... Mayor's Giuliani's letter to Senator Bruno, dated August 16, this year.
>
> Dear Senator Bruno: I am writing as a follow-up to our conversation regarding passage of the Lower Manhattan legislation...I have discussed this matter with the drafters of the legislation and with the Commissioner of ....[HPD], the City agency responsible for implementing the residential conversion program proposed in the legislation. The City's intention has always been that dwelling units and property under the residential conversion program...would be subject to rent stabilization to the same extent as but to no greater extent than other rent regulated property. Any provision of law that generally exempts any housing accommodation from rent stabilization would apply as well to dwelling units in property receiving benefits under the aforementioned program; **thus, the provisions of the Rent Regulation Reform Act of 1993 that provide for the exclusion of high rent accommodation and for high income rent decontrol would apply to property receiving benefits under the program created by the Lower Manhattan legislation**... The City agencies responsible for administering the residential conversion and mixed use programs will promulgate rules that reflect our intention to apply the Rent Stabilization Law as a whole, including any provisions that exempt housing accommodations from rent stabilization to property receiving benefits under those programs. (Emphasis Added) (Exhibits "A," "C" at p. 12383-5).

After Mayor Giuliani's letter was recited, no Senator stood up to contradict the clear and expressed intent to apply luxury deregulation to RPTL§ 421-g tax benefits. Senator Bruno then moved for its adoption, a vote was taken, and the legislation overwhelmingly passed 53 to 1 (Exhibit "C" at p. 12393-4).

The late submissions of affirmations from Senator Connor and Assembly Member Sullivan expressing a contrary intent, that post-dated the above debate and the subsequent enactment of the legislation more than twenty years ago, by "even one who sponsored the law in question, are irrelevant to the law's meaning and intent" (*McKechnie v Ortiz*, 132 AD2d 472, 475 [1st Dept 1987] *aff'd* 72 NY2d 969 [1988]).

Implementation of RPTL § 421-g by Administrative Agencies

Since the enactment of RPTL § 421-g in 1995 through this date, for more than the twenty year history, both the City of New York Department of Housing Preservation and Development ("HPD") and DHCR have effectively administered the 421-g tax abatement program so as to exempt units that are subject to luxury deregulation from the inception of the initial rent stabilized tenancy. As per Mayor Giuliani's letter dated August 16, 1995, which was read into the record as set forth above in detail, as part of HPD's implementation of RPTL § 421-g, the City of New York promulgated rules concerning the applicability of rent regulation which, in most respects, tracks the language of RPTL § 421-g, except that it specifically acknowledges "Exempt Dwelling Units" (28 RCNY § 32-05). It states, in relevant part, as follows:

> Notwithstanding the provisions of the City Rent and Rehabilitation Law (§26-401 et seq. of the Administrative Code), as amended; or the Rent Stabilization Law of 1969 (§ 26-501 et seq. of Administrative Code), as amended; or the Emergency Tenant Protection Act of 1974, as amended, the rents of each dwelling unit in an Eligible Multiple Dwelling, **except Exempt Dwelling Units**, shall be fully subject to control under such local laws and act for the entire period for which the Eligible Multiple Dwelling is receiving benefits pursuant to the Act (Emphasis Added) (28 RCNY § 32-05).

An Exempt Dwelling Unit is defined as "a dwelling unit exempt from rent regulation or deregulated pursuant to the Rent Regulation Reform Act of 1993, the Rent Regulation Reform Act of 1997, Local Law 4 of 1994, or by reason of the condominium or cooperative status of the

dwelling unit (28 RCNY § 32-02)."

Indeed, HPD provides owners, who participate in the 421-g tax abatement program, with various forms to complete, such as the "421-g Affidavit," " Checklist for 421-g Application," and "421-g Continuing Use Certification" that acknowledge exempt dwelling units due to luxury deregulation (Exhibits "F," "G," and "H" to the Motion).

Similarly, the DHCR has issued an advisory opinion letter dated January 30, 1997, wherein it concluded that "high-rent deregulation is available from the inception of the first residential tenancy" with respect to RPTL § 421-g dwelling units (Exhibit "E" to the Motion). More importantly, the DHCR has accepted the plaintiff's filing of an "Initial Apartment Registration" for the Penthouse clearly indicating that it was "exempt" due to "High-Rent, Vacancy Deregulation" (Initial Apartment Registration, Exhibit "K" to the Motion).

Legislature Excluded Only RPTL §§ 489 and 421-a Tax Abatements

As stated above, when the Legislature enacted the RRRA, it explicitly excluded RPTL §§ 489 and 421-a tax abatements from luxury deregulation of rent stabilized apartments (RSL §§26-504.1, 26, 504.2). However, in 1995, the Legislature did not amend RSL §§26-504.1, 26, 504.2 to specifically exclude 421-g tax abatements from luxury deregulation of rent stabilized apartments as it had done so in 1993 with RPTL §§ 489 and 421-a tax abatements. In fact, after several amendments to the RRRA spanning over two decades, the Legislature has never amended RSL §§26-504.1, 26, 504.2 to express its intent (as it has done with RPTL §§ 489 and 421-a tax abatements) to specifically exclude 421-g tax abatements from luxury deregulation of rent stabilized apartments.

Public Policy Considerations

This Court is faced with a Hobson's choice: 1) to interpret RPTL § 421-g to exclude luxury deregulation, in the face of clear legislative intent to the contrary, which would necessarily mean that the *sine qua non* of rent regulation, primary residency, would be inapplicable in this regulatory scheme; or 2) to interpret the statute to include luxury deregulation, which is supported by the legislative intent, but would effectively mean that most of the covered dwelling units would be deregulated in the first instance possibly thwarting a purpose of conferring rent stabilization coverage to dwelling units receiving 421-g tax benefits. Given the alternatives, this Court is constrained to select the lesser of two evils and interpret the statute in conformity with the clear legislative intent to include luxury deregulation even though it implicates some public policy considerations.

As stated by Judge Stoller, the Legislature "has nearly unconstrained authority in the design of taxing measures, Ames Volkswagen, Ltd. v. State Tax Com, 47 N.Y.2d 345, 349 (1979), so the Legislature certainly has the authority to structure a tax break as it wishes, even in a way that minimizes rent regulation coverage" (*UDR 10 Hanover LLC v Aaron*, Index No. L& T 69437/15 [Civil Court, Housing Part, New York Co., Stoller, J., February 1, 2016]. To buttress this argument, Senator Leichter voted against the Plan because he was strongly opposed to his colleague's support of providing taxpayer money to subsidize the conversion of commercial buildings to residential housing containing primarily luxury housing in Lower Manhattan. Notwithstanding Senator Leichter's vigorous opposition, the Legislature rejected his position and overwhelmingly voted to provide the generous tax abatements to owners to encourage the development of Lower Manhattan into a "24-hour commercial, residential and retail

neighborhood" (Exhibit "D" to the Motion). As such, it appears that the main purpose of the Plan was to stimulate economic development, and not to primarily establish rent regulation for luxury housing, in Lower Manhattan. This is in stark contrast to RPTL §§ 489 and 421-a tax abatements which appear to have been historically provided to encourage and foster rent regulation and, therefore, specifically excluded from luxury deregulation.

Deregulation of Apartment

Tenants also argue that even if the Apartment is subject to luxury deregulation, deregulation would not be applicable to such an apartment rented for the very first time, and it was allegedly not properly registered with the DHCR. Luxury deregulation of a vacant rent stabilized apartment occurs at the time "which [it] is or becomes vacant" where the legal regulated rent was $2,000.00 per month or more (RSL §26-504.2). Moreover, DHCR has issued an advisory opinion letter dated January 30, 1997, wherein it concluded that "high-rent deregulation is available from the inception of the first residential tenancy" with respect to RPTL § 421-g dwelling units (Exhibit "E" to the Motion). Given that the plain meaning of RSL §26-504.2 provides for vacancy decontrol "which is or becomes vacant" and according due deference to DHCR's interpretation, it appears that the Apartment was deregulated in the first instance as the Apartment was vacant with a rent exceeding $2,000 per month. In fact, plaintiff properly deregulated the Apartment in 2001 when it declared the Apartment was exempt due to high-rent, vacancy deregulation in its Initial Apartment Registration (Exhibit "K" to the Motion). Plaintiff subsequently registered the Apartment as "exempt" for years 2002 through 2014 (Exhibit "I" to the Cross-Motion).

Conclusion

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED, that plaintiff's motion for summary judgment (sequence number #001) is granted to the extent of 1) declaring that the penthouse apartment known as PH-1 at 85 John Street, in Lower Manhattan is luxury deregulated and not subject to the Rent Stabilization Law; and 2) if the parties cannot agree in writing on the amount of outstanding rent and/or use and occupancy due in this action within thirty days of notice of entry of this decision and order, this Court will refer the matter to a Special Referee for a hearing on this particular issue; and it is further

ORDERED, ADJUDGED and DECLARED, that defendants' cross-motion for an order pursuant to CPLR 3212 granting them summary judgment on their counterclaims "in the form of a finding or declaration that their apartment is subject to rent stabilization, that Defendants are rent stabilized tenants thereof, and that the rents charged to Defendants since the commencement of their tenancy have been and continue to be unlawful" is denied; and it further

ORDERED, that defendants' motion (sequence number #004) to "supplement the summary judgment record...and to file the supplemental Affirmation of New York State Senator Martin Connor..., the affidavit of former New York State Assembly Member Edward Sullivan..., and additional evidence that has come to light subsequent to the filing of the briefs and oral arguments in the case sub judice" is denied.

Dated: May 2, 2017

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.

FILED
MAY 15 2017
COUNTY CLERK'S OFFICE
NEW YORK

-20-

CLERK

154499/15

JUDGMENT