SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOHN R. DENZA, et al.,

Plaintiffs,

- against -

INDEPENDENCE PLAZA ASSOCIATES, LLC, et al.,

Defendants.

Index No.: 117673/05

DECISION/ORDER

In this declaratory judgment action, plaintiff-tenants seek a determination that their apartments at Independence Plaza North ("IPN"), a former Mitchell-Lama complex, are subject to regulation under the Rent Stabilization Law. By decision dated September 26, 2007 ("prior decision"), this court denied defendants' motion for summary judgment without prejudice to renewal after completion of discovery as to IPN's receipt of J-51 benefits after its exit from the Mitchell-Lama program and as to the termination of such benefits. Plaintiffs now move to remand to the New York State Division of Housing and Community Renewal ("DHCR") the portion of this action that seeks a determination of the status of plaintiffs' apartments under the Rent Stabilization Law. In the alternative, plaintiffs' motion seeks further discovery. By separate motion, defendants seek summary judgment dismissing the complaint and plaintiffs cross-move for a declaration, in the event the issue is not remanded to the DHCR, that their apartments are rent stabilized.

The relevant facts were set forth at length in the prior decision and will not be repeated

here. In brief, the following facts are undisputed: IPN was constructed in 1974 and was rent regulated under the Mitchell-Lama program pursuant to the Private Housing Finance Law ("PHFL"). IPN applied for and began receiving J-51 benefits in 1998 while it was regulated under the PHFL. IPN continued to receive these J-51 tax abatement benefits for nearly two years after June 28, 2004, the date on which IPN exited the Mitchell-Lama program ("exit date"). In March 2006, HPD terminated the J-51 benefits effective as of the exit date, and defendants re-paid all of the benefits received between the exit date and the retroactive termination. The parties dispute whether the receipt of these benefits made plaintiffs' apartments subject to regulation under the Rent Stabilization Law.

This court extensively discussed the regulatory framework in its prior decision and also will not repeat that discussion here. The lynchpin of the prior decision was the court's finding that "the J-51 regulatory framework appears to contemplate that J-51 benefits will be terminated by the City of New York where the building ceases to be subject to the form of rent regulation that qualified it for receipt of the J-51 benefits." (Prior Decision at 5.) This finding was based on 28 RCNY § 5-07(f) which provides, in pertinent part, that the Commissioner of the Department of Finance or of the Department of Housing Preservation and Development "shall withdraw tax exemption and tax abatement granted to a building pursuant to the [Real Property Tax Law, the enabling statute for the J-51 program] upon the happening of any of the following events: (3) The building ceases to be subject to the rent regulatory provisions of law set forth in § 5-03(f)(1)." As the building had qualified for J-51 benefits as a result of regulation as a Mitchell-Lama under the PHFL, the court implicitly reasoned that when the Mitchell-Lama regulation ceased, the Commissioner was required to terminate the J-51 benefits. This interpretation of the statute did

not take into account an alternative reading that the Commissioner would not be required to terminate the J-51 benefits if, upon the termination of the first rent regulation, the units became subject to another form of rent regulation – specifically, the Rent Stabilization Law.

The court did not, however, make a final determination as to the proper interpretation of 28 RCNY § 5-07(f), and instead found that this determination should not be made on the then inadequately developed record. On the prior motions, the only evidence of the basis for HPD's termination of the benefits was a record from a Department of Finance website describing March 29, 2006 as a "change date," with the "comment" that J-51 benefits were "terminated 6/28/04." The court thus reasoned:

> "While it may ultimately prove to be the case that the post-exit award of J-51 benefits was simply the result of bureaucratic delay in reflecting that IPN had ceased to be subject to the PHFL regulation that had qualified it for the J-51 benefits, such a finding should be based on evidence, not on supposition based on a record that is both conspicuously and inexplicably silent as to the particular circumstances under which the J-51 benefits continued to be granted or were terminated." (Id.)
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> "The court agrees that it is questionable whether IPN could have become subject to the rent stabilization law if the J-51 benefits that it received after the exit date were merely the same benefits that it had qualified for while under PHFL regulation, assuming that they were inadvertently granted and were repaid. However, as also held above, this issue, with its wide-ranging impact, should not be decided on a record that lacks even minimal competent evidence as to the specific circumstances under which the post-exit date J-51 benefits were received." (Id. at 9.)

The court accordingly denied the prior summary judgment motions with leave to renew after discovery was completed regarding IPN's receipt of J-51 benefits and the termination of such benefits.

That discovery has cast a completely different light on the issues. HPD has produced a letter to the Department of Finance, dated March 23, 2006 (Ex. M to Ps.' Remand Motion), which sets forth its determination to terminate the J-51 benefits retroactively to the June 28, 2004 exit date. This letter states in pertinent part:

> It has come to our attention that, while the Mitchell Lama [tax] Exemption was properly terminated as of the Dissolution date, the Property continues to receive the J-51 Abatement.
>
> HPD has determined that the J-51 Abatement should have been terminated, and the Property should have been restored to full taxpaying status, on the Dissolution Date. HPD therefore requests that the Department of Finance adjust its records to reflect the termination of the J-51 Abatement as of the Dissolution Date.

HPD's determination makes no mention of 28 RCNY § 5-07(f) or of any requirement that J-51 benefits be terminated upon the termination of the form of rent regulation (here, PHFL or Mitchell-Lama) that qualified the premises for the receipt of J-51 benefits. Indeed, Martin Siroka, a former deputy general counsel with HPD who represented defendants in connection with the termination of the J-51 benefits, testified that it was "a question of first impression" for HPD whether, when a post '74 project leaves Mitchell-Lama, its J-51 benefits end. (Siroka Dep. at 51.)

Other evidence unequivocally confirms that HPD treated the termination of the benefits as a discretionary act, not as a mere ministerial act to correct the inadvertent continuation of J-51 benefits that HPD was required to have terminated when IPN exited the Mitchell-Lama program. In a letter to Borough President Scott Stringer, dated June 7, 2006 (Ex. Q to Ps.' Remand Motion), HPD's Commissioner, Shaun Donovan, explains: "HPD, after reviewing the facts as well as equitable and public policy considerations, determined that the J-51 Abatement should

have been terminated on the Dissolution Date." (emphasis supplied). The Commissioner further explains that when IPN left the Mitchell-Lama program, the owner and tenant association negotiated an "exceptional agreement" that provided "lifetime rent protection," and that to undermine the settlement "would not only potentially harm the tenants of IPN," but could have "a chilling effect on negotiations" between landlords and tenants in other Mitchell-Lama projects. This letter also makes no mention of any statutory mandate that HPD terminate J-51 benefits upon the termination of PHFL regulation.

Notably, HPD has apparently taken the contrary position regarding Starrett City, a massive Mitchell-Lama complex that, according to Commissioner Donovan's testimony before Congress in July 2007, was opened in 1974 and thus appears, like IPN, to be what is known as a post-'74 Mitchell-Lama project.[1] In this testimony, Commissioner Donovan stated that nearly three-quarters of the units at Starrett City receive a J-51 tax exemption "which makes them subject to rent stabilization at [Mitchell-Lama] buy-out." (Ex. O to Ps.' Remand Motion at 3.)

The evidence presented on the post-discovery motions thus casts substantial doubt on whether 28 RCNY § 5-07(f)(3) should be interpreted as requiring termination of J-51 benefits upon termination of the PHFL regulation. In any event, as the evidence now presented shows that HPD exercised discretion in terminating the benefits, and did not merely make a ministerial determination based on that statute, an issue also exists as to whether the benefits have been waived or revoked within the meaning of 28 RCNY § 5-03(f)(3)(ii), which categorically provides

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[1]The significance of the pre and post-'74 distinction is that only dwelling units in buildings constructed or rehabilitated before January 1, 1974 and regulated under the PHFL become subject to rent stabilization after the PHFL regulation is terminated, regardless of whether they receive J-51 benefits. (See Rent Stabilization Code § 2520.11[c].)

that "[r]ent regulation shall not be terminated by the waiver or revocation of tax benefits."

The court further finds that this is an issue that should be decided by the DHCR under the doctrine of primary jurisdiction[2]. As explained by the Court of Appeals:

> "The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency. Though the agency's jurisdiction is not exclusive, the court postpones its action until it has received the agency's views."

(Capital Tel. Co. v Pattersonville Tel. Co., 56 NY2d 11, 22 [1982] [internal citations omitted]. Accord Wong v Gouverneur Gardens Hous. Corp., 308 AD2d 301 [1st Dept 2003], lv denied 95 NY2d 770; Davis v Waterside Hous. Co., 274 AD2d 318 [1st Dept 2000].) "Deference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency." (Id. at 319.)

It is undisputed that the DHCR is the agency authorized to administer the Rent Stabilization Law. The DHCR also administers the dissolution of State assisted Mitchell-Lama projects and initial registration requirements for such projects under the Rent Stabilization Law. (See generally 9 NYCRR Part 1750; § 1750.8.) This Department has expressly held that the applicability of rent regulation to former Mitchell-Lama developments is an issue to which the doctrine of primary jurisdiction applies. (Davis, 274 AD2d at 319.)

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[2]To the extent that the court indicated otherwise at the oral argument of the motions, the court is persuaded, upon further consideration of the papers and of the issues developed through the discovery, that the doctrine is applicable.

In the instant case, the DHCR's views in interpreting the statute it administers should be made known to the court. New York rent regulations, including the Rent Stabilization Law, have been characterized by the Court of Appeals as a confusing "patchwork of legislation" (La Guardia v Cavanaugh, 53 NY2d 67, 70 [1981] [internal quotation marks and citation omitted]) or "legislative quagmire." (Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal, 5 NY3d 303, 309 [2005] [internal quotation marks and citation omitted].) Rent Stabilization Law § 26-504(c) provides that the law is applicable to dwelling units in a building receiving J-51 benefits (with exceptions not here relevant), while § 26-504(a)(1)(b) exempts from rent stabilization coverage dwelling units in a building subject to regulation under the PHFL. As held in the prior decision, these sections, read together, extend rent stabilization coverage to units in buildings based on receipt of J-51 benefits only if the building is no longer rent regulated under the PHFL. (Prior Decision at 9.) However, the Rent Stabilization Law does not explicitly address whether apartments in a building that qualified for J-51 benefits because it was regulated as a Mitchell-Lama under the PHFL become rent stabilized if the building continues to receive the same J-51 benefits after the building exits the Mitchell-Lama program. As the administrator for dissolving Mitchell-Lama projects, the DHCR has knowledge of the operational practices that have been followed for registration under the Rent Stabilization Law of projects that were also receiving J-51 benefits. There are also various inconsistencies, discussed in the prior decision, in the provisions of the Rent Stabilization Law regarding the circumstances under which apartments that become rent stabilized as a result of the receipt of J-51 benefits will remain rent stabilized upon expiration or termination of such benefits. (See Prior Decision at 7 n 3.) The agency's views should be heard on these issues that

are now arising as Mitchell-Lama projects are "aging out of" or qualifying to opt out of PHFL regulation.[3]

In addition, as noted above, defendants' counsel has acknowledged that HPD's decision to terminate IPN's J-51 benefits retroactively to the exit date was an issue of first impression. Similarly, it is an issue of first impression whether this retroactive termination of the benefits constitutes a waiver or revocation of tax benefits and is therefore ineffective, pursuant to 28 RCNY § 5-03(f)(3)(ii), to terminate rent stabilization (assuming arguendo that it is determined that rent stabilization became applicable to the units upon termination of the PHFL regulation). Contrary to defendants' contention, this is an issue not for HPD but for the tribunal determining whether the Rent Stabilization Law is applicable. Moreover, this determination involves a mixed question of fact and law, as factual findings must first be made as to the circumstances in which the J-51 benefits were paid after the exit date and then terminated. The DHCR has specialized expertise in making such findings, as Rent Stabilization Code § 2520.13 prohibits any waiver of the benefits of the Rent Stabilization Law and is therefore analogous to 28 RCNY § 5-03(f)(3)(ii).

The court rejects defendants' contention that plaintiffs are barred from asserting the

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[3]On a related issue – the extent to which the court is required to defer to the agency's interpretation – it is well settled that "an administrative agency's interpretation of the statute it is charged with implementing is entitled to varying degrees of judicial deference depending upon the extent to which the interpretation relies on the special competence the agency is presumed to have developed in its administration of the statute." (Roberts v Tishman Speyer Props., L.P., ___ AD3d ___, 2009 WL 540709 [1st Dept 2009] [brackets, internal citations, and quotation marks omitted].) "[W]here the statutory language suffers from some 'fundamental ambiguity', or the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices, courts routinely defer to an agency's construction of a statute it administers" (Matter of New York City Council v City of New York, 4 AD3d 85, 97 [1st Dept 2004], lv denied 4 NY3d 701 [internal citations and quotation marks omitted]), unless the agency's interpretation is manifestly wrong. (See Espada v New York City Campaign Fin. Bd., 59 AD3d 57, 64 [1st Dept 2008].)

primary jurisdiction doctrine based on their litigation of this action through the first summary judgment motion. As discussed above, as the result of the discovery that this court ordered when denying the prior summary judgment motion, it has become questionable that HPD was required to terminate the J-51 benefits as of the exit date and that the retroactive termination was merely a correction of a ministerial error on the part of the City in inadvertently continuing to pay the J-51 benefits. Thus, the discovery has developed a new issue as to whether the benefits were waived or revoked. In light of this new issue, deferral of this court's determination pending a remand to the agency is proper even at this advanced stage of the action. (See Capital Tel. Co., 56 NY2d at 22 [holding that "trial court will, after the issues have been more clearly developed through discovery, be free to defer its action until those particular phases of the action have been considered by the PSC."][internal citations omitted].)

Finally, defendants make no showing of "operative prejudice" that would render a remand improper. (See Shine v Duncan Petroleum Transp., Inc., 60 NY2d 22, 27 [1983].) Given the novel and important issues and their potential impact on former Mitchell-Lama projects throughout the City, the court has concluded that the remand is not only proper but imperative.

The court will accordingly grant plaintiffs' motion for a remand, and stay plaintiffs' and defendants' summary judgment motions and determination of the issue of the rent stabilized status of plaintiffs' units at the premises, pending remand of said issue to the DHCR for determination.

This constitutes the decision of the court. Settle order with a provision for effectuation of the remand.

It is further ORDERED that the parties shall appear for a status conference in the instant action in Part 57 on April 23, 2009 at 11:00 a.m., regarding any causes of action, counterclaims or other issues that are not stayed pending the remand.

Dated: New York, New York
April 3, 2009

MARCY FRIEDMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

INDEPENDENCE PLAZA NORTH TENANTS' ASSOCIATION, et al.,

Plaintiffs,

- against -

INDEPENDENCE PLAZA ASSOCIATES, L.P., et al.,

Defendants.

Index No.: 113831/04

DECISION/ORDER

Plaintiff Independence Plaza North Tenants' Association and various tenants of Independence Plaza North ("IPN") brought this action for a declaration, among others, that they are entitled to "Landlord Assistance Program" ("LAP") leases under a Settlement Agreement, made on March 12, 2004, between the tenants' association and defendant-landlords, prior to IPN's exit from the Mitchell-Lama Program. This court subsequently granted plaintiffs leave to amend the complaint to plead a cause of action for a declaration that plaintiffs' apartments are subject to the Rent Stabilization Law as a result of IPN's receipt of J-51 benefits after the exit date. Plaintiff-tenant Elizabeth Saenger now moves for partial summary judgment on her first through fifth causes of action, declaring that she is entitled, pursuant to the Settlement Agreement, to a LAP lease at the last Mitchell-Lama rent charged before the exit date.[1]

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[1]By order dated July 18, 2008, this court expressly ruled that it would not entertain piecemeal summary judgment motions. No plaintiff other than Saenger has moved for summary judgment in this action, and plaintiffs' counsel represented that there would be no other summary judgment motions. (See P.'s Reply Memo. Of Law at 13.)

By separate decision of the same date in a related action (Denza v Independence Plaza Assocs., LLC, Sup Ct, New York County, Index No. 117673/05), this court remanded the issue of the rent stabilization status of the Denza plaintiffs' units to the New York State Division of Housing & Community Renewal ("DHCR"). Plaintiff Saenger's claim on the instant motion that she is entitled to a LAP lease may be moot in the event it is determined that units at IPN became rent stabilized as a result of IPN's receipt of J-51 benefits after the Mitchell-Lama exit date.

It is accordingly hereby ORDERED that plaintiff Saenger's motion is denied without prejudice to renewal, if appropriate, after the rent stabilization issue is determined. Nothing herein shall be construed as precluding any claims by defendants to cancel the Settlement Agreement or declare it invalid.

The parties shall appear for a status conference in the instant action in Part 57 on April 23, 2009 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
April 3, 2009

MARCY FRIEDMAN, J.S.C.