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

PRESENT: _____ Justice

PART 56

Index Number : 100956/2007
ROBERTS, AMY L.
VS
TISHMAN SPEYER PROPERTIES
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE 5/15/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/16/07

_____ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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AMY L. ROBERTS, THOMAS I. SHAMY, DAVID AND ANNMARIE HUNTER, MARGARET CARROLL, KELLEY AND TONY LANNI, EVAN HORISK, and BETH ROSNER GIOKAS, on behalf of themselves and all others similarly situated,

Plaintiffs,

Index No. 100956/07

-against-

TISHMAN SPEYER PROPERTIES, L.P., PCV ST OWNER LP, METROPOLITAN INSURANCE AND ANNUITY COMPANY, and METROPOLITAN TOWER LIFE INSURANCE COMPANY,

Defendants.

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RICHARD B. LOWE, III, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this purported class action, plaintiffs claim that defendants wrongfully charged tenants of Stuyvesant Town and Peter Cooper Village rents exceeding permissible stabilized rent levels, while at the same time receiving tax benefits under section 11-243 of the New York City Administrative Code, commonly referred to as J-51 tax benefits. The first cause of action of the four-count complaint seeks damages, including interest and attorneys' fees, for defendants' alleged improper rent overcharges. The second cause of action seeks a declaration that plaintiffs' apartments will continue to be subject to rent stabilization as long as defendants receive J-51 tax benefits. The third cause of action asserts a claim for deceptive acts and practices under section

349 of New York's General Business Law (GBL). The fourth cause of action asserts a claim for unjust enrichment.

Plaintiffs allege that Stuyvesant Town and Peter Cooper Village (Property) constitute New York City's largest apartment complex, consisting of 110 apartment buildings that contain 11,200 units and over 20,000 residents. Plaintiffs are rental tenants residing at the Property, and the purported class consists of all persons who are or were tenants charged rents that exceed rent stabilization levels while defendants received J-51 tax benefits.[1] Defendant Metropolitan Insurance and Annuity Company owned the Property from 2002 to 2004, and, by virtue of a merger, defendant Metropolitan Tower Life Insurance Company owned the Property until November 17, 2006, when it was purchased by its current owner, defendant PCV ST Owner LP (PCV). Defendant Tishman Speyer Properties, L.P. (Tishman) is the general partner of PCV.

Plaintiffs aver that the Property has been subject to New York's Rent Stabilization Law (RSL) since 1974 under the Redevelopment Companies Law. Starting in 1992, Metropolitan Life Insurance Company, a former owner of the Property, allegedly began applying for and receiving J-51 tax benefits. According to plaintiffs, these benefits provide partial property tax exemption and abatement benefits to buildings undertaking rehabilitation work, conditioned

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[1] Defendants submit documentary evidence showing that at least three of the plaintiffs' apartments were not decontrolled during their tenancy, but rather, these plaintiffs entered into market rate leases for apartments known at the time to be decontrolled. Defendants submit leases signed by these three plaintiffs, David and Annmarie Hunter and Evan Horisk, stating that "THIS LEASE AND THE APARTMENT ARE NOT SUBJECT TO RENT STABILIZATION, RENT CONTROL OR ANY OTHER REGULATION." Ansell Aff., Ex. F. Separate from this language in the leases, a "Notice of Deregulation" was sent to each of these plaintiffs, stating that their apartments are luxury deregulated by operation of law. *Id.*, Ex. G. Defendants appear to be arguing that these plaintiffs lack standing to bring this action, but defendants fail to adequately address the issue of standing. Therefore, the court does not address standing with respect to these plaintiffs.

upon the units in these properties being subject to rent stabilization laws while receiving the tax benefits. Plaintiffs claim that, since 1992, the owners of the Property have received approximately $24.5 million in J-51 tax benefits. Defendants allegedly deregulated more than 25% of the Property's units and charged market rents exceeding rent stabilization levels, even though they were receiving the J-51 tax benefits. According to plaintiffs, the most recent J-51 tax benefits for the Property expire in 2017 or 2018.

Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company (together, MetLife) now move (in motion sequence number 003) to dismiss the complaint based upon documentary evidence, for failure to state a cause of action, and, raised in a footnote of their opening brief, based upon lack of legal capacity to sue, res judicata and statute of limitations. In motion sequence number 004, Tishman and PCV move to dismiss the complaint based upon documentary evidence and for failure to state a cause of action.

Amicus curiae memoranda are submitted on behalf of defendants by non-parties Community Housing Improvement Program, Inc. and Rent Stabilization Association of NYC, Inc. An amicus curiae memorandum is submitted on behalf of plaintiffs by non-party the Office of the Manhattan Borough President.

Factual Background and Statutory Overview

The following overview of New York's rent stabilization laws places in context the facts of this case and the disputed legal issue.

"The RSL was originally enacted in response to a severe housing shortage following World War II and has been periodically extended by the Legislature as it perceives a continuing need." *Federal Home Loan Mtge. Corp. v New York State Div. of Hous. & Community Renewal*,

87 NY2d 325, 332 (1995) (internal quotation marks and citation omitted). "The central, underlying purpose of the [RSL] is to ameliorate the dislocations and risk of widespread lack of suitable dwellings that accompany a housing crisis." *Id.* (internal quotation marks and citation omitted). However, "[i]n 1971, the State Legislature determined that new construction had essentially come to a standstill and, in response, enacted ... [t]he Vacancy Decontrol Law (VDL) and the Urstadt Law," both of which loosened restrictions on rent regulation. *Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 311-12 (2005) (internal citation omitted). The Urstadt Law also "barred the adoption of more restrictive regulations on housing accommodations that were already subject to rent regulation." *Id.*

Subsequently, there was a shortage in the housing market. In response to this shortage, the Legislature enacted the Emergency Tenant Protection Act (ETPA) in 1974. The net effect of this legislation was "to bring apartments in buildings of six or more units within New York City's rent stabilization system, including apartments that had been decontrolled under the VDL, were in buildings constructed after 1969 but before January 1, 1974, or became vacant after 1975." *Id.* It is at this point, in 1974, that plaintiffs claim that the Property became subject to rent stabilization, pursuant to the Redevelopment Companies Law, now replaced by the Private Housing Finance Law (PHFL).

J-51 was enacted pursuant to section 489 of the New York Real Property Tax Law (RPTL) in order "to improve and maintain the urban housing stock," and authorizes "cities to enact local laws providing multiple dwelling owners with tax incentives to rehabilitate their properties." *Matter of 31171 Owners Corp. v New York City Dept. of Hous. Preserv. & Dev.*,

190 AD2d 441, 443 (1st Dept 1993). J-51 provides that "any increase in the assessed valuation of real property shall be exempt from taxation for local purposes to the extent such increase results from the reasonable cost of [certain conversions, alterations or improvements.]" Administrative Code § 11-243 (b). J-51 also states that it "shall not apply ... to any existing dwelling which is not subject to the provisions of ... the city rent stabilization law or to the private housing finance law." Administrative Code § 11-243 (i) (1).

The New York City Department of Housing Preservation and Development (HPD) is "the City agency charged with administering the J-51 program." *Matter of Bleecker St. Mgt. Co. v New York State Div. of Hous. & Community Renewal*, 284 AD2d 174, 175 (1st Dept 2001); Administrative Code § 11-243 (m). However, while HPD administers the J-51 program, "[i]n 1983, the Legislature, by the Omnibus Housing Act (L 1983, ch 403), transferred responsibility for administering the New York City Rent Stabilization and Rent Control Laws to DHCR," New York State's Division of Housing and Community Renewal. *Festa v Leshen*, 145 AD2d 49, 53-54 (1st Dept 1989); *KSLM-Columbus Apts., Inc.*, 5 NY3d at 310 ("[r]ent stabilization is now administered by DHCR, which has promulgated the Rent Stabilization Code [RSC]").

In 1985, the Legislature amended the RSL by rewriting section 26-504 (c). Under the 1985 amendment, the RSL applied to "[d]welling units in a building or structure receiving [J-51 tax benefits] until the occurrence of the first vacancy of such unit after such benefits are no longer being received," or if tenants received proper notice in their leases, upon expiration of the J-51 benefits. The amendment did not change the status of buildings already subject to rent stabilization, incorporating in the amendment the proviso that, if the apartment was already subject to rent regulation prior to receiving J-51 benefits, the apartment "shall, upon the

expiration of [J-51] benefits, continue to be subject to this title or the [ETPA of 1974] to the same extent and in the same manner as if this subdivision had never applied thereto." RSL § 26-504 (c).

In 1993, the Legislature enacted statutes under the Rent Regulation Reform Act (RRRA) to exclude "high income renters" and "high rent accommodations" from rent stabilization, referred to as the luxury decontrol statutes. RSL §§ 26-504.1 and 26-504.2 (a). RSL section 26-504.1 (as originally drafted) excluded apartments occupied by persons whose annual income exceeded $250,000 for each of the two preceding years and whose monthly rent equaled $2,000 or more. Section 26-504.2 (a) excluded apartments with monthly rent upon vacancy of $2,000 or more. Both of these provisions contained the following limiting language: "[p]rovided, however, that this exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section ... four hundred eighty-nine of the real property tax law ... ."

At some point after the RRRA was enacted, the law firm Belkin Burden Wenig & Goldman, LLP (Belkin Burden), now Tishman's attorneys, requested an Advisory Opinion from DHCR concerning the interpretation of the "by virtue of" language of the statutes. DHCR responded on October 19, 2005. Belkin Burden submitted a follow-up letter dated December 14, 2005. The parties do not submit DHCR's October 19th response, but defendants do submit DHCR's letter dated January 16, 1996, responding to Belkin Burden's December 14th follow-up letter. DHCR's January 16th letter expressly reconsiders its October 19th opinion and states, in pertinent part, as follows:

> The relevant provisions of the RRRA ... adding [RSL] Sections 26-504.1 and 26-504.2 ... provide that Luxury Decontrol is not

> applicable to housing accommodations which became or become subject to the specific rent regulation law "by virtue of" receiving tax benefits under [RPTL] Section 489 (which covers the "J-51" Program, in New York City, Sections 11-243 and 11-244 of the Administrative Code).
>
> In reviewing our interpretation of that language, we have determined that the Introducer's Memorandum In Support of the RRRA is silent on the issue. As that document fails to give us guidance as to the extent to which the Legislature intended to exclude buildings receiving "J-51" benefits from the applicability of Luxury Decontrol, we will construe "by virtue of" literally, in accordance with the ordinary meaning thereof. Therefore, applying a lexicographical definition to those words, as for example is enunciated in Webster's College Dictionary, it is our opinion that their apparent meaning is synonymous to "by reason of" or "because of," and that an owner is precluded from seeking Luxury Decontrol of a housing accommodation receiving "J-51" tax abatement benefits only where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation.
>
> However, it should be noted that where Luxury Decontrol is applied before the "J-51" tax benefit period has expired, the abatement should be reduced proportionately. That the Legislature recognized the inherent inequity of an owner's continuing to enjoy tax benefits after decontrol is apparent from RPTL Section 489 7 (b) (1), which provides that as to "...any multiple dwelling, building or structure which is decontrolled subsequent to the granting of such benefits, the local legislative body or other governing agency may withdraw such benefits from such dwelling."

1/16/96 DHCR Opinion Letter, Kasner Aff., Ex. 2 (emphasis in original). The letter states that, while it is an opinion letter, it "is not a substitute for a formal agency order issued upon prior notice to all parties and after having afforded all parties an opportunity to be heard." *Id.*

In 1997, the Legislature enacted the RRRA of 1997, which extended the duration of rent stabilization to 2003 and expanded the terms for exempting luxury rentals from rent stabilization by, among other things, reducing the income level needed to trigger the exclusion from $250,000

to its current level of $175,000. In the RRRA of 1997, the Legislature did not amend the provisions that limit the exclusion from luxury decontrol to housing accommodations that "became or become subject" to rent stabilization "by virtue of receiving" J-51 tax benefits.

New York's Rent Stabilization Code (RSC), promulgated and adopted by DHCR in 1987, applies to housing accommodations "subject to regulation pursuant to the RSL or any other provision of law ... ." 9 NYCRR § 2520.11. The RSC states various exceptions to the general applicability of the RSC to housing accommodations. In December 2000, DHCR amended the RSC in order "[t]o conform regulations to statutes, particularly the RRRAs of 1993 and 1997, judicial determinations and incorporate agency practice." 51 NY Reg, Dec. 20, 2000, at 18. The 2000 amendment added paragraphs (r) and (s) to section 2520.11. These provisions prohibit the luxury decontrol of "housing accommodations which became or become subject to the RSL and this Code: (i) *solely* by virtue of the receipt of [J-51] tax benefits," thereby adding the word "solely" to RSL sections 26-504.1 and 26-504.2 (a), but otherwise tracking the language of these statutes. (Emphasis added.)

In 2003, the Legislature extended the rent regulation laws through 2011. Also in 2003, RSL section 26-504.2 (a) was amended to maintain high vacancy decontrol if the monthly legal regulated rent is $2,000 or more, regardless of whether a landlord actually charges rent of less than $2,000 per month. However, again, the Legislature did not amend the "became or become subject to rent stabilization by virtue of receiving" J-51 tax benefits language in this section, section 26-504.1, or require any change to the DHCR's use of "solely by virtue of" in RSC sections 2520.11 (r) (5) or (s) (2).

Discussion

Defendants argue that the Property is exempted from rent stabilization requirements because they did not apply for J-51 tax benefits until *after* it became subject to rent stabilization. Plaintiffs counter that defendants deregulated certain "high income renter" and "high rent accommodation" apartments that should not be deregulated because defendants are still receiving J-51 tax benefits. Defendants do not dispute that they are receiving J-51 benefits while certain of their apartments are deregulated. Rather, the parties' dispute focuses on the discrete issue of whether, under the relevant statutes, defendants are permitted to deregulate certain high-income and high-rent apartments while receiving J-51 benefits.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and [w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *Pultz v Economakis*, 40 AD3d 24, 28 (1st Dept 2007) (citations and quotation marks omitted). Moreover, "[a] fundamental rule of statutory construction is that the Legislature is presumed to mean what it says and when the language of a statute is unambiguous, it is to be construed 'according to its natural and most obvious sense, without resorting to an artificial or forced construction.'" *Matter of Schmidt v Roberts*, 74 NY2d 513, 520 (1989) (citation omitted). "[T]he courts are not at liberty to hold that the Legislature had an intention other than its language imports, and new language cannot be imported into a statute to give it a meaning not otherwise found therein." McKinney's Cons Laws of NY, Book 1, Statutes § 94.

Here, the clear and unambiguous language of the RSL states that the luxury decontrol "exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving [J-51] tax benefits ... ." RSL §§ 26-504.1 and 26-504.2 (a). The

parties agree that the phrase "by virtue of" means "because of" or "by reason of." Plaintiffs concede that Peter Cooper Village and Stuyvesant Town became subject to rent stabilization in 1974 and did not apply to receive J-51 tax benefits until 1992. Complaint, ¶¶ 28, 30. Having become subject to rent stabilization in 1974 pursuant to the PHFL, 18 years before applying for J-51 tax benefits, defendants did not become subject to rent stabilization by virtue of receiving J-51 tax benefits. Thus, defendants did not need J-51 benefits in order for the Property to become subject to rent stabilization; rather, the Property was already subject to rent stabilization regardless of the J-51 benefits. *See e.g. KSLM-Columbus Apts., Inc.*, 5 NY3d at 312 (buildings "would have been regulated under the 1969 law, and would not have needed the ETPA to bring them under stabilization").

This interpretation is consistent with the attempt of the luxury decontrol laws to:

> restore some rationality to a system which provides the bulk of its benefits to high income tenants. The Act recognizes that [t]here is no reason why public and private resources should be expended to subsidize rents for these households. To that end, these rent laws specifically provide for deregulation of high-rent accommodations upon vacancy or when occupied by high-income tenants.

Noto v Bedford Apts. Co., 21 AD3d 762, 765 (1st Dept 2005) (internal quotation marks and citations omitted). This interpretation is also consistent with the progeny of the Legislature's 1985 amendment to RSL section 26-504 (c), as the Legislature enacted sections 26-504.1 and 26-504.2 (a) to carve out high-income tenants and high-rent accommodations.

Moreover, "DHCR's interpretation of the statutes it administers, if not unreasonable or irrational, is entitled to deference." *Matter of Salvati v Eimicke*, 72 NY2d 784 (1988). As discussed above, DHCR's interpretation in the 1/16/96 DHCR Opinion Letter states that "an owner is precluded from seeking Luxury Decontrol of a housing accommodation receiving 'J-51'

tax abatement benefits only where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation." DHCR's subsequent amendment to the RSC in 2000 makes explicit what the 1/16/96 DHCR Opinion Letter stated to Tishman's attorneys in 1996. Specifically, the RSC expressly states that exemption from the RSL based upon luxury decontrol does not apply to housing accommodations that "became or become subject to the RSL and this Code: (i) solely by virtue of the receipt of tax benefits pursuant to ... section 11-243 (formerly J51-2.5) ... of the Administrative Code of the City of New York ... ." RSC §§ 2520.11 (r) (5) (i) and 2520.11 (s) (2) (i). "Thus, DHCR was exercising its power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Matter of Versailles Realty Co. v New York State Div. of Hous. & Community Renewal*, 76 NY2d 325, 329 (1990) (quotation marks and citation omitted).

Significantly, the Legislature has not amended the RSL in response to DHCR's use of the term "solely by virtue of" in DHCR's 2000 amendment of the RSC, even though the Legislature had an opportunity to do so when it amended the luxury decontrol provisions of the RSL in 2003. Thus, "the local legislature, in never choosing to amend the statute to provide otherwise, has acquiesced in this construction." *Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 215 (1989).

Moreover, in February 2004, DHCR issued Fact Sheet #36 concerning "High-Rent Vacancy Decontrol and High-Rent High-Income Decontrol." Kasner Aff., Ex. 3. This document states that:

> Apartments that are subject to rent regulation *only because of* the receipt by the owner of tax benefits pursuant to Sections 421-a or 489 of the Real Property Tax Law, or pursuant to Sections 11-243 (formerly J51-2.5) or 11-244 (formerly J51-5) of the New York

> City Administrative Code, or only because of Article 7-C of the Multiple Dwelling Law (commonly referred to as the "Loft Law"), do not qualify for high-rent vacancy decontrol.

Id. (Emphasis added.) This document is consistent with the plain language of the luxury decontrol statutes, the 1/16/96 DHCR Opinion Letter, and DHCR's subsequent amendment of the RSC.

Plaintiffs argue that the luxury decontrol statutes should be read to exclude from deregulation any apartments that are receiving J-51 benefits, and that the Legislature could have inserted the word "solely" into the statute if it intended to exclude from deregulation those apartments that are rent stabilized *solely* because of receiving J-51 benefits. However, by enacting the RRRAs of 1993 and 1997, the Legislature carved out luxury decontrol from regulation under section 26-504 (c) of the RSL; and even after the Legislature amended the RRRA, and DHCR amended the RSC to *include* the word "solely," the Legislature never altered the limiting language of the luxury decontrol statutes.

Plaintiffs' argument is also refuted by the interpretive canon of inclusio unius, exclusio alterius, which supports the conclusion that "[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." *Presbyterian Hosp. in City of New York v Maryland Cas. Co.*, 90 NY2d 274, 285 (1997) (citation omitted). The Legislature could easily have stated, as it did in section 26-504 (c) of the RSL, that units in buildings "receiving the benefits of [J-51]" could not be subject to luxury decontrol if that is what the Legislature intended. Tellingly, the Legislature did not repeat the blanket "receiving the benefits" language used in section 26-504 (c) of the RSL in its subsequent luxury decontrol carve-outs in sections 26-504.1 and 26-504.2 (a). Rather, the Legislature identified only

"housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section [421-a] or [489] of the [RPTL] ..., or by virtue of article seven-C of the multiple dwelling law." RSL §§ 26-504.1 and 26-504.2 (a). The statutes make no reference to housing accommodations that became subject to the RSL by virtue of the Redevelopment Companies Law or the PHFL.

Furthermore, as discussed above, J-51 was enacted in order "to improve and maintain the urban housing stock" (*31171 Owners Corp.*, 190 AD2d at 443), while the RSL was enacted in response to a housing crisis, the luxury decontrol statutes were enacted because "[t]here is no reason why public and private resources should be expended to subsidize rents" for high-income households (*Noto*, 21 AD3d at 765), and the Urstadt Law sought to limit local rent regulation (*KSLM-Columbus Apts., Inc.*, 5 NY3d 311-12). Taken together, the policies behind these laws do not support plaintiffs' blanket argument that receipt of J-51 tax benefits subjects a building to rent stabilization. Rather, the statutes were enacted for different purposes. J-51 was not enacted in order to cause rent stabilization, but rather, "to improve and maintain the urban housing stock," and provide owners with incentives to improve their properties. *31171 Owners Corp.*, 190 AD2d at 443. Plaintiffs' attempt to merge the language of the statutes is at odds with their purposes. In addition, as discussed below, plaintiffs' argument appears to impermissibly confer upon HPD, the agency with authority to administer the J-51 program, the additional authority to regulate rent stabilization.

Moreover, in effect, plaintiffs' interpretation eviscerates the statutory language "which became or become subject to this law (a) by virtue of," so that the statute reads: "this exclusion shall not apply to housing accommodations receiving tax benefits pursuant to J-51." However,

"it is a fundamental principle of statutory construction that a court must construe a statute in a manner that will give effect to every word, if possible, and every word, phrase, clause or paragraph must be presumed to have some meaning." *Matter of Tristram K.*, 36 AD3d 147, 151 (1st Dept 2006); *see also Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 (2001) ("words are not to be rejected as superfluous"). For the foregoing reasons, plaintiffs' argument is unpersuasive.

Plaintiffs also argue that DHCR's December 1995 Operational Bulletin 95-3 supports their claims. Referring to the RRRA of 1993, that Bulletin states that "[t]hese deregulation provisions shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits pursuant to section[] ... 489 of the Real Property Tax Law, until the expiration of the tax abatement period." Kasner Aff., Ex. 4, at 5-6. However, this language for the most part repeats the luxury decontrol language contained in RSL sections 26-504.1 and 26-504.2 (a). In any event, the 1/16/96 DHCR Opinion Letter, issued *after* the Operation Bulletin, makes clear that DHCR deemed the "by virtue of" language to prohibit an owner from seeking luxury decontrol of housing accommodations receiving J-51 tax benefits "only where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation." DHCR's amendments to the RSC in 2000, also issued *after* the Operation Bulletin, are consistent with this letter. This interpretation is also consistent with the Urstadt Law, which "was intended to prevent any new tightening of rent regulation after 1971 ... ." *KSLM-Columbus Apts., Inc.*, 5 NY3d at 314. Therefore, this argument is unpersuasive.

Plaintiffs argue that, in 1991, HPD promulgated section 5-03 of title 28 of the Rules of the City of New York. This section provides that units receiving J-51 tax benefits shall remain

subject to rent regulation for "at least so long as a building is receiving the benefits of the Act ... ." 28 RCNY § 5-03 (f). However, this provision predates the RRRA of 1993, which established the luxury decontrol statutory carve-outs. It also predates DHCR's 2000 amendment to the RSC. In addition, while HPD has authority to administer the J-51 tax program, it is DHCR that administers the rent stabilization laws, not HPD.

Moreover, section 5-03 is consistent with defendants' argument that HPD has, in certain instances, reduced J-51 benefits in proportion to the number of units in the building deregulated through luxury decontrol. In support of this argument, defendants submit an HPD "Certificate of Eligibility," wherein HPD "certifies that the reasonable cost of the alteration or other improvements" for which a tax benefit was granted was reduced to reflect the deregulation of units. Kasner Reply Aff., Ex. B. Section 5-03 is also implicitly acknowledged in DHCR's representation "[t]hat the Legislature recognized the inherent inequity of an owner's continuing to enjoy tax benefits after decontrol," and its statement "that where Luxury Decontrol is applied before the 'J-51' tax benefit period has expired, the abatement should be reduced proportionately." 1/16/96 DHCR Opinion Letter. This practice is also consistent with HPD's J-51 application form, which asks applicants to identify "exempt" apartments and the number of rent stabilized units. Thus, it is the City of New York, through HPD, the enablers of this legislation, that can withdraw J-51 benefits proportionate to the deregulation of apartments.[2]

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[2] The court notes that, as discussed above, HPD is "the City agency charged with administering the J-51 program." *Matter of Bleecker St. Mgt. Co.*, 284 AD2d at 175. Thus, it is HPD's responsibility to ensure that, as rental apartments become luxury decontrolled, the landlords' tax benefits are reduced proportionately. The issue of whether HPD is fulfilling its administrative duties by monitoring luxury decontrol and making proportionate tax benefit reductions is not presently before the court.

RPTL § 489 (7) (b) (1). But plaintiffs fail to explain how HPD has any authority to use J-51 tax rules to regulate the stabilization of rents.

Plaintiffs also argue that the luxury decontrol statutes can be read to deregulate the non-J-51 basis for regulation (that is, the Property's regulation by virtue of the PHFL in 1974) while leaving the J-51 basis for rent regulation intact. This would leave J-51 benefits as the sole basis for regulation under the luxury decontrol statutes, thereby causing the Property to be excluded from luxury decontrol under RSL sections 26-504.1 and 26-504.2 (a). However, this interpretation strains the Legislature's plain language, because it assumes that the Legislature enacted a statute whereby luxury decontrol could apply to an apartment, but then cause that same apartment to be restabilized instantaneously, thereby eviscerating the statute's purpose of deregulating luxury apartments that are subject to rent stabilization for reasons other than receipt of J-51 benefits. Moreover, plaintiffs submit no legal authority in support of this interpretation. If the Legislature intended that all buildings receiving J-51 benefits are prohibited from luxury decontrol, it could have simply said so in the statutes, which it did not do. Therefore, this argument is unpersuasive.

Moreover, while not fully briefed by the parties, it is not clear to the court whether plaintiffs permissibly or impermissibly seek to enforce a tax-based claim belonging to HPD. *See e.g. Kolari v New York-Presbyterian Hosp.*, 382 F Supp 2d 562, 571 (SD NY 2005) (plaintiffs' claims dismissed where seeking to enforce the Internal Revenue Code, which "allows an entity seeking exempt status, and only that entity, to obtain judicial review of the IRS determination"), *vacated in part on other grounds* 455 F3d 118 (2d Cir 2006). In any event, this argument is raised for the first time in Tishman's reply papers, and, therefore, it is not properly before the

court. *171 West 57th Street Operating, LLC v New York State Div. of Hous. & Community Renewal*, 38 AD3d 245, __, 2007 NY Slip Op 01942, *2 (1st Dept 2007).

Furthermore, as suggested in a footnote of MetLife's opening brief, to the extent that plaintiffs are challenging the deregulation of apartments pursuant to a DHCR order under RSC section 2530.1 (MetLife Mem. of Law, at 4 n 4), a challenge would be proper in an Article 78 proceeding, and may raise issues of statute of limitations and res judicata. However, MetLife fails to indicate which of plaintiffs' apartments, if any, were deregulated pursuant to a DHCR order. In any event, plaintiffs represent to the court in their opposition papers that they are not challenging any action by DHCR, and that they merely seek relief for defendants allegedly charging rents in excess of permissible rent stabilized rents (Plaintiffs' Opp. Mem. of Law, at 38).

With respect to the standing issues raised by defendants, the court notes that, while it appears to be undisputed that the tax laws can establish conditions for the receipt of tax benefits, plaintiffs fail to explain how the receipt of tax benefits can force rent stabilization when rent stabilization would not otherwise exist under the RSL, particularly where rent stabilization is administered by DHCR, not HPD. HPD, as administrator of the J-51 program, has the authority to adjust J-51 tax benefits received by landlords, if appropriate, so that the benefits received are consistent with the number of regulated apartments. RPTL § 489 (7) (b) (1). It is also worth noting that plaintiffs' attorneys represented to the court that they attempted to have the City of New York submit amicus curiae papers, but, according to plaintiffs, for undisclosed reasons the City refused and stood silent. 5/15/07 Tr., at 60.

For the foregoing reasons, defendants' motions to dismiss the first and second causes of

action for damages from improper rent overcharges and a declaration concerning the rent stabilized status of plaintiffs' apartments while defendants receive J-51 benefits are granted. Plaintiffs do not dispute defendants' argument that the third and fourth causes of action for violations of section 349 of the GBL and unjust enrichment, respectively, are derivative of the first and second causes of action. Therefore, the third and fourth causes of action are also dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 16, 2007

ENTER:

J.S.C.