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

**PRESENT : DONNA M. MILLS** **PART 58**

*Justice*

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*SHARON CALIFANO TEISSEIERE,*

Plaintiff,

-v-

W7879 LLC, et al.,

Defendants.

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INDEX NO. 150439/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause-Affidavits– Exhibits.... | 1,2 |
| Answering Affidavits– Exhibits | 3 |
| Replying Affidavits | 4, 5 |



CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that the motion is hereby decided in accordance with the attached memorandum decision.



**Dated:** 4/12/12

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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SHARON CALIFANO TEISSEIERE,

Plaintiff,

-against-

W7879 LLC, et al.,

Defendants.

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Index No. 112008/11

**DONNA M. MILLS, J.:**

Plaintiff tenant brings this action to compel defendant owners to give a rent stabilized lease for her apartment and refund alleged rent overcharges from 2008 to the present. Plaintiff's claims center around the deregulation of her apartment while the building received J-51 tax benefits. Defendants now seek dismissal of the complaint pursuant to CPLR § 3211(a)(1,5 & 7).

The current action concerns real property located at 230 West 79th Street, New York, New York (the "Building"). The Building is mixed use with commercial and residential space. Several of the residential apartments are rent controlled and stabilized. The defendants are the owners of the Building (the "Building Owners") and plaintiff has lived in Apartment 101N of the Building for decades, first with her parents and then as the successor in law to the rent controlled tenancy, and has continuously occupied the subject unit.



In 1992, the Building was granted J-51 tax exemption status, which expired in June 2004. On February 28, 2007, the Building Owners filed a luxury deregulation petition at the New York State Division of Housing and Community Renewal ("DHCR") with respect to plaintiff's apartment pursuant to Sec. 26-403.1 of the New York City

Rent and Rehabilitation Law (Rent Control), Sec. 26-504.1 of the New York City Rent Stabilization Law of 1969, as amended ("RSL"), and Part 2531 of the Rent Stabilization Code ("RSC"). The luxury deregulation petition resulted in an Order of Deregulation issued on February 5, 2008. DHCR determined that because the legal rent stabilized rent for the subject unit was $2,107.14 per month and the plaintiff's income was in excess of $175,000.00 the subject unit was to be deregulated. It is undisputed that plaintiff never challenged the petition for deregulation before DHCR, nor sought an Article 78 proceeding regarding the Order of Deregulation.

Plaintiff alleges in her complaint that the Building Owners improperly deregulated her apartment in light of the Court of Appeals decision in Roberts v Tishman Speyer Properties, 13 NY3d 270 (2009). In Roberts, the Court of Appeals found incorrect longstanding interpretation of rules and regulations of DHCR and others which allowed for deregulation of apartments while a premise received J-51 tax benefits. However, in the instant matter, the Building Owners did not file the prior administrative proceeding for high income decontrol until after the expiration of the J-51 tax status. This Court's reading of Roberts merely prohibits the filing for decontrol while the building is receiving J-51 tax benefits. It is undisputed that the subject apartment was in fact rent controlled throughout the time the Building received J-51 tax status. The apartment was not, however, deregulated until several years after the expiration of J-51 tax benefits, thus the Roberts decision cannot be relied on to support plaintiff's contentions.

In opposition, plaintiff takes the position that J-51 benefits place a permanent banishment from luxury deregulation on all rent controlled apartments. Plaintiff's argument was expressly rejected by the court in Schiffren v Lawlor, 2011 NY Slip Op

31511U (NY Sup Ct 2011):

> "To support petitioner's interpretation of the statute, petitioner cites Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388 (2009). Roberts, however, holds that a rent stabilized unit that is located in a building receiving J-51 benefits, and would be subject to luxury deregulation but for such J-51 benefits, cannot be deregulated until such benefits expire. Roberts does not in any way support petitioner's interpretation of RSL § 26-504( c). The Court therefore finds that, pursuant to RSL § 26-504( c), petitioner's apartment unit was not granted permanent rent stabilized status until vacancy..."

Plaintiff attempts to distinguish the Schiffren decision by submitting an unpublished administrative decision In re Berk, Adm. Rev. Docket Number YL-420051-RT (DHCR 2011), is unpersuasive. This Court does not agree with and is not bound by the holding In re Berk, which suggests that a building owner is forever precluded from moving to deregulate a rent controlled apartment if the Building had previously received J-51 benefits.

As mentioned earlier, the complaint seeks a judicial declaration regarding the status of the subject apartment as rent stabilized despite the deregulation order of DHCR. DHCR's Order of Deregulation from 2008 is a final administrative order which became effective on March 1, 2008. Thus, the plaintiff's rent controlled unit became deregulated on the effective date stated in DHCR's Order of Deregulation from 2008.

Pursuant to RSC §2529.2, the plaintiff had 35 days from the issuance date of the deregulation orders to file a Petition for Administrative Review ("PAR"). The Rent

Stabilization Code unambiguously provides: "A PAR against an order of a Rent Administrator must be filed in person or by mail with the DHCR within thirty-five days after the date such order is issued." (RSC [9 NYCRR] § 2529.2] ). The 35–day time limit has been strictly enforced ( Windsor Place Corp. v. State Div. of Hous. and Community Renewal, 161 A.D.2d 279, 280, 554 N.Y.S.2d 913; Kaplen v. New York State Div. of Hous. & Community Renewal, Office of Rent Admin., 131 A.D.2d 483, 516 N.Y.S.2d 100; see also, Lipes v. State Div. of Hous. and Community Renewal, 174 A.D.2d 571, 570 N.Y.S.2d 684), and courts have found DHCR's interpretation of its own regulation to be neither arbitrary nor irrational ( see, id.; Rusty Realty Assocs., Ltd. v. New York State Div. of Hous. and Community Renewal, Office of Rent Admin., 161 A.D.2d 207, 209, 554 N.Y.S.2d 594, lv. denied 76 N.Y.2d 711, 563 N.Y.S.2d 62, 564 N.E.2d 672). Moreover, the untimely filing of a PAR constitutes a failure to exhaust administrative remedies and justifies dismissal of a subsequent Article 78 proceeding ( see, Ponds v. New York State Div. of Hous. and Community Renewal, 191 A.D.2d 153, 594 N.Y.S.2d 28, lv. denied 82 N.Y.2d 657, 604 N.Y.S.2d 47, 624 N.E.2d 177).

A motion to dismiss a complaint pursuant to CPLR 3211 (a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff's claim" (Paramount Transp. Sys., Inc. v Lasertone Corp., 76 AD3d 519, 520 [2010]).

Where a party has had a full and fair opportunity to litigate an issue, but has

received an adverse final ruling on it, that party is collaterally estopped from litigating the same issue in another proceeding (see Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640, 649 [1993]). In order for collateral estoppel to apply, two elements must be established: (1) that "the identical issue was necessarily decided in the prior action and is decisive in the present action;" and (2) that the precluded party "must have had a full and fair opportunity to contest the prior determination" (D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]). An issue is "raised" and ""actually litigated" for collateral estoppel purposes when it is submitted for determination, and is determined, and may be so submitted, inter alia, by pleading, or on a motion for summary judgment (Restatement [Second] of Judgments § 27, Comment d). Here, defendants established that in the first action, the plaintiff challenged the deregulation of her apartment and this contention was rejected by DHCR when it issued the Order of Deregulation in 2008.

This Court finds that the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. Moreover, plaintiff failed to challenge the DHCR Order of Deregulation, dated February 5, 2008 and is precluded from relitigating the issue of status of the subject apartment in this action.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of all defendants.

Dated: 4/12/12

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

APR 17 2012

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COUNTY CLERK'S OFFICE