

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

PRESENT: GEOFFREY D.S. WRIGHT PART 62
Justice

In The Matter Of The Application Of
RAM I, LLC,

INDEX NO. 114412/11

Plaintiff/Petitioner
For A Judgment Pursuant To Article 78 Of The
Civil Practice Law and Rules

MOTION DATE _____

- v -

MOTION SEQ. NO. 001
MOTION CAL. NO. _____

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and PHYLLIS BERK,

Defendant/Respondent(s)

The following papers, numbered 1 to 3 were read on this motion to/for revoke agency decision,
cross-motion to dismiss the petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	
Other _____	

Cross-Motion: X Yes No 2

Upon the foregoing papers, It is ordered that this motion/petition by the Petitioner to revoke the decision of the Division of Housing and Community Renewal of October 26, 2011, which granted the Petition for Administrative Review of Respondent Berk, is granted, and the cross-motion of the Division to dismiss the petition is denied, a/p/o.

Dated: May 21, 2012

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GEOFFREY D. WRIGHT
AWSC
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED

JUN 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

-----X
In The Matter Of The Application Of
RAM I LLC,

Plaintiff/Petitioner(s),

For A Judgment Pursuant To Article 78 Of The
Civil Practice Law and Rules

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and
PHYLLIS BERK,

Defendant/Respondent(s).
-----X

Index #114412/11

Motion Cal. #
Motion Seq. #
DECISION/ORDER

Present:
Hon. Geoffrey Wright
and Judge, Supreme Court

FILED

JUN 04 2012

Recitation, as required by CPLR 2219(a), of the papers considered in the review of
this Motion to: revoke agency determination; cross-motion to dismiss the petition
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PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	
Replying Affidavits & Exhibits Annexed	3
Other (Cross-motion) & Exhibits Annexed	2

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Petitioners seeks to overturn a decision of the Division of Housing and Community Renewal, dated October 26, 2011, which vacated an earlier decision, dated November 30, 2010. The 2010 decision declared that the apartment of Respondent Phyllis Berk would lose its prior rent controlled status pursuant to the Rent Regulations Reform Act of 1993 [*L. 1993, CH. 253, RENT CONTROL LAW 26-403.1*], because the rent for this rent controlled apartment had surpassed the \$2,000.00, per month threshold and the total income for the residents exceeded \$175,000.00. Complicating matters was the fact that Ms. Berk's landlord had received a real estate tax abatement under the J-51 program [*NYC CODE § 11-243*].

The building received the tax abatement from July 1994, until June 30, 2005. The

Petitioner did not seek to remove the subject apartment from rent regulation until 2008, which required the review of the resident income for the apartment for the years 2006 and 2007. There is no dispute here that the total income for the residents of Ms. Berk's apartment was above the threshold for excluding the apartment from rent regulation. The issue then, is the expanse of the holding of the Court of Appeals in the case of **ROBERTS v. TISHMAN SPEYER PROPERTIES, L.P.**, 13 N.Y.3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388, 2009 N.Y. Slip Op. 07480. The decision is written with a Delphic imprecision that allows multiple and contradictory interpretations on first reading, and perhaps even second reading. However, when read a third time, and with the assistance of succeeding discussion and interpretation, one is left with the conclusion that the Petitioner's argument is more cogent.

The question asked of the agency is whether the receipt of tax relief, at any time in the past will forever condemn an apartment to the restraint of rent regulation, even after the expiration of the tax benefit of the J-51 program. Turning to the history of **ROBERTS** the Appellate Division, First Department, with which the Court of Appeals agreed in specific language said "In Tishman, we held that a rent-stabilized apartment in a building for which the owner receives J-51 tax benefits (see Administrative Code of City of N.Y. § 11-243) is not subject to the luxury decontrol provisions of the Rent Stabilization Law (Administrative Code of City of N.Y. §§ 26-504.1, 26-504.2) until the tax benefit expires." [**LATIPAC CORP. v. BMH REALTY LLC**, 93 A.D.3d 115, 938 N.Y.S.2d 30, 2012 N.Y. Slip Op. 00737]. In **ROBERTS** (usually referred to as **TISHMAN**), the landlord took the position that once individual apartments had reached a monthly rental of \$2,000.00 they could be removed from rent stabilization, notwithstanding the fact that the building owner was still receiving a tax benefit. The answer of the Appellate Division and the Court of Appeals was no. I cannot read **ROBERTS** to mean anything more [see **GERSTEN v. 56 7TH AVE. LLC**, 88 A.D.3d 189, 928 N.Y.S.2d 515, 2011 N.Y. Slip Op. 06300, "plaintiffs [in **ROBERTS**] sought a declaration that units in the properties would remain rent stabilized as long as J-51 benefits were received.."]. That being said, the petition to revoke the decision of October 26, 2011, should be revoked as a misreading and over extension of the decision of the Court of Appeals in **ROBERTS v. TISHMAN SPEYER PROPERTIES, L.P.**, 13 N.Y.3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388, 2009 N.Y. Slip Op. 07480. The cross-motion to dismiss the petition must be and is denied. This constitutes the decision and order of the Court.

GEOFFREY D. WRIGHT

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Dated: May 21, 2012

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JUN 04 2012

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