Rent Regulation in New York City After Roberts v. Tishman Speyer Properties

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New York City has many tenant protection laws. One such protection is rent regulation, which aims to protect tenants from, among other things, oppressive rents and price gouging. This Note will explore the City’s rent regulation laws for privately-owned residential buildings in the wake of Roberts v. Tishman Speyer Properties, a 2009 case decided by the New York Court of Appeals, New York State’s highest court. Roberts held that owners of buildings that received tax benefits under the J-51 program—a tax program that provides tax abatements and tax exemptions to owners for rehabilitating residential housing—could not deregulate apartments and charge market rents. The Roberts holding was narrow and did not resolve many important issues, including retroactivity, statute of limitations, and possible defenses.

Before Roberts, it was widely believed and accepted that certain buildings were eligible for deregulation regardless of whether the building was receiving J-51 tax benefits. The decision’s sudden break with industry practice caused an outpouring of alarm by some landlords, owners, and real estate experts, who, like the defendants in Roberts, deregulated J-51 buildings in the hopes of converting regulated apartments into market rent. Many real estate practitioners believed the impact of Roberts would wreck havoc on New York City’s real estate industry since the ruling exposed many parties to massive amounts of unforeseen liability in rent overcharges.

The purpose of this Note is to examine whether the impact of Roberts on New York City’s real estate industry has been as dire as predicted. This Note will summarize some of the post-Roberts litigation and will analyze how several lower courts have addressed the decision’s unanswered issues. Finally, this Note will discuss the implications of Roberts on New York City’s real estate industry, and argue that the Roberts has not produced the dire financial repercussions initially predicted.
I. INTRODUCTION

New York City has had many heated debates on rent regulation since its inception. On one side of the political spectrum, anti-regulation parties such as developers and landlords have argued to repeal all rent regulation laws. On the other side, tenants have lobbied to permanently strengthen the rent system. Although both sides have never ultimately been successful in achieving their objectives, these debates have caused the pendulum to swing from one side to the other, with the strengthening of rent regulation in one year followed by its undoing several years later.

This debate has been waged for decades.¹ It has centered on whether rent regulation is part of the problem or part of the solution to New York City’s rental housing problems.² Tenants

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defend rent regulation as an essential protection against widespread housing shortages if deregulation were to occur and argue that it provides affordable housing to millions of low-income and moderate-income tenants. Landlords, meanwhile, argue that the rent system reduces the quality and supply of housing because regulated rents have neither provided sufficient operating and maintenance income nor a fair return on investment. In the end, this debate has become an ideological issue for both parties, with tenants viewing affordable housing as a basic necessity and landlords viewing rent regulation as an attack on private property.

New York has recently strengthened its rent regulation system, as evidenced by the passage of stricter rent regulation laws for tenants and supportive court decisions. In line with this sentiment, the New York Court of Appeals, the highest court in the State, recently decided Roberts v. Tishman Speyer Properties a major pro-tenant decision that has caused an outpouring of alarm by some landlords, owners, and real estate experts believing the case will wreck havoc on the real estate industry.

This Note discusses the impact of Roberts and argues that it has not produced the negative repercussions initially predicted by many real estate industry professionals. Part II provides a general overview of New York City’s rent regulation system, including rent control and rent stabilization legislation. Part III provides an overview of the process by which regulated apartments can leave the rent system and become unregulated and charge market rent. Part III also focuses on the interplay between the deregulation laws and the J-51 tax program—a
program that provides tax incentives to owners that rehabilitate and renovate their buildings. Part IV discusses the *Roberts* decision, including the majority opinion and the dissent. Part V summarizes post-*Roberts* litigation, specifically looking at how the courts resolved issues such as retroactivity, statute of limitations, jurisdiction, and applicable defenses.

Part VI argues that *Roberts* has had some impact on New York City’s real estate industry but its implications have been limited for three main reasons. First, the real estate deals that defaulted in the post-*Roberts* era were overleveraged and already on the brink of failure before the decision. Second, lower court decisions have effectively narrowed the impact of *Roberts* by limiting landlords’ liability of overcharges, and by refusing to award treble damages and attorney’s fees. Finally, *Roberts* may be limited to middle-income developments because applying *Roberts* to luxury buildings puts the goals of rent regulation at odds by protecting wealthy tenants at the expense of lower-income tenants.

II. OVERVIEW OF NEW YORK CITY’S RENT REGULATION SYSTEM

New York City has had some form of rent regulation—federal, state, or local—for almost a century. The City adopted its first rent control legislation in 1920, during the “Red Scare” just after World War I, which gave tenants some protections against arbitrary evictions and rent increases. This system eventually ended in 1929 at the beginning of the Great Depression, a time of decreasing rents and increasing vacancies, which caused the state legislature to decline to renew the laws.

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9 Keating, supra note 1, at 151.
11 Keating, supra note 1, at 152.
12 Id. at 152.
The United State’s entry into World War II caused the federal government to impose rent control on a national scale with the enactment of the Emergency Price Controls Act of 1942, and as a result, New York City was brought under federal rent control regulation.\textsuperscript{13} Once the economy stabilized after war, “federally administered rent control programs became less necessary and defensible.”\textsuperscript{14} However, the need for continued rent control varied from community to community, and as a consequence, the “federal government passed on to state and local governments the power to continue, eliminate, or modify the wartime system of rent control.”\textsuperscript{15} As the federal controls phased out, the New York State Legislature decided to continue the rent control system by noting the existence of housing shortages caused by soldiers returning from war and.\textsuperscript{16}

Rent control was intended to be a temporary emergency measure, and as a result, the Legislature required periodic findings of a continued emergency to justify renewing the rent laws. At the time, it was expected that increased supply of housing would solve the housing shortages, and the rent regulation system would not be needed.\textsuperscript{17} As a result, the Legislature established a vacancy rate: If the vacancy reached above 5\%, it would eliminate rent control.\textsuperscript{18}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 31.
\item \textit{Id.}
\item \textit{See id. See generally} Woods v. Cloyd W. Miller Co., 333 U.S. 138, 142-44 (1948) (upholding the rent-control statute and recognizing housing shortages caused by soldiers returning home from World War II); City of New York v. New York State Div. of Hous. & Cmty. Renewal, 97 N.Y.2d 216, 219-20 (2001) (stating “[r]ent control originated in New York through federal legislation designed to address housing shortages during and immediately after the Second World War”). \textit{See also} N.Y.C. ADMIN. CODE § 26-501. The section states, in relevant part, that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rent. \textit{Id.}; \textit{see also} id. § 26-401 (declaring the same findings for rent controlled apartments).
\item Stegman, \textit{supra} note 13, at 31.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
Anything short of the 5% vacancy threshold would be *prime facie* evidence of a continued emergency housing shortage and would result in continued rent regulation.\(^19\)

In 1962, with increasing political conflict between the City and the State over continuing rent control, the State Legislature transferred its authority and administration of rent control to New York City with the enactment of the Local Emergency Housing Rent Control Act.\(^20\) New York City expanded the rent regulation system in 1969 with the enactment of the Rent Stabilization Law.\(^21\) The Rent Stabilization Law was passed as a measure to deter a potential housing shortage resulting from an increasing number of apartments leaving rent control.\(^22\) As a result of the passage of the Rent Stabilization Law, housing within New York City fell either under rent control or under rent stabilization. Over time, the rent regulation system—adopted as a temporary emergency measure—became a permanent fixture in New York City.\(^23\)

Currently, the New York City Rent Stabilization Law (the “Rent Stabilization Law”) governs rent stabilized apartments,\(^24\) and the New York City Rent and Rehabilitation Law (the “Rent Control Law”) governs rent controlled apartments.\(^25\) The New York State Division of Housing and Community Renewal\(^26\) ("DHCR") administers both systems.

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\(^{19}\) *Id.*

\(^{20}\) *Id.* at 32. See also MONICA R. LETT, RENT CONTROL: CONCEPTS, REALITIES, AND MECHANISMS 11 (1976); N.Y. RENT CONTROL LAW § 8605 (McKinney 2011) (“Each city having a population of one million or more, acting through its local legislative body . . . may adopt and amend local laws or ordinances in respect of the regulation and control of residential rents.”).

\(^{21}\) LETT, supra note 20, at 11.

\(^{22}\) See, e.g., Avon Furniture Leasing, Inc. v. Popolizio, 500 N.Y.S.2d 1019, 1021 (N.Y. App. Div. 1986) (stating the Rent Stabilization Law was enacted “within the context of an extremely serious housing shortage.”).

\(^{23}\) The 5% vacancy threshold was never repealed and is still required to eliminate rent control. See N.Y.C. ADMIN. CODE § 26-414. The section states, in relevant part:

> Whenever the city rent agency shall find, after making such studies and investigations as it deems necessary for such purpose . . . that the percentage of vacancies in all or any particular class of housing accommodations in the city . . . is five per centum or more, the controls imposed on rents . . . with respect to the housing accommodations as to which such finding has been made, shall be forthwith scheduled for orderly decontrol.

*Id.*

\(^{24}\) *Id.* §§ 26-501 to -520 (2010).

\(^{25}\) See *id.* §§ 26-401 to -415 (2010).

\(^{26}\) See *id.* § 26-404; § 26-516.
promulgates separate regulations for each rent system: the Rent Stabilization Code applies to rent stabilized apartments and the New York City Rent and Eviction Regulations applies to rent controlled apartments.

Rent regulation is important in New York City since most New Yorkers do not own the homes in which they live. The aim of both rent control and rent stabilization is to protect tenants by preventing “unjust, unreasonable and oppressive rents”; “forestall[ing] profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare”; and preventing “uncertainty, hardship and dislocation.” In 2008, New York City had over three million housing units, of which over 67% were rental units. In contrast to the rest of the country, this represents twice as many rental units as elsewhere, and unlike most cities, most of the rental units are rent regulated. According to the 2008 Housing and Vacancy Survey (“HVS”), only 36% of renters resided in unregulated housing and were charged rent based on market conditions. Rents for the remaining rental units, or 64% of the total, were regulated by federal, state or city governments. Although the aim of rent control and rent stabilization is the protection of tenants, each system differs substantially in, among other things, the type of housing that it governs and the way it calculates the legal level of rent.

As discussed above, rent control is the older of the two systems and has been in place since the 1920s. According to the 2008 HVS, rent controlled apartments comprised only 2%,
40,000, of all rent regulated buildings. The rent control system currently in place consists of several elements. Generally, rent control covers buildings that were constructed before 1947. Further, the apartment must have been continuously occupied by the tenant or his descendent since before 1971. An apartment loses its rent controlled status if it is voluntarily vacated by the tenant or its legal successor. No new units may be added to the system. Given such requirements, the number of rent controlled units is constantly decreasing. Once the apartment is vacated, it may be deregulated or may become rent stabilized by entering the rent stabilization system.

Rent control limits the amount of rent an owner may charge and restricts the right of an owner to evict tenants. Rent controlled tenants live under what has become known as a “statutory tenancy” in that there is no requirement for a written lease once the lease expires; as long as the tenant continues to pay the regulated rent, an owner cannot terminate the tenancy at will. As one court has stated, “[a] tenant in rent-controlled premises has a right to continued occupancy, assuming the tenant has complied with the rent control laws, notwithstanding the expiration of the lease. The tenancy exists not by contract but by operation of law—it is a ‘statutory tenancy.’” As a result, at the expiration of a rent controlled lease, the tenant survives

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36 HVS, supra note 33, at 5.
37 N.Y.C. ADMIN. CODE § 26-403(e)(2)(h).
38 Id. § 26-403(e)(2)(i)(9).
39 N.Y. COMP. CODES R. & REGS. tit. 9 § 2203.2(a) (2011).
40 N.Y.C. ADMIN. CODE § 26-504(a).
41 See N.Y. COMP. CODES R. & REGS. tit. 9 §§ 2201.1 to 2201.6.
42 See id. §§ 2204.1 to 2204.9.
43 Id. § 2204.1(a). The section states, in relevant part:
No tenant, so long as he continues to pay the rent . . . shall be removed from any housing accommodation by action to evict . . . nor shall any person attempt such removal . . . notwithstanding that the tenant has no lease or that his lease, or other rental agreement, has expired or otherwise terminated.

Id.

the terms of the original lease and every provision is carried over and governs the statutory tenancy.45

In contrast to rent control, rent stabilization is the newer of the two systems.46 According to the 2008 HVS, 47%, or 982,000, of the regulated housing in New York City was rent stabilized.47 Rent stabilization generally applies to residential apartment buildings completed between 1947 and 1974, as well as apartments that were removed from rent control.48 Newly constructed housing is exempt from rent regulation but may become subject to rent stabilization if an owner receives tax breaks under the State’s various tax benefit programs.49 Once the building receives tax benefits, it becomes rent stabilized until the tax program expires.50 An owner cannot terminate the receipt of tax benefits before they expire for the purpose of ending rent stabilization.51 Owners that voluntarily place units under rent stabilization do so because of a cost-benefit analysis illustrating that short-term regulation with tax benefits outweighs free market rents without tax benefits.52

When a tenant moves into a rent stabilized apartment, the landlord is required to provide a lease for a term of one or two years.53 If the lease expires, a landlord is required to provide a

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45 See, e.g., 188-90 Eighth Ave. Hous. Dev. Fund Corp. v. Guzman, 874 N.Y.S.2d 780, 782 (N.Y. Civ. Ct. 2009) (“It is well settled that at the expiration of a rent controlled lease, the tenant becomes a ‘statutory tenant’ and all terms of the lease are projected into and govern the statutory tenancy.”).
46 See LETT, supra note 20, at 11.
47 HVS, supra note 33, at 5.
48 See N.Y.C. ADMIN. CODE § 26-504(a).
49 Id. § 26-504(c). See also 2010 Changes to Rent Stabilized Housing, supra note 10, at 3.
50 2010 Changes to Rent Stabilized Housing, supra note 10, at 4, 7.
51 § 26-504(c). The statute states, in relevant part:
Upon the expiration or termination for any reason of the benefits of section 11-243 [J-51] . . . any such dwelling unit shall be subject to this chapter until the occurrence of the first vacancy of such unit after such benefits are no longer being received or if each lease . . . at the time of the expiration of the tax benefit period has included a notice . . . informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period . . . such dwelling unit shall be deregulated as of the end of the tax benefit period.

Id.

52 2010 Changes to Rent Stabilized Housing, supra note 10, at 3.
53 N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5.
renewal lease on the same terms and conditions as the expired lease unless the landlord demonstrates a substantial change in circumstances.\textsuperscript{54} Unlike rent control, “assuming the right to continued occupancy, the nature of the rent-stabilized landlord/tenant relationship continues to be contractual in nature because the landlord of a rent-stabilized apartment must offer the tenant a renewal lease at the expiration of a term.”\textsuperscript{55} A tenant cannot be denied a renewal lease or be evicted unless certain statutory grounds are met.\textsuperscript{56}

Both rent controlled and rent stabilized apartments may exit the rent regulation system through deregulation. The next section of this Note will discuss the various deregulation provisions. In addition, the following section will discuss the relationship between deregulation and the “J-51 program,” a state tax program that encourages the rehabilitation and improvement of buildings by providing owners with tax abatements and exemptions.

\section*{III. INTERPLAY BETWEEN DEREГULATION AND THE J-51 PROGRAM}

For over twenty years since the passage of the rent control and the rent stabilization laws, deregulation was permitted in very specific and narrow circumstances. Deregulation could only occur, for example, if a “tenant in occupancy purchased the apartment as part of a conversion, or the apartment was deregulated based on owner or employee occupancy.”\textsuperscript{57} Public opinion began to turn against the rent regulation system once it became apparent that the system was protecting wealthy tenants by allowing them to pay low rents in highly coveted apartments.\textsuperscript{58}

\textsuperscript{54} Id. § 2522.5(g).
\textsuperscript{55} Duell, 84 N.Y.2d at 779.
\textsuperscript{56} Id. § 2524.1(a).
\textsuperscript{58} See, e.g., Mona Charen, Editorial, Rent for the Wealthy, BALT. SUN, Mar. 23, 1994, at 19A (arguing that “New York’s rent-control laws permit windfalls to the wealthy and ensure a permanent shortage of housing for the poor and the middle class”); Reforming Rent Rules, N.Y. TIMES, Mar. 21, 1994, at A16 (supporting the reform of the rent regulation system because wealthy renters benefit from artificially low rents); Time to Make Sense on Rent Control, N.Y. TIMES, June 14, 1993, at A14 (arguing to overhaul the rent control system with luxury decontrol); Editorial, The Enduring Cost of Rent Control, N.Y. TIMES, June 27, 1992; Raymond H. Brescia, Line in the Sand: Progressive Lawyering, “Master Communities,” and a Battle for Affordable Housing in New York City, 73 ALB. L.
In response, in 1993 the Legislature amended the rent regulation system with the passage of the Rent Regulation Reform Act ("RRRA").\(^{59}\) The RRRA instituted what became known as “luxury decontrol” by permitting the deregulation of luxury apartments that met certain income and rent thresholds.\(^{60}\) These amendments were an extraordinary change, especially under the rent stabilization scheme, because until 1993, an apartment generally remained rent stabilized forever.\(^{61}\) The rent system was amended by the RRRA of 1997\(^ {62}\) and again in 2011 with the Rent Act of 2011.\(^ {63}\) As a result of these two acts, an owner may deregulate both vacant and occupied apartments if the requisite threshold levels are met. For vacant units, an owner can permanently deregulate a vacant apartment if the monthly rent is $2500 or more.\(^ {64}\) Occupied apartments may be deregulated if both the monthly rent is $2500 or more and the tenants have an annual income in excess of $200,000.\(^ {65}\)

The Legislature carved out an exception to the luxury decontrol statutes by prohibiting the deregulation of rent stabilized buildings that receive tax breaks under certain tax benefit programs. New York City provides various tax incentive programs to encourage rehabilitation and improvement of residential housing. One such program, popularly known as the “J-51 program,”\(^ {66}\) provides tax abatements and tax exemptions to rehabilitated or renovated

\(^{59}\) RRRA 1993 N.Y. Laws 253. See also Brescia, supra note 58, at 719-22 (providing a brief history of rent regulation and its subsequent reform).

\(^{60}\) Brescia, supra note 58, at 720.

\(^{61}\) Warren A. Estis & Jeffrey Turkey, supra note 57.


\(^{64}\) S. 5856, 2011 Leg., 234th Sess. (N.Y. 2011) (amending section 26-403(e) of the Rent Control Law and section 26,504.2 of the Rent Stabilization Law for vacant apartments).


\(^{66}\) The nomenclature derives from the program’s former section, N.Y.C. ADMIN. CODE § J51-2.5, which was subsequently renumbered and is currently found in section 11-243 of the Code.
buildings. After performing certain qualified rehabilitation work, owners are eligible to receive property tax abatements and/or property tax exemptions. An abatement allows an owner to reduce the amount of property taxes based on the cost of the work performed. An exemption freezes a building’s assessed value for tax purposes and exempts an owner from paying taxes on the resulting increase in value. Abatements can last up to twenty years, and exemptions generally last fourteen years.

In exchange for receiving J-51 tax breaks, landlords must place their buildings under rent stabilization. Pursuant to section 26-504(c), an apartment that was not regulated before enrolling in the J-51 program becomes rent stabilized as a condition of receiving tax benefits and continues to be regulated until the J-51 tax benefits expire. Once a building enrolls in the J-51 program, an owner is expressly prohibited from deregulating apartments with luxury decontrol. Specifically, the Rent Stabilization Law states that the luxury decontrol provision “shall not apply to housing accommodations which became or become subject to this law … by virtue of receiving tax benefits pursuant to [the J-51 program].” Thus, an owner cannot use luxury decontrol to deregulate a rent stabilized apartment that is receiving J-51 tax benefits and accordingly, the apartment continues to be rent regulated when enrolled in the program.

Once the J-51 tax benefits expire, apartments may be deregulated in one of two ways. First, an apartment may be deregulated if the owner includes a J-51 notice in the lease informing

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67 N.Y.C. ADMIN. CODE § 11-243 (2010). The program is authorized by Real Property Law § 489 and is administered by the New York City Department of Housing Preservation and Development and the New York City Department of Finance. N.Y. REAL PROP. LAW § 489(1)(a).


70 Id.

71 Id.

72 Id.

73 N.Y.C. ADMIN. CODE § 26-504(c) (stating the Rent Stabilization Law shall apply to “[d]welling units in a building or structure receiving the benefits of [the J-51 program]”).

74 Id. §§ 26-504.1 to 504.2.
the tenant the apartment will be subject to deregulation when the tax benefits expire.\textsuperscript{75} If the owner fails to provide this notice, then the only other way to deregulate the apartment is when a vacancy occurs.\textsuperscript{76}

Many owners of already rent stabilized buildings also apply for J-51 benefits. Under such circumstances, the receipt of the tax benefits will have no effect on the building’s status because the building is \textit{already} rent stabilized.\textsuperscript{77} In other words, a building receiving J-51 benefits is always subject to rent regulation during the receipt of tax benefits—regardless of whether it was \textit{already} rent regulated or \textit{became} rent regulated shortly after enrollment.

For years, DHCR has interpreted this exception as prohibiting luxury decontrol only where the receipt of J-51 benefits was the \textit{sole reason} for the imposition of rent regulation. DHCR promoted this policy with operational bulletins and advisory letters. For instance, in an opinion letter written in 1996, the Assistant Commissioner of DHCR stated 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 \textit{sole} reason for the accommodation being subject to rent regulation.”\textsuperscript{78} Further, in 2000, DHCR incorporated this position into the Rent Stabilization Code, stating that luxury decontrol “shall not apply to housing accommodations which became or become subject to the [Rent Stabilization Law] and this Code . . . solely by virtue of the receipt of tax benefits pursuant to [the J-51 program].”\textsuperscript{79}

Many developers and real estate owners of buildings that were already rent stabilized relied on DHCR’s interpretation and took advantage of the J-51 program by using luxury

\textsuperscript{75} Id. § 26-504(c).
\textsuperscript{76} Id.
\textsuperscript{77} See, e.g., Gersten v. 56 7th Ave, LLC, 928 N.Y.S.2d 515, 520 (N.Y. App. Div. 2011) (stating that “a rent stabilized building will be rent stabilized before, during and after the receipt of J-51 benefits”).
\textsuperscript{79} N.Y. COMP. CODES R. & REGS. tit. 9, 2520.11(r)(5) (2011).
decontrol to deregulate apartments. Relying on DHCR policy, the landlords rightly believed that luxury decontrol was allowed since the building at issue was already subject to rent stabilization prior to enrollment. However, in 2009, this widespread understanding of the interplay between the J-51 program and luxury decontrol was rejected by the New York Court of Appeals in the seminal case of *Roberts v. Tishman Speyer Properties*. The next sections will discuss the factual background of *Roberts* as well as the majority decision and its dissent.

**IV. ROBERTS V. TISHMAN SPEYER PROPERTIES**

On October 22, 2009, the New York Court of Appeals, the highest court in the State, affirmed the appellate division’s holding that owners of all buildings that received J-51 benefits were prohibited from using luxury decontrol to deregulate rent stabilized apartments; it did not matter whether the building became subject to rent stabilization prior to or after enrollment in the tax program. In effect, *Roberts* rejected the widely accepted belief that rent stabilized apartments could be deregulated in buildings that received J-51 benefits as long as the building had not become stabilized solely because of enrollment in the J-51 program. Pro-tenant groups and their advocates hailed the *Roberts* decision as a victory. Meanwhile, developers, owners and landlords viewed the decision as a nightmare for New York City’s real estate industry because it overturned widespread industry practice accepted by DHCR for years and threatened many financial plans and investments.

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80 13 N.Y.3d 270 (N.Y. 2009).
81 *Roberts*, 13 N.Y.3d at 287.
82 *Id.*
83 *Id.* at 285-87.
84 Joan Gralla, *NYC Ruling Tenant Victory, Landlord Nightmare*, REUTERS, Oct. 22, 2009 (stating “[t]housands of New York City apartment renters . . . won a major court victory that could help them keep lower rents but may drive landlords into foreclosure and crater city tax revenues”).
85 *Id.* See also Christine Haughney & Charles V. Bagli, *Ruling Sets Off Tough Calculations for Landlords, and Causes Some To Cancel Deals*, N.Y. TIMES, Oct. 23, 2009, at A31 (stating the ruling “had an immediate effect on real estate in New York” with landlords questioning “whether they could raise rents, and some even [going] so far
A. BACKGROUND

In 2006, the biggest real estate transaction in the United States took place with the purchase of Stuyvesant Town and Peter Cooper Village ("Stuy Town") by Tishman Speyer Properties ("Tishman") from Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company ("MetLife"), the former owner of the two complexes, for a record smashing price of $5.4 billion.\footnote{Charles DuBow, The World’s Biggest Real Estate Deal, BUS. W.K., Oct. 18, 2006, http://www.businessweek.com/bwdaily/dnflash/content/oct2006/db20061017_682643.htm. The last record set was the purchase of the Rockefeller Center in 2000 for $1.9 billion. Id.} Completed in the early 1940’s for returning World War II veterans, the Stuy Town property is a sprawling collection of red-brick apartment buildings located on the east side of Manhattan.\footnote{Stuy Town “has been called the last bastion of middle-class housing amid the super-charged real estate market of Manhattan.” MetLife sells Stuyvesant Town for $5.4B, AFX UK FOCUS, Oct. 17, 2006, http://articles.boston.com/2006-10-18/business/29241310_1_peter-cooper-village-stuyvesant-town-largest-apartment-complexes.} The middle-income apartment complex\footnote{William Spirer, Note and Comment, Roberts v. Tishman Speyer Properties: A Source of False Hope for Low-Income Victims of Predatory Equity, 18 J.L. & POL’Y 855, 856 (2010).} is home to 25,000 tenants in 110 buildings and 11,232 apartments.\footnote{DuBow, supra note 86; see also Frank Lombardi et al, Stuy Town Goes for Sky-high Price Tag as Real Estate Big Grabs Middle-Class Enclave, N.Y. DAILY NEWS, Oct. 18, 2006; Steve Cuozzo, Ready or Not, Crackdown is Coming, N.Y. POST, Oct. 18, 2006 (emphasizing that Tishman is a not a residential but a commercial landlord).}

The Stuy Town deal attracted much publicity, with real estate experts wondering whether the new owners would be able to get a return on their investment without dramatically increasing rents.\footnote{DuBow, supra note 86; see also Frank Lombardi et al, Stuy Town Goes for Sky-high Price Tag as Real Estate Big Grabs Middle-Class Enclave, N.Y. DAILY NEWS, Oct. 18, 2006; Steve Cuozzo, Ready or Not, Crackdown is Coming, N.Y. POST, Oct. 18, 2006 (emphasizing that Tishman is a not a residential but a commercial landlord).} Stuy Town was subject to rent stabilization since 1974\footnote{Roberts, 13 N.Y.3d at 280.} and at the time of the purchase, many of the apartments were still rent stabilized.\footnote{Colleen Long, Stuy Town Residents Say Sale of Complex Squeezes Out Middle Class, A.P. ALERT, Oct. 22, 2006.} Tishman, like many owners at the time, bought the property intending to raise rent by deregulating apartments that met the luxury as to cancel plans to buy more apartments in buildings with tax subsidies”). Daniel Geiger, Headaches for J-51 Owners, 56 REAL. EST. W.KLY., (2009).
decontrol criteria. The owners planned on tripling their net income by 2011 by replacing regulated tenants with those able to pay higher market rents.

In 1992, long before the Stuy Town sale, MetLife applied for and began receiving property tax benefits under the J-51 tax program. Stuy Town’s enrollment in the program did not change its regulation status because the complex was already rent stabilized since 1974. In 1993, MetLife, with DHCR’s approval, began to deregulate some of the apartments that met the luxury decontrol thresholds while simultaneously receiving J-51 tax benefits.

Shortly after Tishman bought the Stuy Town complex, the tenants filed suit, alleging the current and former owners illegally charged market rents while receiving almost $25 million in tax benefits under the J-51 program. The tenants sought, among other things, relief for rent overcharges totaling $215 million and a declaration that the deregulated apartments would remain rent stabilized until the J-51 benefits period has expired. In 2007, the state supreme court dismissed the tenants’ complaint, reasoning that “the clear and unambiguous language of the [Rent Stabilization Law] 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.’” The tenants appealed and the appellate court unanimously reversed, concluding

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93 DuBow, supra note 86.
95 Roberts, 13 N.Y.3d at 280.
96 Id.
97 Id. at 282.
98 Id. See also Charles V. Bagli, Suit Contests Rent Increases in Complexes MetLife Sold, N.Y. TIMES, Jan. 23, 2007, at B5.
99 Roberts, 13 N.Y.3d at 282.
that owners who receive J-51 benefits forfeit their rights under luxury decontrol even if their buildings were already subject to rent stabilization.\footnote{101}

**B. MAJORITY DECISION**

The issue in *Roberts* was whether the appellate court properly ruled that all J-51 buildings—regardless of when the buildings first became regulated—were precluded from deregulating with luxury decontrol while receiving J-51 tax benefits.\footnote{102} Since many of the Stuy Town apartments were already rent stabilized years before receiving J-51 benefits, the owners argued they could deregulate with luxury decontrol.\footnote{103} Meanwhile, the tenants argued that it did not matter whether the buildings were stabilized before or after enrolling in the J-51 program because the luxury decontrol exclusion precluded deregulation of all buildings receiving such tax benefits.\footnote{104}

The *Roberts* majority, in a 4-2 *per curiam* decision, sided with the tenants and based its holding on two main rationales. First, the majority reviewed the language of the statute to discern the plain meaning of the Rent Stabilization Law and the Rent Stabilization Code.\footnote{105} Specifically, the court looked at the phrases “became or become” and “by virtue of receiving” in section 26-504.1 and section 26-504.2(a) of the luxury decontrol exclusion, concluding that it does not create two types of J-51 buildings.\footnote{106} The court stated the owners’ interpretation of the statute “conflicts with the most natural reading of the statute’s language.”\footnote{107}

\footnote{102} *Roberts*, 13 N.Y.3d at 284. *See also* Spirer, *supra* note 89, at 871-74 (providing a brief discussion of the majority opinion).
\footnote{103} *Roberts*, 13 N.Y.3d at 282-83.
\footnote{104} *Id.* at 282.
\footnote{105} *Id.* at 286-87.
\footnote{106} *Id.* at 284-86. The court stated:

Defendants essentially read these words as recognizing two categories of J-51 benefitted buildings—those, like the properties, that were rent-stabilized prior to receiving J-51 benefits, for which luxury decontrol became available in 1993; and those that only became rent-stabilized as a condition of receiving J-51 benefits, for which luxury decontrol is unavailable (at least during the
The court also reviewed the legislative history of the RRRA and the luxury decontrol exclusion. The majority looked to the statements of the RRRA’s sponsor during the Senate debate as further support for its holding. Specifically, the majority quoted the sponsor as stating “that luxury decontrol was unavailable to building owners who ‘enjoy[ed] another system of general public assistance’ such as J-51 benefits.” The majority further quoted the sponsor as stating that “‘should the exemptions contained in section 489 end, that’s—those J.51s and 489s end, then they would be subject so that at no point do you have the [luxury] decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned.’”

Thus, the majority concluded that even the legislative history “plainly indicated that ‘at no point’ would the luxury decontrol provisions apply to buildings which ‘received’ tax exemptions being discussed, including J-51 benefits.”

In reaching this holding, the majority refused to look at DHCR’s interpretation of the exclusion which supported the widespread belief among real estate experts that some J-51 buildings are eligible for luxury decontrol while receiving tax benefits. The court rejected the owners’ argument that the Legislature’s inactivity in the face of DHCR’s interpretation illustrated that the Legislature accepted DHCR’s interpretation. Instead, the court reasoned that “at the time the Legislature most recently considered the statute, there is no indication that

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107 Id. at 286.
108 Id.
109 Id. at 286 (quoting the senate debate bill A. 8859, dated July 7, 1993).
110 Id.
111 Roberts, 13 N.Y.3d at 287.
112 Id.
113 Id.
the specific question presented here—that DHCR’s interpretation is improper and conflicts with
the plain language of the statute—had been brought to the Legislature's attention.”¹¹⁴

Finally, the majority rejected the owners’ argument that such a ruling would bring dire financial consequences for the owners themselves as well as the New York City real estate industry.¹¹⁵ Specifically, the court stated that such “predictions may not come true; they depend, among other things, on issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants.”¹¹⁶ Indeed, the court advised the owners to seek legislative relief should the luxury decontrol statute impose unacceptable burdens.¹¹⁷

C. JUSTICE READ’S DISSENT

The majority’s ruling provoked a firm dissent by Justice Read.¹¹⁸ Justice Read warned of “significant, if not severe dislocations in the New York City residential real estate industry as a result of [the majority’s] decision.”¹¹⁹ Justice Read argued the RRRA was an attempt to provide rationality to the rent regulation system that disproportionately conferred benefits on high-income tenants at the expense of those tenants that were in need of protection.¹²⁰ The dissent attacked the majority’s statutory interpretation, its reading of legislative intent, and its failure to give weight to regulatory authority.¹²¹

First, Justice Read argued the “majority’s interpretation necessarily supposes that the Legislature inserted pointless words into the statute . . . . [but] if the Legislature had intended for

¹¹⁴ Id.
¹¹⁵ Id.
¹¹⁶ Id.
¹¹⁷ Id.
¹¹⁸ Id. at 288-96 (Read, J., dissenting). For a brief discussion of Justice Read’s dissent, see also Spirer, supra note 89, at 873-76.
¹¹⁹ Roberts, 13 N.Y.3d at 295.
¹²⁰ Id. at 288.
¹²¹ Id. at 288-96.
all buildings receiving J-51 tax benefits to be exempt from luxury deregulation, it could have easily said just that.”122 The dissent went on to explain that the owners’ reading of the statute gave meaning to all the words used in the luxury decontrol statute.123 Justice Read disagreed with the majority’s reasoning that the phrase “became or become” results in only one correct meaning, but may be understand to mean several things—in which case, the meaning of the phrase was at most ambiguous.124

Next, Justice Read rejected the majority’s interpretation of the Legislature’s intent by charging that the majority “pluck[ed] a snippet from a floor exchange during the Senate debate” on the RRRA.125 Justice Read quoted the full text of the question-and-answer dialogue to show that the majority took the RRRA sponsor’s statements out of context.126 The sponsor’s statement was in regards to a question on the implications of luxury decontrol and the J-51 program on developers of new construction projects, and not on already existing buildings receiving J-51 benefits.127 Moreover, Justice Read argued that the majority failed to consider the RRRA had a sunset clause, “which forces the Legislature to reconsider its terms periodically.”128 Justice Read further reasoned that since DHCR issued its advisory opinion in 1996 supporting the owners’ understanding of the statute, the Legislature failed to amend the RRRA even though it reviewed it twice—in 1997 and again in 2003.129

Finally, Justice Read took issue with the majority’s failure to give any weight to DHCR’s interpretation of the exception.130 The dissent argued that while the court “may not owe

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122 Id. at 288.
123 Id. at 289.
124 Id.
125 Id. at 291.
126 See id.
127 Id. at 292.
128 Id. at 293.
129 Id. at 294-95.
130 Id. at 294-95.
deference to the administrative agency, it should count for something that DHCR adopted its interpretation as a formal regulation after a notice-and-comment rulemaking enjoying wide participation by both landlord and tenant advocacy groups and interests."131 Justice Read also emphasized how the majority’s ruling ignored the manner in which the J-51 program was administered by DHCR, which reduced the J-51 benefits in proportion to the deregulated apartments in the building.132

Justice Read concluded by stating the majority downplayed the dire implications of its ruling on the real estate industry and as a result, the holding had “upended an understanding of the law upon which numerous and substantial business transactions and dealings have been predicated for over a decade.”133 This in turn, Justice Read warned, was further exacerbated by the fragility of the real estate market in the aftermath of the housing crisis.134 The dissent found “cold comfort” in the majority’s observation that the owners’ losses would depend on legal issues and defenses that the lower courts were to determine because it will take years of costly litigation to analyze the boundaries of the majority’s holding.135

In 2011, the Legislature took heed of Justice Read’s warning and proposed several bills to amend the rent regulation system, but ultimately failed to pass any of the bills.136 As predicted

131 Id. at 294.
132 Id. at 294-95.
133 Id. at 295.
134 Id.
135 Id.

See, e.g., A.B. 2679, 2011 Leg., 234th Sess. (N.Y. 2011) (proposing an amendment to Luxury Decontrol in response to the Roberts decision); S.B. 4117, 2011 Leg., 234th Sess. (N.Y. 2011) (proposing an unqualified four-year statute of limitations to rent overcharge claims); S.B. 5763, 2011 Leg., 234th Sess. (N.Y. 2011) (proposing an opportunity for property owners to repay J-51 benefits in light of the Roberts decision). The most expansive legislative proposal, Senate Bill 5763, was meant to alleviate financial burdens by creating “market certainty,” avoid years of pending litigation, and protect landlords who, in good faith deregulated, from “potential rent rollbacks and potentially enormous rent overcharge claims by thousands of tenants.” A.B. 2679, 2011 Leg., 234th Sess. (N.Y. 2011). The justification for this bill was a direct response to the majority’s invitation for the Legislature to step in if Roberts created unacceptable burdens. Id. The bill predicated that the impact of Roberts would be large, estimating that since 1993, over 80,000 apartments were deregulated as a result of luxury decontrol and between 19,000 to 37,000 deregulated apartments have received J-51 benefits. Id. This bill was introduced on June 14, 2011 and went
by Justice Read, lower courts began to see an increasing number of lawsuits resulting from Roberts. The next section of this Note will analyze the impact of Roberts by summarizing several lower court decisions, specifically looking at how the courts have resolved the ruling’s unanswered issues.

V. RECENT CASE LAW SINCE ROBERTS

The majority opinion in Roberts seems to have raised more questions then it answered. The Roberts holding was narrow and, as discussed above, the majority left many important issues unresolved including retroactivity, statute of limitations, and applicable defenses. Shortly after Roberts, there has been some impact on the real estate industry, considered in Part VI of this Note, but this section will focus on Roberts’ impact on the lower courts. As predicted by Justice Read, there has been some litigation in the wake of Roberts that directly addressed some of the unresolved issues. It is in those lower court cases where the battle over the implications of Roberts has been waged as similarly situated landlords struggled to protect themselves against the possible looming liability of Roberts.

All the cases are based on similar facts as Roberts where the owners deregulated apartments in buildings receiving J-51 tax benefits. The tenants in such buildings brought suit against the landlords arguing the deregulation was illegal as a direct result of Roberts. In response, the defendant landlords tried to shield themselves by making retroactivity, statute of limitations, and jurisdictional arguments.

In dealing with the question of retroactivity, the lower courts consistently rejected the landlords’ argument to apply Roberts prospectively. In addition, the courts extensively discussed

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to the Assembly Committee on Housing on June 22, 2011. There has been no further legislative action since June 22, 2011, and as a consequence, it is safe to assume that the bill has died.
the issue of jurisdiction and held that both the courts and DHCR had concurrent jurisdiction over issues left unresolved by Roberts. The lower courts also rejected many landlords’ arguments that the tenants’ claims were time-barred by various statutes of limitation. Finally, some lower courts also addressed applicable defenses such as collateral estoppel. The next sections will summarize these lower court opinions and will look at how each court struggled to define the boundaries of Roberts. Discussing each case in chronological order, the next sections will focus on the factual background, the parties’ relevant arguments, and the reasoning behind each court’s holding.

A. 72A REALTY ASSOCIATES V. LUCAS

The first case to address retroactivity and applicable statute of limitations was 72A Realty Associates v. Lucas. Lucas was initiated by the landlord, 72A Realty, as a holdover proceeding seeking to evict the tenant from her East Village apartment because the tenant’s lease expired and the landlord did not wish to renew it. When 72A Realty deregulated the apartment in 2001, the building was receiving J-51 tax benefits during the deregulation and for the first few months into the tenant’s lease. When the tax benefits expired a few months after the tenant moved in, 72A Realty deregulated the apartment but failed to provide a notice in the lease informing the tenant the apartment would be deregulated after the benefits expired. Citing Roberts, the tenant moved to dismiss the eviction petition arguing the landlord failed to provide adequate notice informing the tenant the apartment was rent stabilized due to the building’s

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137 72A Realty Assoc. v. Lucas, 902 N.Y.S.2d 791 (N.Y. Sup. Ct. 2010), aff’d, No. 570514/10, 32 Misc.3d 47 (N.Y. App. Div. 2011). This case was pending at the time Roberts was being decided by the Court of Appeals. Id. at 794.

138 Lucas, 902 N.Y.S.2d at 792.

139 Id. at 792-93.

140 Id. at 793.
receipt of J-51 tax benefits, and that upon expiration of the tax benefits, her apartment could be deregulated.\textsuperscript{141} In response, 72A Realty argued that \textit{Roberts} should only apply prospectively.\textsuperscript{142}

Judge Wendt rejected the landlord’s argument and applied \textit{Roberts} retroactively, holding the tenant’s apartment was rent stabilized because the building received J-51 benefits during the deregulation.\textsuperscript{143} Further, the judge found that even after the tax benefits expired, deregulation was still improper since there was no requisite notice informing the tenant that her apartment will be deregulated once the tax benefits expire.\textsuperscript{144} Regarding retroactivity, Judge Wendt used the three-pronged test set forth in \textit{Gurnee v. Aetna Life & Casualty Company},\textsuperscript{145} a New York Court of Appeals decision, to conclude in favor of retroactive application.\textsuperscript{146} The \textit{Gurnee} test applies a court ruling retroactively if the following three factors are met:

\begin{itemize}
  \item[(1)] the decision establishes a new principle of law, either (a) by abruptly overruling past precedent on which parties have relied on, or (b) by deciding an issue of first impression in a way that was not foreshadowed;
  \item[(2)] the court must examine the impact of retroactive application on the rule’s purpose; and
  \item[(3)] the court must decide whether retroactive application will result in inequitable results.\textsuperscript{147}
\end{itemize}

First, Judge Wendt reasoned that \textit{Roberts} did not create any new principle of law because \textit{Roberts’} initial interpretation of the statute, “even if the statute has been misconstrued previously, [did] not constitute a change in the law.”\textsuperscript{148} Moreover, the case at bar was pending before the

\textsuperscript{141} \textit{Id.} Before \textit{Roberts}, owners generally did not include such notices because the industry understanding was that the landlord was exempt from the notice requirement in buildings that were already rent regulated regardless of whether the building was receiving J-51 benefits.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 795.
\textsuperscript{144} \textit{Id.} at 793.
\textsuperscript{145} 55 N.Y.2d 184, 192 (N.Y. 1982).
\textsuperscript{146} \textit{Lucas}, 902 N.Y.S.2d at 793-94.
\textsuperscript{147} \textit{Gurnee}, 55 N.Y.2d at 192.
\textsuperscript{148} \textit{Lucas}, 902 N.Y.S.2d at 793.
court during *Roberts* which further weighed in favor of retroactive application. ¹⁴⁹ Second, the court found that the *Roberts* ruling was foreshadowed by the clear language of the luxury decontrol statute,¹⁵⁰ which expressly prohibited buildings receiving J-51 benefits from using luxury decontrol to deregulate apartments.¹⁵¹ Finally, Judge Wendt looked at *Gurnee’s* third prong and concluded that retroactive application would not create inequitable results since “[i]t simply protects tenants who were initially meant to be protected by the Rent Stabilization Law from” excessive rent increases.¹⁵²

Judge Wendt also rejected 72A Realty’s claim that the four-year statute of limitations applicable to rent overcharge complaints also applied to the tenants’ challenge on the rent status of the apartment.¹⁵³ The court found this argument unavailing and stated:

> It is well settled that the four-year statute of limitations applicable to rent overcharge claims is inapplicable to claims regarding the status of an apartment. Examination of an apartment’s regulatory status, as opposed to whether or not a rent overcharge has actually occurred, is not limited to four years of inquiry.¹⁵⁴

Thus, challenging the status of an apartment does not expire and accordingly, a tenant could file a complaint with the courts or DHCR at anytime.

*Lucas* did, however, limit the tenant’s recovery of overcharges to the preceding four years since before the filing of the complaint.¹⁵⁵ The court reasoned that the there was no reason to go outside the four-year look-back period because there was no finding of fraud nor any intentional evasion of the regulation laws.¹⁵⁶ Judge Wendt stated that the landlord, “in setting an

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¹⁴⁹ Id. at 794 (stating that “‘it is well established that, consonant with the common law’s policy laden assumptions, a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process’”) (citing *Gurnee*, 55 N.Y.2d at 191).

¹⁵⁰ Id.


¹⁵² *Lucas*, 902 N.Y.S.2d at 794.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.
unregulated rent for [the tenant], was simply acting in a manner then consistent with the Rent Stabilization Code that the Court of Appeals later ruled, in Roberts, to be a DHCR misinterpretation of [the deregulation statutes].”

The court also awarded the tenant attorney’s fees.

This decision was appealed, and in a per curiam opinion, the appellate court affirmed the majority of Judge Wendt’s holding, except the award of attorney’s fees. The court stated that the “holding of Roberts, that apartments in buildings receiving J-51 tax benefits are exempt from high rent deregulation regardless of how they became subject to rent stabilization, was properly applied retroactively.” The court agreed that Roberts did not establish a new principle of law but simply construed a statute that has been around for years. The court also agreed with Judge Wendt’s holding that no reason was shown to go beyond the four-year statute of limitations when assessing the amount of rent overcharges. There was also no basis to impose treble damages on 72A Realty because there was no showing of willful fraud during the deregulation.

Further, the appellate court upheld Judge Wendt’s decision that deregulation was improper even after the expiration of the tax benefits because the landlord failed to provide a notice informing the tenants that the apartment will be deregulated once the tax benefits expired. The court did, however, express some sympathy because it appeared unfair to hold 72A Realty to the notice requirement given that the absence of such a notice was a result of the

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157 Id.
158 Id. at 796.
160 Lucas, 32 Misc.3d at 48.
161 Id. at 49.
162 Id.
163 Id. at 50.
164 Id.
165 Id. at 49-50.
landlord acting in accordance with what was at the time accepted industry practice. The court stated:

We acknowledge that the strict application of the J-51 notice requirement in the circumstances here present may work a hardship on this landlord. After all, landlord, in good faith reliance on DHCR’s long-standing and unambiguous interpretation of the luxury decontrol statute—and unchallenged for the better part of a decade until determined to be erroneous by the Roberts court—proceeded with the understanding that it was exempt from the notice requirement based upon a reasonable, but as it turns out mistaken, belief that [the tenant’s] tenancy was not subject to rent stabilization coverage in the first instance. However, we are constrained to strictly enforce the statutory J-51 notice requirement as written, without engrafting onto the regulatory framework equitable factors not specified therein.\footnote{166}

The appellate court also disagreed with Judge Wendt’s award of attorney fees, stating that the “imposition of attorney’s fees against [72A Realty] would be unfair under the particular circumstances of this case, where its possessory claim, albeit unsuccessful, was at least colorable at the time of commencement of the holdover proceeding.\footnote{167}"

Most importantly, the appellate court recognized there may be unacceptable burdens imposed on similarly situated landlords resulting from Roberts, and to ameliorate such burdens, the court “invite[d] the Legislature to consider amending the [Rent Stabilization Law] to include a ‘good faith reliance’ defense of the type presently found in several federal statutes.\footnote{168} A good faith reliance defense would preclude similarly situated landlords from liability for actions done in conformity with DHCR’s previous interpretation of the statute.\footnote{169} The court referred to various other statutes that allow such a defense, including the good faith defense found in the Truth in Lending Act\footnote{170} and the Portal-to-Portal Act.\footnote{171}

\footnote{166} Id.
\footnote{167} Id. at 50.
\footnote{168} Lucas, 32 Misc.3d at 50-51.
\footnote{169} See id.
\footnote{170} Id. at 51 (citing 15 U.S.C. § 1640(f)). This defense precludes liability to a creditor that acted in “good faith in conformity with any rule, regulation, or interpretation . . . or in conformity with any [agency] interpretation.” Id.
B. Nezry v. Haven Avenue Owner

Several months after Lucas, another New York trial court had an opportunity to address Roberts-related issues in Nezry v. Haven Avenue Owner, a class action that addressed whether the court or DHCR was the proper forum to resolve complex rent regulation issues resulting from Roberts. Haven Avenue moved to dismiss the tenants’ complaint based on a lack of jurisdiction by arguing the tenants failed to exhaust their administrative remedies before DHCR. Haven Avenue argued that DHCR was the proper forum because it had the authority, experience, and technical expertise in complex rent regulation issues such as in the case at bar. Haven Avenue further argued that having DHCR resolve rent regulation-related issues would foster judicial economy by preventing inconsistent and duplicative results in similar disputes.

Judge Edmead rejected the defendants’ jurisdictional arguments by explaining that both the courts and DHCR share concurrent jurisdiction over rent regulation issues. Further, tenants may not be able to receive complete relief since DHCR lacks the statutory authority to issue damages judgments. Judge Edmead warned, however, that DHCR may have primary jurisdiction if a tenant first files a complaint with DHCR. In the case at bar, the tenants did not

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171 Id. (citing 29 U.S.C. § 259). This defense precludes an employer from liability or punishment “for or on account of the failure of the employer to pay minimum wages or overtime . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation . . . or any administrative practice or enforcement policy.” Id.


173 Nezry, 28 Misc.3d at *1.

174 Id.

175 Id.

176 Id. at *2.

177 Id. at *8.

178 Id. (stating that New York City’s “rent control laws do not give DHCR the authority to issue an order in overcharge cases that can be entered as a judgment . . . For rent controlled apartments, DHCR may only issue an order determining the maximum rent; damages cannot be awarded”).

179 Id.
file an overcharge complaint with DHCR and thus, Judge Edmead concluded that dismissal was unwarranted.\(^{180}\)

C. **Dugan v. London Terrace Gardens**

Another trial court decision that also addressed whether the judicial courts or DHCR have primary jurisdiction was *Dugan v. London Terrace Gardens*.\(^{181}\) Following *Roberts*, the tenants of London Terrace Gardens, a 1000-unit building complex, filed a class action claiming the landlord unlawfully deregulated 30% of the rent regulated apartments despite receiving almost $2 million in J-51 tax benefits since 2003.\(^{182}\) The tenants sought a declaratory judgment stating that their apartments were rent regulated and reimbursement for rent overcharges.\(^{183}\) London Terrace moved to dismiss the action on the grounds that *Roberts* should not be applied retroactively.\(^{184}\) Alternatively, London Terrace asked the court to stay the action and refer it to DHCR arguing that the agency was the proper forum.\(^{185}\) Like the landlords in *Nezry*, London Terrace argued DHCR had years of rent regulation expertise on complex building issues such as the one before the court.\(^{186}\)

Trial court Judge Billings ultimately ruled in favor of the tenants by denying the landlord’s motion to dismiss or stay the proceeding.\(^{187}\) In refusing to allow a stay, Judge Billings reasoned that staying the action could cause the tenants irreparable harm:

> While DHCR’s resolution of the issues through rulemaking well might consider all stakeholders’ interests, defendant concedes that DHCR in over 18 months still has not amended its rules to conform to [*Roberts*]. Were the court to grant a stay, plaintiffs might lose their apartments without rent regulation while waiting

\(^{180}\) *Id.*

\(^{181}\) *Id.*

\(^{182}\) *Dugan*, 2011 N.Y. Misc. LEXIS 2953, at *1-2.*

\(^{183}\) *Id.* at *13-14.

\(^{184}\) *Id.* at *8-9

\(^{185}\) *Id.* at *2.

\(^{186}\) *Id.* at *7.

\(^{187}\) *Id.* at *27.
indefinitely for DHCR to act. For these reasons alone, such an indefinite stay would be inequitable, denying plaintiffs a prompt and permanent adjudication of their claims.\(^{188}\)

Thus, the court reasoned that such irreparable harm was of higher importance then the possibility that DHCR might consider all the parties’ interests.

Judge Billings also denied London Terrace’s motion to dismiss by rejecting the landlord’s jurisdictional claims.\(^{189}\) First, Judge Billings outlined the basic rules of primary jurisdiction, stating that DHCR and the courts generally have concurrent jurisdiction unless: (1) the legislature has conferred exclusive jurisdiction on the agency, (2) the plaintiff has sought referral to the agency, or (3) there was a pending proceeding already filed with the agency before the court action.\(^{190}\) Judge Billings found that none of the three factors were applicable here.\(^{191}\) Second, Judge Billings was unpersuaded by the claim that the court should defer to DHCR’s expertise because legal issues such as retroactivity, class certification, and relief can only be adjudicated by a judicial court.\(^{192}\)

Finally, Judge Billings criticized London Terrace’s claim that applying \(\text{Roberts}\) retroactively would destroy New York City’s real estate market.\(^{193}\) Specifically, Judge Billings stated that “[h]owever magnanimous defendant's concern for other property owners, prospective owners, lenders, and governmental tax revenues, yet again, the only interests to be considered

\(^{188}\) \textit{Id.} at *7.

\(^{189}\) \textit{Id.} at *14-27.

\(^{190}\) \textit{Id.} at *14-16.

\(^{191}\) \textit{Id.} at *16.

\(^{192}\) \textit{Id.} at *19. The court stated that DHCR is not well suited to determine the broadly applicable determinations [including] the retroactive effect of [\textit{Roberts}], application of the governing statute of limitations to the accrual of plaintiffs’ claims, the lawfulness of decontrol in proportion to a reduction of J-51 tax benefits, the preclusive effect of prior judicial or DHCR decisions, class certification, and grounds for relief. \textit{Id.}

here are defendant’s financial constraints if required to repay years of high overcharges to many tenants.”194 As in Lucas, Judge Billings invoked the three-pronged Gurnee test,195 reasoning that Roberts did not overrule past precedent given that the Court of Appeals relied on past law.196 Judge Billings also found the resolution was foreshadowed because Roberts looked at the plain meaning of the text, the legislative history, and the natural reading of the statutes’ language, which has remained intact since its passage in 1993.197 The court found the only factor of concern was whether “retroactive application will produce inequity, which in turn would consider any inequitable financial impact on defendant to repay massive overcharges.”198 Although this issue was not before the court, Judge Billings militated in favor of retroactive application if the issue was reached.

D. **London Terrace Gardens v. City of New York**

In a related matter, the landlord of Dugan, London Terrace Gardens, filed a separate suit against the City of New York asking the court for permission to repay the J-51 benefits it received in order to avoid liability under Roberts.199 London Terrace characterized its participation in the J-51 program as a contract with the City and argued that the court should allow London Terrace to rescind it.200 London Terrace reasoned that DHCR’s pre-Roberts policy of permitting deregulation despite receipt of J-51 tax breaks was a misrepresentation that it relied on, and accordingly, it should be able to pay back the benefits and rescind the contract.201

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194 *Id.* at *9.
195 *Id.* at *10-11.
196 *Id.* at *11-12.
197 *Id.* at *12.
198 *Id.* at *11.
200 *Id.* at *8-10.
201 *Id.* at *5-7* (stating that it “would not have applied for J-51 benefits, nor accepted them, if the receipt of J-51 benefits would have required it to re-regulate that [sic] apartments that previously had been subject to luxury
London Terrace further reasoned that as a result of Roberts, its financial benefit from the tax breaks was substantially less than the liability it was facing in rent overcharges caused by what appeared at the time to be proper deregulation.  

In dismissing the action, Judge Gische held that London Terrace could not repay the J-51 benefits because its participation in the program did not create a contractual relationship. Judge Gische wrote there was no statutory or regulatory language that London Terrace could have relied on to prove the City intended to create a contract between itself and the participating landlord. Indeed, there was no language in the enabling legislation that supported a finding that the J-51 program was intended to operate on a contractual basis. Thus, London Terrace’s attempt to escape liability by repaying the J-51 tax benefits was unsuccessful.

E. GERSTEN V. 56 7TH AVENUE

In addition to Lucas, the appellate court had a second opportunity to address retroactivity, statute of limitations, and the defense of collateral estoppel on an appeal from the trial court in Gersten v. 56 7th Avenue. The tenants in Gersten moved into their rent stabilized West Village apartment in 1968, which over time, was converted into an apartment that occupied the entire 20th floor of the building. This luxury apartment totaled 3259 square feet in size and contained “four bedrooms, five bathrooms, an office, an eat-in kitchen, separate dining room, and a 20-foot by 34-foot living room.”

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202 Id. at *7.
203 Id. at *10-15.
204 Id. at *11-12 (stating that the “J-51 program is just that, a program, and no contractual rights are created as a result of a landlord’s voluntary participation therein”).
205 Id. at *12.
207 Id. at 518.
208 Id.
The building was receiving J-51 tax benefits from 1990 until they expired in 2009. While receiving J-51 tax benefits, in 1998, the former owner deregulated the luxury apartment and because the apartment was occupied by the current tenants, DHCR had to approve the deregulation. In 1999, DHCR approved the deregulation and the tenants did not appeal the order. When the current owner, 56 7th Avenue LLC, bought the building in 2008, the building was not receiving J-51 benefits and the owner did not reapply for them.

In 2009, following the passage of Roberts, the tenants commenced this action claiming that, pursuant to Roberts, their apartment was illegally deregulated and the 1999 DHCR order was invalid. The tenants sought a declaratory judgment that their luxury apartment was rent stabilized and reimbursement for eleven years of rent overcharges. In response, the landlord moved to dismiss based on lack of jurisdiction, which the trial court granted and the parties appealed.

On appeal, the tenants argued the 1999 DHCR order was void ab initio because the apartment was deregulated while the building was still receiving J-51 benefits. In response, the landlord argued that (1) the tenants were collaterally estopped from challenging DHCR’s 1999 order; (2) Roberts should not be applied retroactively; and (3) a six-year statute of limitations set forth in New York Civil Procedure Law section 213(2) barred the tenants’

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209 Id.
210 Id.
211 Id.
212 Id. at 519.
213 Id.
214 Id.
215 Id.
216 Id. at 519 (holding that “DHCR's deregulation order was binding and that the court had no jurisdiction to set it aside 11 years after its issuance”).
217 Id. at 521.
218 Id. at 524.
219 Id. at 521.
In a unanimous ruling authored by Judge Renwick, the appeals court affirmed the dismissal by holding the tenants were collaterally estopped from challenging DHCR’s deregulation order.

Judge Renwick looked at the four-factor test for collateral estoppel and concluded that all four prongs were satisfied. The court found that the issue here, whether the subject apartment was properly deregulated, was the same issue that was brought before DHCR in 1999. The court also found the tenants had a full and fair opportunity to litigate the issue in the prior Agency proceeding because DHCR satisfied all the steps of the deregulation process when it issued its order. The court also emphasized that the tenants could have, but failed, to raise the same defense that was successfully used in Roberts:

The receipt of J–51 benefits is a matter of public record . . . . DHCR made public its policy on the issue—namely that J–51 benefits had no bearing on a landlord’s right to apply for luxury decontrol—when it issued an advisory opinion in 1996, which it incorporated into the [Rent Stabilization Code] in 2000. Thus, since it appears that nothing prevented plaintiffs from raising the J–51 benefits issue before DHCR, plaintiffs are now estopped from relitigating the issue 11 years later.

Further, the court stressed the importance of administrative finality but warned there were certain circumstances where DHCR has the discretion to reconsider its determinations. For instance, DHCR may, on its own initiative or on application of either party, issue an order modifying or revoking any prior order when it finds the prior order was the result of fraud or

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220 Id. at 522.
221 Gersten, 928 N.Y.S.2d at 529.
222 Id. at 524-26. The four factors of collateral estoppel are: (1) the issue in both proceedings is identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. Id. at 524.
223 Id. at 524.
224 Id. at 525-26.
225 Id. at 526.
226 Id.
illegality. However, a court cannot order a remand of a final administrative determination if a party’s argument is based on the same administrative record that existed at the time of the Agency proceeding. In the case at bar, the tenants tried to reopen an eleven-year old case based on the same record that was before the Agency at the time of its determination.

Although the landlord won on the issue of collateral estoppel, it lost on retroactivity. In analyzing this issue, the court invoked the *Gurnee* test and found the facts did not even satisfy the first prong. *Roberts* did not create a new principle of law but simply represented the court of Appeals’ first opportunity to interpret the language of the luxury decontrol statute. The court also stated that *Roberts* was “clearly foreshadowed in view of the clear language of the statute.” Finally, Judge Renwick did not see *Roberts* as causing much inequity because applying the decision prospectively would permit landlords to illegally collect excess rent at the expense of the tenants.

The owner also argued the tenants’ challenge to the status of their apartment was barred by the six-year statute of limitations set forth in rule 213(2) of the New York Civil Procedure Law. Rule 213(2) requires that “an action upon a contractual obligation or liability” be brought within six years. The owner argued the tenants’ rejection of their 1999 lease was a

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227 *Gersten*, 928 N.Y.S.2d at 526.
228 *Id.* at 527.
229 *Id.*
230 *Id.* at 521.
231 *Id.*
232 *Id.* at 522.
233 *Id.*
234 *Id.*
235 *Id.*
237 *Id.*
recession of contract and because the claim commenced more than six years after the beginning
of the lease it was now time-barred.\textsuperscript{238}

The court rejected this argument by reasoning the landlord-tenant relationship was
governed by statute and not by a written agreement that could be subject to a rescission claim.\textsuperscript{239}

The court reasoned that a statute defines a rent stabilized lease and when the lease expires, the
tenant becomes a statutory tenant.\textsuperscript{240} As a consequence, “[b]y law, every provision of a tenant’s
original rental agreement remains part of the landlord-tenant relationship imposed on the parties
for the remainder of the tenant’s occupancy of the unit.”\textsuperscript{241} Further, there is no statute of
limitations in challenging an apartment’s status because rent status is a continuous circumstance
and remains until facts or events change.\textsuperscript{242}

The court also rejected the owner’s claim that the tenants were barred by the four-year
statute of limitations applicable to rent overcharges as set forth in section 26-516(a)(2) of the
Rent Stabilization Law.\textsuperscript{243} The four-year statute of limitations precludes rent stabilized tenants
from seeking recovery for rent overcharges that occurred more than four years after filing the
rent overcharge complaint.\textsuperscript{244} The court found this statute of limitations also did not apply here
since the issue was regarding the status of the apartment and not its legal rent.\textsuperscript{245} The court
reasoned that imposing a statute of limitations to the issue of “determining rent regulatory status
subverts the protection afforded by the rent stabilization scheme . . . [and] except to limit rent

\textsuperscript{238} Gersten, 928 N.Y.S.2d at 522.
\textsuperscript{239} Id. at 523.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 523-24.
\textsuperscript{244} N.Y.C. ADMIN. CODE § 26-516(a)(2). See also N.Y. COMP. CODES R. & REGS. tit. 9, § 2526.1 (“A
complaint . . . must be filed with the DHCR within four years of the first overcharge alleged, and no determination
of an overcharge and no award . . . may be based upon an overcharge having occurred more than four years before
the complaint is filed.”).
\textsuperscript{245} Gersten, 928 N.Y.S.2d at 524.
overcharge claims, the legislature has not imposed a limitations period for determining the rent regulatory status of an apartment.246 Thus, the court rejected imposing any time limitations when challenging the status of a regulated apartment.

F. **DODD v. 98 RIVERSIDE DRIVE**

The most recent trial court case to address post-*Roberts* litigation was *Dodd v. 98 Riverside Drive*.247 Although filed in 2010, the court initially stayed the action pending the appeals courts’ resolution of *Lucas* and *Gersten*.248 After both cases were decided, trial court Judge Gische ruled on a motion for summary judgment filed by several tenants who had sued their owners for illegally deregulating their apartments.249 The facts here are similar to the cases discussed above.

The apartment building at issue in *Dodd* was located in Manhattan and owned by 98 Riverside.250 While the building was receiving J-51 tax benefits, the owner deregulated several vacant apartments with luxury decontrol.251 The situation in *Dodd* was similar to *Lucas*. As in *Lucas*, because the owner deregulated vacant apartments, the landlord did not need to—and did not—obtain DHCR approval of the deregulation.252 Further, like *Lucas*, the landlord did not provide a notice in the tenants’ leases informing the tenants that their apartments would be subject to deregulation upon the expiration of J-51 benefits.253 The tenants lived in the

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246 *Id.*
248 *Id.* at *3* (acknowledging both cases’ “potential precedential impact” on *Dodd.*)
249 *Id.* at *3-6.
250 *Id.* at *3-4.
251 *Id.* at *4-6.
252 *Id.* at *10-11.
253 *Id.* at *4-6. As explained in *Lucas*, before *Roberts*, owners generally did not include such a notice because the industry understanding was that the landlord was exempt from the notice requirement in buildings that were rent regulated before the received J-51 benefits. See *supra* notes 141,166 and accompanying text.
apartments during the receipt of J-51 benefits and continued their occupancy after the benefits expired.\(^{254}\)

Following *Roberts*, the tenants filed suit for, among other things, a declaration that their apartments were subject to rent stabilization, reimbursement for rent overcharges, and attorney fees.\(^{255}\) The tenants argued that: (1) pursuant to *Roberts*, because the building was receiving J-51 benefits during their occupancy, 98 Riverside had no right to deregulate their apartments; (2) *Roberts* should be applied retroactively as a matter of law; and (3) the tenants were entitled to rent overcharges outside the statutory four-year look-back period as well as treble damages and attorney’s fees.\(^{256}\) In opposition, 98 Riverside raised several defenses including, among other things, that the: (1) J-51 benefits already expired;\(^{257}\) (2) *Roberts* should be applied prospectively;\(^{258}\) (3) tenants’ claims were time-barred by a statute of limitations;\(^{259}\) and (4) tenants were collaterally estopped.\(^{260}\)

Judge Gische held the tenants “established a *prima facie* case that they are entitled to the benefit of rent regulation” pursuant to *Roberts*.\(^{261}\) First, Judge Gische addressed the effect of the expiration of the J-51 benefits on the tenants’ claims.\(^{262}\) Citing *Lucas*, Judge Gische rejected the landlord’s argument and reasoned that the subject apartments were continually occupied by the original tenants since before the J-51 benefits expired, and in any event, the landlord failed to

\(^{254}\) *Id.* at *4*.
\(^{255}\) *Id.* at *6-7*.
\(^{256}\) *Dodd*, 2011 N.Y. slip op. 32708U, at*8*.
\(^{257}\) *Id.* at *11-12*.
\(^{258}\) *Id.* at *13*.
\(^{259}\) *Id.*
\(^{260}\) *Id.* at *7*.
\(^{261}\) *Id.* at *11*.
\(^{262}\) *Id.* at *11-13*. 
provide the required notification in the leases that the apartments may become deregulated when
the J-51 benefits expire.\textsuperscript{263}

Second, Judge Gische rejected 98 Riverside’s arguments regarding retroactivity and
statute of limitations since the appellate court affirmed both issues in \textit{Gersten} and \textit{Lucas}.\textsuperscript{264} Third, regarding relief, Judge Gische limited the tenants’ recovery by applying the four-year
statute of limitations applicable to rent overcharges since there was no finding of willfulness or
fraud.\textsuperscript{265} The judge also declined to award treble damages, stating “undisputed facts in the case at
bar negate the willfulness required for the punitive imposition of treble damages [because] [i]n
setting the rent the owner simply relied upon DHCR’s, albeit incorrect, interpretation of the
applicable law.”\textsuperscript{266}

In addition, Judge Gische declined to award attorney’s fees because of section 234 of the
Real Property Law and the express terms of the leases.\textsuperscript{267} Discussing section 234, Judge Gische
stated that,

\[\text{[i]n the case of residential leases, [section 234] provides that when, in any action}
\text{or summary proceeding, an owner is permitted to recover legal fees from the}
tenant based upon the failure to perform any covenant or agreement of the lease,
there is also an implied reciprocal obligation by the owner to pay the tenant's legal
fees, if the tenant otherwise prevails in the dispute. While this reciprocal right will
apply to actions commenced by the tenant against a landlord, either directly or by
way of counterclaim, its scope is still limited to the rights afforded the landlord by
the terms of the underlying lease.}\textsuperscript{268}

Here, the terms of the leases permitted only the owner to collect legal fees in certain
circumstances, and accordingly, “the leases and the reciprocal application of [section
\begin{footnotesize}
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\item \textit{Id.} at *12. Judge Gische was not persuaded by the landlord’s claim that it was “unfair to hold it to the
notice requirement because the absence of any required notice was a result of it acting in accordance with the
DHCR’s interpretation of the law.” \textit{Id.}
\item \textit{Id.} at *13-15.
\item \textit{Id.} at *14-16.
\item \textit{Id.} at *16.
\item \textit{Id.} at *18-19.
\item \textit{Id.} at *18.
\end{enumerate}
\end{footnotesize}
do not justify an award of legal fees.”

Finally, the court also rejected the landlord’s collateral estoppel defense. Citing *Gersten*, Judge Gische reasoned that this defense was unavailing since the landlord did not seek a DHCR order when deregulating the tenants’ apartments.

**G. ROBERTS III**

The most recent case to go before the appeals court was none other than *Roberts v. Tishman Speyer Properties* (“*Roberts III*”) regarding the issue of retroactivity. In 2010, the trial court applied *Roberts* retroactively and denied MetLife’s argument that retroactive application of *Roberts* would violate its due process. In upholding the trial court, the appeals court stated that the “background or default rule is that judicial decisions have retrospective effect” and that “[p]rospective application is an exception which should not be permitted to swallow the rule.” As discussed in the above cases, the court invoked the *Gurnee* test of retroactivity and held that *Roberts* did not establish a new principle of law.

In sum, *Roberts* has had an impact on the lower courts as illustrated by some of the major cases summarized above. *Roberts* has the potential to reach similarly situated landlords since the lower courts have applied the decision retroactively. In addition, the courts have refused to apply a statute of limitations to challenging an apartment’s status and have ruled that the courts—and not DHCR—are the proper forum for such suits. The next section of this Note will discuss the implications of *Roberts* on New York City’s real estate industry, and notwithstanding the post-

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269 *Id.*  
270 *Id.* at *20.*  
271 *Id.*  
273 *Id.* at *2.*  
274 *Id.*  
275 *Id.*
Roberts case law, this Note will ultimately conclude that the impact of Roberts was not as dire as initially predicted.

VI. IMPLICATIONS OF THE ROBERTS DECISION

Shortly after Roberts, the decision alarmed many landlords and developers, causing some parties to either rearrange or scrap their development plans altogether. Real estate experts estimated that thousands of apartments were likely to be affected and even banking institutions predicted the ruling was likely to “significantly harm New York apartment investment for several years.” At the very least, the short term effects became clear as many tenants in similar circumstances filed putative class actions against landlords for rent overcharges.

Indeed, only one year after the Roberts decision, Tishman threw in the towel and its lenders took control of the Manhattan apartment complex. What began as the “world’s biggest real estate deal” ended in the “world’s biggest real estate default.” The deal, initially valued at $5.4 billion, dropped to $1.9 billion shortly after the Roberts ruling—a value of less than one-third of its purchase price. The ruling affected more than 4000 units and made the owners liable for an estimated $200 million in rent overcharges. After the Stuy Town fiasco, many

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276 Haughney & Bagli, supra note 85 (stating “the ruling by the New York Court of Appeals had an immediate chilling effect on real estate in New York: Landlords questioned whether they could raise rents, and some even went so far as to cancel plans to buy more apartments in buildings with tax subsidies”).

277 Id.

278 Illaina Jones, Court Ruling May Cost NYC Apartment Owners Billions, REUTERS NEWS, Dec. 1, 2009 (reporting that 366 loans totaling $5.8 billion would likely be affected).


281 DuBow, supra note 86.


283 Bagli, Lenders Take Over, supra note 280.

284 Rob Johnson & Larry McShane, Stuy Town Tenants Owed Millions—Court, N.Y. DAILY NEWS, Oct. 23, 2009. The owners of Stuy Town were not the only ones to lose out, as many other parties also lost their financial
investors, real estate experts, and similarly situated landlords feared the same financial debacle would happen to them.\textsuperscript{285}

It is hard to determine how many rent regulated buildings were financially impacted by \textit{Roberts} because not many real estate owners’ affairs are public. However, there have been several owners of rent regulated buildings that have seen their investment plans evaporate since \textit{Roberts}. For instance, the lenders of Riverton Houses, a 1200-unit middle-income complex located in Harlem, foreclosed on the building in 2010.\textsuperscript{286} Ninety percent of Riverton’s 1200 units were rent regulated.\textsuperscript{287} Like Tishman, the owner bought the building in 2005 in the hopes of making a profit by converting half of the regulated apartments to market rates by 2011.\textsuperscript{288} When financial troubles ensued, lenders refused to restructure the $250 million loan and foreclosed on the property.\textsuperscript{289}

Another rent stabilized building to experience similar financial troubles is The Belnord, a luxury residential building located on the Upper West Side of Manhattan.\textsuperscript{290} The Belnord, occupying the entire City block from 86th Street to 87th Street, is an Italian Renaissance-style 12-story apartment building consisting of 215 rental units.\textsuperscript{291} A bulk of the buildings’ units are rent stabilized.\textsuperscript{292} Like Tishman, the owner of The Belnord betted on the market and took out loans on the expectation that the building’s rent regulated apartments would be converted to

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\textsuperscript{285} See, e.g., Haughney & Bagli, supra note 85; Jones, supra note 278.
\textsuperscript{286} Charles V. Bagli, \textit{They Bet the Rent, and Lost}, N.Y. TIMES, May 29, 2010, at B1 [hereinafter Bagli, \textit{They Bet and Lost}].
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Charles V. Bagli, \textit{In Harlem Buildings, Reminders of Easy Money and the Financial Crisis}, N.Y. TIMES, May 29, 2010, at B1 [hereinafter Bagli, \textit{Harlem Buildings}]. The property is currently estimated to be worth less than half of its debt. Id.
\textsuperscript{291} Geiger, supra note 85.
market rates.\textsuperscript{293} This proved more difficult then expected, and in 2011, the owner transferred its loan to a special servicer.\textsuperscript{294}

Looking at various statistics in the aftermath of \textit{Roberts}, it seemed inevitable that the decision would have a major negative impact on the real estate industry. Over 80,000 apartments were deregulated because of luxury decontrol since 1993,\textsuperscript{295} and it was estimated that about 40,000 apartments in 4000 buildings would be affected.\textsuperscript{296} Since May of 2010, DHCR received 200 overcharge complaints from tenants in J-51 buildings,\textsuperscript{297} and as discussed in the preceding sections, a handful of tenant class actions were filed as a direct result of \textit{Roberts}.\textsuperscript{298}

The number of owners newly applying for J-51 benefits has also drastically dropped since 2009. According to the 2010 Housing Supply Report, published by New York City’s Rent Guidelines Board, the number of apartment units receiving J-51 benefits decreased over 40\% in 2009, the lowest level since the history of the report.\textsuperscript{299} Further, since \textit{Roberts}, investors and lenders have been unwilling to make deals on buildings that received, or are still receiving, J-51 benefits.\textsuperscript{300} This is unsurprising as it has become impossible to value such buildings given the uncertainty in rent receivables and the possible liability for rent overcharges.\textsuperscript{301}

Although \textit{Roberts} has had some negative repercussions on New York City’s real estate industry, its impact has been contained for three main reasons. First, \textit{Roberts} seems to have limited itself to overleveraged owners who were already in dire financial trouble before the

\textsuperscript{293} Pristin, supra note 290.
\textsuperscript{294} Id.
\textsuperscript{296} Noeleen G. Walder, \textit{Experts Say Impact of Stuyvesant Ruling May Be Set by Trial Courts}, 243 N.Y.L.J. 1 (2010). \textit{But see} Haughney & Bagli, supra note 85 (stating that between 35,000 to 80,000 apartments were likely to be affected by \textit{Roberts}).
\textsuperscript{297} Walder, supra note 296.
\textsuperscript{298} See supra Part V.
\textsuperscript{301} See id.
decision. Second, although most of the issues have widened the scope of Roberts, the courts have restricted relief solely to rent overcharges by not imposing treble damages or attorney’s fees and have even recognized some defenses. Finally, Roberts may be limited to middle-income developments since applying Roberts to luxury buildings would go against the spirit of the decision and New York City’s rent regulation system. The next sections will discuss in greater detail how the impact of Roberts has been limited based on the three reasons outlined above.

**A. Overleveraged Deals**

Although many owners of J-51 buildings had defaulted on their loans since 2009, the decision in Roberts was not the cause of this financial debacle. Instead, Roberts was likely one of many factors that broke the overleveraged deal in an already financially strained housing market. Many of these real estate deals originated in the housing boom period of 2000 to 2007 when landlords and investors bet on the market’s rising rent.  

Investing in rent regulated residential buildings was seen as a “diamond in the rough” compared to luxury buildings, with investors believing they could make huge profits by converting regulated apartments into luxury units and charge increased rents. Some investors paid top dollar for such deals, speculating that they would not only make modest profits from such conversions, but substantial profits. It is tempting to point fingers at Roberts as the cause of deals gone sour for many owners of buildings such as Stuy Town, Riverton Houses, and The Belnord. However, these owners originated their loans in the mid-2000s market boom, overleveraged, and inevitably wound up in a similar financial mess as Tishman once the market began to tank in 2008.

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303 Bagli, *They Bet and Lost*, supra note 286 (“At the start of the real estate boom in 2004, private equity firms began buying these kinds of meat-and-potato complexes, which they had long eschewed in favor of luxury buildings.”).

For instance, the Stuy Town owners were already experiencing financial woes before the 2009 Roberts decision, with many financial experts believing the deal was overleveraged from inception and would eventually fall apart. Unsurprising, soon after the Stuy Town deal closed, the owners’ problems began to mount when they could not convert regulated apartments as quickly and as easily as planned. Moreover, the successfully deregulated apartments caused resentment among tenants as the disparity between rents became well-known throughout the building. The plan to renovate Stuy Town into a luxury building was also seen as a failure because the building was never intended for luxury tenants and instead, was commonly viewed as a middle-income housing development for moderate-income families. Moreover, the economy began to fizzle, causing current rents and property values to decrease substantially. These troubles were already brewing, and when Roberts was decided in 2009, it simply pushed the deal over the real estate ledge—so to speak.

The Stuy Town problems are symptomatic of other overleveraged real estate deals in New York City. Both Riverton Houses and The Belnord have similar stories. Like Stuy Town, Riverton was built by MetLife in the 1940s for veterans and middle-class families after World War Two. The owner bought the property during the housing market boom of 2005 for $132 million and a $105 million mortgage, and expected to raise income substantially by converting half of the regulated units to market rate by 2011.

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306 Id.
307 Id.
308 Id.
309 Id.
310 Bagli, They Bet and Lost, supra note 286.
311 Bagli, Harlem Buildings, supra note 289.
In 2006, the owner more than doubled its debt by refinancing for $250 million of new loans to renovate and upgrade the development into a more luxury-type building.\textsuperscript{312} However, even before the fated 2009 \textit{Roberts} decision, the owner began experiencing similar financial problems as Tishman. The rental income covered less than half of the debt payments and the conversion turnover was slow.\textsuperscript{313} By August of 2008, the owner was nearly defaulting and had only converted 10\% of the units—not the 50\% as originally projected.\textsuperscript{314} In early 2010, the lenders finally foreclosed and took over the property.\textsuperscript{315}

The Belnord encountered similar financial problems long before \textit{Roberts}.\textsuperscript{316} The owner of The Belnord originally acquired the property in the 1990s for a paltry purchase price of $15 million.\textsuperscript{317} At the peak of the market boom, in 2006, the property’s value skyrocketed to $774 million and the owner refinanced his existing debt into a $375 million loan with plans to renovate regulated apartments and raise their rents to market rate.\textsuperscript{318} The Belnord, as many regulated buildings in New York City, participated in the J-51 program throughout the years.\textsuperscript{319} After \textit{Roberts}, the owner blamed the decision for its financial problems since the building could no longer raise its rents through deregulation.\textsuperscript{320} However, many real estate experts believed The Belnord was in financial trouble “long before [\textit{Roberts}] had really come to fruition” since the building experienced cash flow problems and turnover of regulated apartments to market rates

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Prstin, supra note 290.
\item Geiger, supra note 290.
\item Id.
\item Prstin, supra note 290.
\item Id. The owner, Gary Barnett, called “the J-51 ruling ‘absolutely outrageous’ and said he would have turned down the tax relief if he had foreseen the consequences.” Id.
\end{enumerate}
\end{footnotesize}
slowed through 2008.\textsuperscript{321} With the reserve fund quickly dwindling, the owner transferred the loan to a special servicer in 2011.\textsuperscript{322}

These financial debacles were not contained to New York City alone but occurred in other parts of the country—parts where Roberts could not reach. Owners of rent regulated buildings have defaulted in places as far as California. For example, the owner of Parkmerced, a 3221-unit apartment complex in San Francisco, recently defaulted on a $550 million loan.\textsuperscript{323} The building was one of the largest affordable properties for middle-class families with 3200 rent stabilized apartments.\textsuperscript{324} According to Charles Bagli, a reporter of The New York Times, “just like Riverton and Stuyvesant Town, the owners of Parkmerced sought to take advantage of a roaring market to replace rent-regulated residents with tenants able to pay far higher rents.”\textsuperscript{325} The owners borrowed large loans and renovated the properties, but with the slowed economy, they ultimately failed to raise enough revenue to cover debt payments on the heavily overleveraged property.\textsuperscript{326}

Thus, Roberts did create some financial burdens on New York City’s real estate industry, but it was only one of the many reasons that contributed to the defaults that took place shortly thereafter. It appears that some of the defaults involved overleveraged properties bought by real estate speculators during the market boom years. Such properties were destined to fail since the investors made several faulty assumptions, including: dramatic rising rents; a continuing housing boom; easy and quick deregulation; and bad investments decisions such as over-priced

\begin{footnotesize}
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\item[\textsuperscript{321}] Id.
\item[\textsuperscript{322}] Id.
\item[\textsuperscript{323}] Id.
\item[\textsuperscript{324}] Bagli, They Bet and Lost, supra note 286.
\item[\textsuperscript{325}] Id.
\item[\textsuperscript{326}] Id.
\end{itemize}
\end{footnotesize}
acquisition costs and high refinancing loans. In other words, *Roberts* seems to have affected overleveraged owners to a degree by hastening their inevitable downfall in an already sluggish real estate economy. Further, it seems that these unfortunate events were part of a broader financial recession that occurred in other parts of the country involving rent regulated properties.

Even though New York City has been known to be the toughest and most unforgiving real estate market in the world, there have been few career fatalities among its developers. As one real estate expert stated: “Capital is blind. It will go wherever it can for a return. That’s it in a nutshell.” According to the expert, the financial market has a short memory and real estate speculators that lose money on such deals will most likely recuperate as intuitional lenders and bankers forget the losses—and the process will start anew. Thus, *Roberts* did not create the dire financial burdens as initially predicted by real estate experts but simply played one part in an already dysfunctional market.

**B. LIMITED LIABILITY AND OTHER DEFENSES**

The lowers courts have effectively rejected all three arguments that landlords had to mitigate the impact of *Roberts*. As discussed above, the Court of Appeals in *Roberts* did not rule on issues such as retroactive application, statute of limitations, and available defenses. As a result, these issues became the crux of litigation in the trial and appellate courts. For instance,

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327 See, e.g., McArdle, *Tishman Turns Over Keys*, supra note 302. The author stated that the Tishman properties, as well as other deals, were based on three questionable assumptions: First, you had to believe that it would be easy to decontrol apartments, which it almost never is, in New York, especially over the last few years. Second, because there were a number of bidders on the property, Tishman and Black Rock paid top dollar for those projected cash flows, so there wasn’t a lot of margin for error if things went wrong. And they didn’t just project that they’d be able to decontrol the apartments for a modest rent boost; they assumed a continuation of New York’s sizzling real estate boom.


329 Id.

330 Id.

331 See supra Part IV.A.
many defendant landlords argued the decision should not be given retroactive application as it
exposed them to thousands, if not millions, of dollars in rent overcharges. The landlords further
argued, that, in the interest of fairness and public policy, it was unfair to hold owners liable for
massive amounts of back rent when all parties—including lenders, legislators, and DHCR—
believed the regulation laws were being properly followed. If Roberts was to apply retroactively,
landlords argued the claims were time-barred by various statutes of limitation.

As illustrated in the preceding sections, both the trial courts and appellate courts held that
Roberts applied retroactively. In analyzing the issue, the courts evoked the Gurnee test and
reasoned that Roberts could not even overcome the first prong of Gurnee. The courts emphasized
that retroactive application would not produce inequitable results because the purpose of the
Rent Stabilization Law—protection from illegal rent overcharges—outweighed subjecting
landlords to unforeseen liability that stemmed from what was at the time an acceptable real estate
practice. The lower courts also refused to recognize a statute of limitations for challenging the
status of an apartment mainly because the Legislature had never promulgated one and the courts
refused to apply a statute of limitation over from other laws. The courts reasoned that
challenging the status of a deregulated apartment was not time-barred and holding otherwise
would subvert the purpose of the rent regulation laws.

In theory, these rulings seemed to impose an unlimited liability on owners for rent
overcharges. But in practice, the liability is narrower. First, the lower courts have limited
damages by holding owners liable for rent overcharges to four years before the filing of the

332 See, e.g., Gersten, 928 N.Y.S.2d at 522 (stating “the equities do not favor only prospective application of Roberts. The impact of retroactive application of Roberts would be to protect, where applicable, tenants from rent increases in excess of those allowed by the [Rent Stabilization Law]”); Lucas, 902 N.Y.S.2d at 794 (stating that the “impact of retroactive application of Roberts creates no inequity. It simply protects tenants who were initially meant to be protected by the [Rent Stabilization Law] from eviction for no cause other than expiration of their leases, and protects them from rent increases in excess of those allowed by the [Rent Stabilization Law]”); Dugan, 2011 N.Y. Misc. LEXIS 2953 at *11 (refusing to look at defendant’s claim that retroactive application will cause financial havoc on property owners, prospective owners, lenders, and the City).
complaint pursuant to the rent overcharge statute of limitations. For instance, a tenant can bring a claim for improper deregulation of her apartment at any time—even if the owner has deregulated the unit years ago. If the deregulation is indeed improper, a court will return the deregulated apartment to regulated status and the tenant can collect rent overcharges. However, the landlord will only be liable for rent overcharges for the preceding four years before the date of the complaint.

Second, landlords that deregulated J-51 buildings based on the belief that such conduct was proper at the time are not liable for treble damages. To be liable for treble damages, a tenant must demonstrate the landlord willfully collected excess rent. Given that the majority of landlords followed DHCR’s interpretation of luxury decontrol, an award of treble damages is unlikely. Based on similar reasoning, a landlord also has a high chance of not being liable for attorney’s fees even if a tenant successfully challenges the status of a deregulated apartment.

Finally, collateral estoppel may preclude some claims—as was successfully argued in Gersten.

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333 N.Y.C. ADMIN. CODE § 26-516(a)(2) (stating “a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed”). See, e.g., Gordon, 2011 N.Y. Misc. LEXIS 3362, at *3 (stating “the tenants have instituted an action in court asserting a rent overcharge claim, [and] for purposes of determining the legal regulated rent, the base date is four years prior to the commencement of the action”); Lucas, 32 Misc.3d at 50 (agreeing that “no basis was shown for the court to go outside the four-year look-back period”).

334 See, e.g., Crimmins v. Handler & Co., 249 A.D.2d 89, 89 (N.Y. App. Div. 1998). The court construed the statutory language of section 26-516(a)(5) to mean that “the action must be brought within four years of the first month for which damages are sought to be recovered and not, as defendants suggest, that an action is forever barred where the overcharge extends over a period in excess of four years.” Id. The statute of limitations for rent controlled tenancies is even shorter and limits recovery to two years before the complaint. N.Y.C. ADMIN. CODE § 26-413(d).

335 N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2206.8(b)(2) & 2526.1(a)(1).

336 See, e.g., Lucas N.Y. Misc. LEXIS 2527, at *4 (finding the imposition of attorney’s fees on the landlord “would be unfair under the particular circumstances of this case, where its possessory claim, albeit unsuccessful, was at least colorable at the time of commencement of the holdover proceeding”).

337 See supra notes 221-41 and accompanying text.
If there was a prior DHCR luxury deregulation order, and the tenant failed to reargue it, then the tenant could be collaterally estopped from bringing a claim.\footnote{This exception may be limited, because as illustrated in Dodd, it may be difficult to establish all four factors of collateral estoppel. The factor of most concern would be whether the tenant had a fair and full opportunity to litigate the deregulation order because landlords generally do not need a DHCR order when deregulating vacant apartments. As a consequence, some tenants would not be precluded under collateral estoppel since those tenants never had a fair and full opportunity to litigate before the Agency. See supra notes 270-69 and accompanying text.}

C. \textit{Roberts} May Be Limited to Middle-Income Developments

The goal of the rent regulation system is to protect those tenants that cannot afford substantial rent increases.\footnote{See supra note 30 and accompanying text.} The Legislature adopted the luxury decontrol provisions to prevent the rent regulation system from protecting higher-income tenants at the expense of middle and lower-class tenants.\footnote{See supra notes 58-60 and accompanying text.} The \textit{Roberts} ruling was in line with the goals of the rent stabilization system because it prevented the deregulation of thousands of middle-income rent stabilized apartments in exchange for increased profits. However, there is an argument to be made that applying \textit{Roberts} to all buildings—luxury and middle-income developments alike—will hurt the goals of the rent regulation system.\footnote{Gieger, supra note 290 (quoting an attorney as stating that “[t]he J-51 decision was bad because in the past you had your wealthy renters who would pay market rents and in a sense subsidize the renters in the building who were in regulated apartments, keeping the building profitable and providing the funds for its upkeep . . . . Now the J-51 case is basically saying that landlords can only get so much for every unit. It’s hurting the building and in turn hurts all the renters, including the regulated tenants”).}

This argument has been implied in \textit{Gersten} where the appeals court upheld a trial court’s dismissal of a wealthy tenant’s suit.\footnote{928 N.Y.S.2d at 516.} In ruling against the tenant, the \textit{Gersten} court refused to allow the tenant to collect rent overcharges from a deregulated luxury apartment that occupied the entire 20th floor.\footnote{Id.} The \textit{Gersten} court emphasized that the tenants were “not the typical tenants intended to be protected by rent regulation.”\footnote{Id. at 518.} Indeed, the court also stressed that the
apartment at issue was unusually luxurious for the Manhattan market. This decision may be relevant to owners of luxury buildings that are facing lawsuits from wealthy tenants challenging the status of their luxury apartments. One such building is The Belnord.

Unlike the Stuy Town and Riverton developments, The Belnord was never a middle-income development. Since 1908, the property was intended as housing for the wealthy, and when built, it was anticipated to be “the largest and highest grade apartment house in this city, if not the world.” The building continued its luxury appeal and was landmarked in 1966. It has been famous for its residents over the years—and has housed tenants such as Isaac Bashevis Singer, Walter Matthau, Samuel Joel “Zero” Mostel, and Matt Damon. Currently, The Belnord is facing a handful of individual lawsuits from several of its wealthy tenants for rent overcharges.

In sum, Roberts may be used as a way for wealthy renters to receive substantial discounts even though many of these tenants initially agreed to rent the deregulated apartments at market value. Under such circumstances, the few regulated apartments that are left in such buildings may be lost as the owner scrambles to increase revenue by, for example, converting regulated apartments to condominiums. This outcome was probably not the Court of Appeals’ intention. Once the system starts to shelter high-income tenants in luxury buildings at the expense of middle and working-class renters, the Legislature and/or the courts may have to step in—as they

345 See note 208 and accompanying text.
346 Pristin, supra note 290.
347 Id. (citing a July 19, 1908 article by The New York Times).
348 Id.
349 Id.
350 Pristin, supra note 290.
351 Id. (“[T]he J-51 decision appears to be a way for wealthy renters, who agreed to take the deregulated apartments at market value, to receive a substantial discount, [and this, accordingly, will] not help middle class renters hold onto their apartment as the spirit of the ruling seemed to intend.”)
352 An owner may generally deregulate certain rent stabilized or rent controlled apartments by converting them to condominiums once certain criteria are followed. See N.Y. GEN. BUS. LAW § 352-e (2011).
have done in the past. Thus, the implications of Roberts may further be limited to middle-income apartment complexes and not to luxury buildings housing wealthy tenants that can afford its extravagant rent.

VII. CONCLUSION

New York City’s rent regulation system is difficult to understand, and its complexity has been recognized by the judicial system. In place since the 1920s, the legislation has gone through numerous amendments as both tenant and landlord lobbyists swayed the Legislature from relaxation to strengthening the system. New York City is once again in a period of strengthening its rent laws in favor of tenants, as illustrated both by the Rent Act of 2011 and the 2009 Court of Appeals decision in Roberts. It has now become harder for landlords to deregulate apartments as the Legislature has increased both the rent and income threshold levels of luxury decontrol. Further, Roberts has imposed liability on landlords that deregulated apartments in buildings that received or were receiving J-51 tax benefits.

Following Roberts, there has been some litigation in the lower courts over issues that Roberts left unanswered. All the litigation thus far has expanded the impact of Roberts to similarly situated landlords by applying the decision retroactively and by rejecting any statute of limitations in challenging the status of rent regulated apartments. However, the lower courts have limited liability for rent overcharges by refusing to impose treble damages, attorney’s fees, and restricting the refund of overcharges to a four-year look-back period. The courts refused to find willfulness or fraud among landlords who deregulated by following, albeit incorrectly, DHCR’s

353 See Lucas, 32 Misc.3d at 50 (stating New York City’s rent regulation system “can prove to be an ‘impenetrable thicket confusing not only for laymen but to lawyers’”); see also Ade v. Riverview Redevelopment Co., LP, 26 Misc.3d 1102, 1105 (N.Y. Sup. Ct. 2010) (stating that “forays into New York City’s complex area of rent control and stabilization are analogous to the experience of American armored units . . . during World War II . . . . [where] it [is] easy enough to get in but extremely difficult to get out”).
position that participation in the J-51 program precluded luxury decontrol only where the receipt of J-51 benefits was the sole reason for the building being subject to rent regulation.

This Note argues that although *Roberts* did create some unacceptable burdens, it failed to cause the major financial havoc on New York City’s real estate industry that was initially predicted. *Roberts’* effects may be limited for three main reasons. First, the defaults that have occurred usually involved overleveraged deals that were hit by a turbulent financial market. Second, recent lower court cases have restricted *Roberts* by limiting the liability of landlords and by allowing certain defenses. Finally, if *Roberts* is applied to luxury buildings, it may break the spirit and goals of the rent regulation system and ultimately prompt the State Legislature to act.