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News

MITCHELL-LAMA RENTS CAN RISE TO MARKET RATES

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INITIAL RENTS for apartments removed from the Mitchell-Lama program can be adjusted to rents for comparable apartments in the same area, an appellate court ruled yesterday in the case of three Upper West Side apartment buildings.

The decision will be published Wednesday.

The adjustments could dramatically increase rents that had been kept low under caps imposed under the rules of the Mitchell-Lama program.

The ruling by the Appellate Division, First Department, in *In re KSLM-Columbus Apartments Inc. v. New York State Division of Housing and Community Renewal, 2080*, will allow the owner of the buildings, also called the Westgate Apartments, to apply for adjustments to bring the rents to meet market rates.

New York State and New York City had allowed the formation of limited-profit housing companies in the 1950s, '60s and '70s to encourage developers to build middle-income housing. Property owners received low-interest mortgages and tax abatements in exchange for limitations on rents that were based on tenants' incomes. After a set term -- typically 20 or 35 years, depending upon when the housing was built -- a property owner could withdraw from the program by paying off the mortgage and meeting other conditions.

Of some 140,000 apartments built in the Mitchell-Lama program, mostly in New York City and its suburbs, about 17,000 have been withdrawn from the system, state and city officials estimated yesterday.

The appellate court yesterday unanimously reversed Justice Sheila Abdus-Salaam's ruling upholding a determination of the Division of Housing and Community Renewal (DHCR) that KSLM-Columbus Apartments, the owner of the three Westgate buildings on West 96th and 97th Streets between Columbus and Amsterdam Avenues, was not entitled to apply for an adjustment of the rents after withdrawing from the Mitchell-Lama program.

Justice Eugene Nardelli, writing for the five-judge panel, said Justice

2/27/2004 N.Y.L.J. 1, (col. 3)

Abdus-Salaam and the DHCR had incorrectly decided that KSLM, which withdrew from Mitchell-Lama in 1998, was not eligible to apply for an adjustment of the rents under the Emergency Tenant Protection Act (ETPA) of 1974 because the buildings were built before 1969, and thus the ETPA did not apply to them.

Without adjustment the rents paid by the tenants before the withdrawal from Mitchell-Lama would be continued, subject to annual rent stabilization increases.

KSLM appealed, arguing that it was entitled to apply to reset the rents based on Rent Stabilization Law §26-513(a), which was enacted with the ETPA. That provision allows the DHCR to adjust the initial legal regulated rent "upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.'

The rents for the neighborhood have been estimated by the tenants to range from three to seven times their Mitchell-Lama rents.

Justice Nardelli said when the ETPA was passed, its jurisdiction included housing that was exempted from the Rent Stabilization Law. That included the Westgate Apartments because they were regulated under Mitchell-Lama, he noted.

'[N]either the state legislature, nor the City Council, endeavored to qualify that application [of the ETPA] by the building's year of construction. We must, therefore, conclude that the legislature's failure to include such an arbitrary, prohibitive restriction was intentional," the judge said.

The Rent Stabilization Code §2520.11 provides that buildings completed before Jan. 1, 1974, and previously regulated by the Private Housing Finance Law (the Mitchell-Lama Law), are subject to the ETPA and the Rent Stabilization Law, Justice Nardelli added.

Letters from DHCR officials indicated, the judge said, that they were "aware of the economic disadvantage a building owner would encounter upon losing its Mitchell-Lama financing and tax incentives.'

'To now discount such a disadvantage based upon an arbitrary factor such as the date the building was constructed, without any support in the statutes for such a distinction is, in our view, irrational. Moreover, such an egregious result would certainly dampen any future interest by developers who might be inclined to participate in government subsidized housing programs, but who might very well abstain in view of the arbitrary economic hardships imposed by the DHCR," he concluded.

Justices Angela M. Mazzarelli, Joseph P. Sullivan, Ernst H. Rosenberger and Alfred D. Lerner concurred with Justice Nardelli's opinion.

Nicholas Kamillatos and Blaine Z. Schwadel of Rosenberg & Estis represented KSLM-Columbus Apartments. Kevin R. McConnell, Mary Traynor, Serge Joseph and William J. Gribben of **Himmelstein**, McConnell, Gribben, Donoghue & Joseph were

2/27/2004 NYLJ 1, (col. 3)

Page 3

2/27/2004 N.Y.L.J. 1, (col. 3)

counsel for the Westgate tenants, and Assistant Attorneys General Oren L. Zeve and Marion R. Buchbinder appeared for the DHCR.

2/27/2004 NYLJ 1, (col. 3)

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