STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

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IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

NAUM AND SUSANNE MEDEVOY

SJR NO. 14,544

ADMINISTRATIVE REVIEW
DOCKET NO. AV410042RT

RENT ADMINISTRATOR'S
DOCKET NO. XF411975LD

OWNER: 9 EAST 10 LLC

PETITIONERS

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

On October 25, 2012, the above-named tenants filed a petition for administrative review (PAR) of an order issued on September 25, 2012 by a Rent Administrator concerning the housing accommodations known as 9 East 10th Street, Apartment 2R, New York, New York, wherein the Rent Administrator determined that the subject apartment was to be deregulated upon the expiration of the existing lease pursuant to Section 2520.11(s) of the Rent Stabilization Code.

The Commissioner has reviewed all of the evidence in the record and has carefully considered that portion of the record relevant to the issues raised in the administrative appeal.

On June 25, 2009, the owner filed a petition for high income rent deregulation alleging that the legal rent for the subject apartment was $2,000 or more per month and requesting verification of the household income in order to establish that the total annual income of the household was in excess of $175,000 in each of the two preceding calendar years.

On October 20, 2011, the Administrator sent to the tenants by first class priority mail with United States Postal Service Delivery Confirmation a copy of the owner's petition for deregulation and an answer form requiring the tenants to submit specified income verification information.

The answer form mailed to the tenants clearly stated (in a separate paragraph in **bold-face type**):

> You are required to complete this answer form and return it to DHCR within sixty (60) days of this notice. Your failure to answer will result in the issuance by DHCR of an order deregulating your housing accommodation and eliminating rent regulatory protections (such as protections against unlimited rent increases and eviction) for your housing accommodation.

The answer form also clearly stated that the tenants were required to submit a copy of either the preprinted mailing labels used on the New York State income tax returns or the first page of the tenants' N.Y.S. income tax returns for both 2007 and 2008, or a copy of any extension requests that had been filed or granted.

The tenants responded to this notice and asserted that under the controlling statutory and case law the subject apartment was not subject to luxury decontrol since the subject building had received J-51 tax benefits and that DHCR should therefore not have processed the owner's application and was now required to deny the owner's petition for deregulation. The tenants did not submit a completed answer form or provide any of the specified required income verification information with this response.

On January 10, 2012, DHCR sent the tenants a follow-up notice, by priority mail with United States Postal Service Delivery Confirmation, advising the tenants that the answer was incomplete and that the tenants did not submit all of the required income verification information in their response to the notice and answer form, and requiring the tenants to complete the answer form and submit a copy of either the preprinted mailing labels or the first page of their 2007 and 2008 N.Y.S income tax returns, as well as other specified income verification information. This notice also advised the tenants that the subject building was no longer receiving J-51 tax benefits and that the case was still being processed. Finally, this notice further advised the tenants that their failure to respond to the notice might result in the issuance by DHCR of an order deregulating the subject apartment and eliminating rent regulatory protections (such as protection against unlimited rent increases and eviction) for the subject housing accommodation. A copy of the tenants' blank, uncompleted answer form was attached to this notice.

The tenants submitted a response to this notice which asserted that under the controlling statutory and case law, as made clear by the N.Y.S. Court of Appeals in its decision in the case of Roberts, et al. v. Tishman Speyer Properties L.P., the subject apartment was not subject to high income rent deregulation since the subject building had received J-51 tax benefits, even after the expiration of those J-51 tax benefits, and that DHCR should therefore not have processed the owner's application and was now required to deny the owner's petition for deregulation. The tenants once again did not submit a completed answer form or provide any of the specified required income verification information with this response.

On July 18, 2012, and August 14, 2012, respectively, DHCR sent the tenants follow-up notices, by priority mail with United States Postal Service Delivery Confirmation, again advising the tenants that the answer was incomplete and that the tenants did not submit all of the required income verification information in their responses to the various subsequent follow-up notices, and requiring the tenants to complete the answer form and submit a copy of either the preprinted mailing labels or the first page of their 2007 and 2008 N.Y.S income tax returns, as well as other specified income verification information. Each of these two notices also advised the tenants that the subject building was no longer receiving J-51 tax benefits, that DHCR has ruled that luxury decontrol is available once J-51 benefits have expired, and that the case was still being processed. Finally, each of these notices once again further advised the tenants that their failure to respond to the notice might result in the issuance by DHCR of an order deregulating the subject apartment and eliminating rent regulatory protections (such as protection against unlimited rent increases and eviction) for the subject housing accommodation. A copy of the tenants' blank, uncompleted answer form was attached to each of these notices.

The tenants responded to the July 18, 2012, notice requesting an extension of time within which to submit a response. Subsequently, the tenants submitted a response to the July 18 and August 14, 2012 notices, once again asserting that pursuant to the controlling statutory and case law, the receipt of J-51 tax benefits at any time during an occupant's tenancy precludes high income rent deregulation and that since the owner has received such J-51 benefits during the tenants' tenancy the subject apartment could not be deregulated pursuant to high income rent deregulation, even after the expiration of the J-51 tax benefits. The tenants once again did not submit a completed answer form or provide any of the specified required income verification information with this response.

On September 5, 2012, DHCR sent the tenants a final notice, by priority mail with United States Postal Service Delivery Confirmation, once again advising them that they did not submit all of the required income verification information in their August 28, 2012 response to the prior follow-up notice and further advising them that that the Rent Stabilization Law mandates that DHCR submit the names of the qualified occupants of the subject apartment to the N.Y.S. Department of Taxation and Finance, and requiring the tenants to complete the answer form and submit all of the specified income verification information, including a copy of either the preprinted mailing labels or the first page of their 2007 and 2008 N.Y.S income tax returns. This notice also again advised the tenants that the subject building was no longer receiving J-51 tax benefits, that DHCR has ruled that luxury decontrol is available once J-51 benefits have expired, and that the case was still being processed. Finally, this notice further advised the tenants that their failure to respond to the notice and provide the required income verification information would constitute a default and might result in the issuance by DHCR of an order deregulating the subject apartment and eliminating rent regulatory protections (such as protection against unlimited rent increases and eviction) for the subject housing accommodation. A copy of the tenants' blank, uncompleted answer form was attached to this final notice.

The tenants submitted a response to this final notice asserting that their failure to submit a completed answer form did not constitute a default since they had submitted responses to each of the prior DHCR notices, in which they repeatedly raised substantive opposition to the proceeding and requested that the owner's application be denied on the substantive ground that high income rent deregulation was not available for the subject apartment as a result of the owner's receipt of J-51 tax benefits during the period of time the tenants resided in the apartment. The tenants once again did not submit a completed answer form or provide any of the specified required income verification information with their response to the final notice.

In the order here under review, the Administrator ordered that the subject apartment be deregulated upon the expiration of the existing lease because the tenants failed to provide all the required income verification information. The Administrator's order also explicitly stated in a rider that the tenants had failed to complete and return the answer form to DHCR and had failed to provide a copy of their N.Y.S. tax returns or a copy of a validated extension granted by the N.Y.S. Department of Taxation and Finance

(DTF) for the tax years of 2007 and 2008, thereby not meeting the obligations imposed upon them by the rent stabilization laws and regulations. The rider to the Administrator's order also specifically noted that the J-51 tax benefits for this building had expired before this current 2009 filing cycle.

In their petition for administrative review, the tenants assert, in substance, that they answered the owner's petition and responded to each of DHCR's follow-up notices and requests for information, in which they continuously asserted a legal defense to the petition relating to the owner's receipt of J-51 tax benefits, and therefore did not default in the proceeding below; that based on the legal defense they raised the tenants were not required to provide income verification information to DHCR; that since the owner received J-51 tax abatements during their tenancy high income rent deregulation pursuant to Section 26-504.1 of the Rent Stabilization Code is not available for the subject apartment, even after those J-51 tax benefits have expired; that tenants, such as themselves, who were rent stabilized prior to the receipt of J-51 benefits and have continued in occupancy of their apartment since the benefits have expired are not subject to high rent/high income deregulation; that the N.Y.S. Appellate Division has rejected the contrary position that has been adopted by DHCR and, in the case of 73 Warren Street LLC v. N.Y.S. Division of Housing and Community Renewal, 2012 N.Y. Slip Op 4820 (1st Dept. 2012), conclusively held that luxury deregulation was not available against tenants who resided in a building while J-51 benefits were being received, even after those J-51 benefits expired, whether the tenants were otherwise rent stabilized prior to the receipt of the J-51 benefits or became rent stabilized solely by virtue of the owner's receipt of J-51 benefits at the subject building; that, with respect to the position that the phrase "to the same extent and in the same manner as if this subdivision had never applied thereto," which is contained in Section 26-504(c) of the Rent Stabilization Law (RSL) (which addresses the rent stabilization status of an apartment after the expiration of the J-51 benefits), means that luxury decontrol would return as an available decontrol method once the J-51 benefits expired and which is the position that has been adopted by DHCR, the Appellate Division in the 73 Warren Street LLC case clearly rejected this position and stated that "this interpretation….is wrong….. It is plain from the statute that the Legislature simply intended to provide that a building that is already regulated when it begins to receive J-51 benefits continues to be regulated for the original reason when the tax benefits expire….;" that the court in 73 Warren Street LLC, further

determined that Section 26-504(c) of the RSL only addresses the application of rent stabilization to buildings receiving J-51 tax benefits after the benefits expire and not the application of the luxury decontrol exclusion to rent stabilization in the post expiration time period; and that the Legislature could not possibly have intended the above-specified language contained in Section 26-504(c) to mean that luxury decontrol would be available after the expiration of J-51 benefits since the luxury decontrol laws were not enacted until several years after the time that Section 26-504(c) of the Rent Stabilization Law was enacted.

The tenants' PAR further asserted, in substance, that the Appellate Division in 73 Warren Street LLC also explicitly rejected the erroneous claim that the prior holding in Roberts v. Tishman Speyer Properties, 62 A.D.2d 71, affirmed 13 N.Y.3d 270 (2009), reflected the court's view that the exclusion from luxury decontrol only applies while a building is currently receiving J-51 benefits; that the Legislature amended Section 421-a of the Real Property Tax Law (RPTL) (pertaining to 421-a tax benefits) at the time Section 26-504.1 of the RSL (the high income rent deregulation statutory provision) was enacted so as to expressly provide that luxury deregulation would be available upon the expiration of the 421-a tax benefits but did not similarly amend Section 489 of the RPTL (pertaining to J-51 tax benefits), which does not contain any such provision, thereby demonstrating that the Legislature did not intend for luxury decontrol to be available after the expiration of J-51 benefits; that in the Matter of Phyllis Berk, (PAR Docket No. YL420051RT) DHCR took a position inconsistent with the one it takes in this proceeding and determined that rent controlled tenants who resided in a building prior to the owner's receipt of J-51 benefits may not be deregulated under the high income rent deregulation provisions, even after the expiration of the J-51 benefits; and that there is no evidence that the Legislature intended that tenants who were rent stabilized prior to the receipt of J-51 benefits would be subject to luxury decontrol upon the expiration of those J-51 benefits while tenants who became rent stabilized only due to the receipt of J-51 benefits would not be subject to high income rent deregulation upon the expiration of the J-51 benefits, and that there is no legitimate public policy interest in having such a distinction in the applicability of luxury decontrol after the expiration of J-51 benefits.

The owner submitted a response to the tenants' PAR, asserting, in substance, that as a result of the tenants' default in the proceeding below DHCR should not consider the merits of the underlying application and should uphold the order of deregulation;

and that the Warren case cited in the tenants' PAR dealt with an apartment that became subject to regulation only because of a J-51 tax benefit, unlike the subject apartment in this proceeding which was subject to rent regulation before the receipt of the J-51 benefits, and so is not applicable in the instant proceeding.

The Commissioner is of the opinion that this petition for administrative review should be denied and that the Administrator's order deregulating the subject apartment should be affirmed.

In Schiffren v. Lawlor, 101 A.D.3d 456 (1st Dep't 2012) the Appellate Division held that high income rent deregulation is not *per se* prohibited once J-51 tax benefits expire on a housing accommodation that was subject to the RSL prior to J-51 tax benefits having been obtained. Thus, the reversion to pre-J-51-benefit rent stabilization status upon expiration of J-51 tax benefits includes the right of owners to seek high income rent deregulation. The tenants' reliance in this appeal upon 73 Warren Street LLC, supra, is misplaced as the Appellate Division in Schiffren acknowledged that no prior decision of the Appellate Division, nor of the Court of Appeals (including 73 Warren Street LLC) had determined whether, as a matter of law, a housing accommodation that was subject to rent stabilization prior to the owner receiving J-51 tax benefits can be subject to the high income deregulation remedy after the J-51 tax benefits have expired. Moreover, 73 Warren Street LLC is inapposite because that case involved a housing accommodation that was not rent stabilized prior to receiving J-51 tax benefits - which is not the same status of the building that is the subject of this appeal. Also irrelevant is this agency's determination in the Matter of Phyllis Berk (DHCR docket number YL420051RT) as that case was governed by a different regulatory statute, the New York City Rent and Rehabilitation Law (commonly known as the Rent Control Law), and not the RSL that governs this instant appeal. The Rent and Rehabilitation Law does not follow the same rules that are applicable in rent stabilization. As the tenants in this case reside in a building that was subject to the RSL prior to the owner receiving J-51 tax benefits, Schiffren is controlling.

The scope of review in this administrative appeal is governed by RSC § 2529.6 which limits review of a Rent Administrator's order to the facts or evidence before the Rent Administrator as raised in the PAR. The tenants' PAR does not address an issue as to whether the tenants' leases needed to contain the statutory warnings set

forth in RSL § 26-505c. Therefore, such an argument is waived. However, even if the tenants had raised such an argument it would lack merit, as the Appellate Division has held in 72A Realty Associates v. Lucas, 101 A.D.3d 401 (1st Dep't 2012) that the lease notice requirement in RSL 26-504c does not apply to dwellings that were subject to rent regulation for a reason other than the receipt of J-51 tax benefits. Moreover, the RSL does not make availability of the high income rent deregulation remedy contingent upon warning notices in leases.

Finally, the Commissioner further notes that Section 2531.4(b) of the Rent Stabilization Code ("the Code") requires a tenant, upon the filing of an owner's petition for deregulation, to file an answer to the owner's petition within 60 days and to provide the DHCR with such information as the DHCR and the New York State Department of Taxation and Finance ("DTF") shall require to verify whether the relevant annual total household income exceeds the specified $175,000 statutory threshold required for high income rent deregulation, including submitting a photo copy of either the preprinted mailing labels used on the New York State income tax returns or the first page of the N.Y.S income tax returns for the applicable years for each qualified occupant. Section 2531.6 of the Code provides that if a tenant fails to provide such information, DHCR shall issue an order deregulating the subject apartment. The record reveals that the tenants never filed a filled in, completed answer form to the owner's petition for deregulation and never provided any of the specified required income verification information in the proceeding below despite repeatedly being provided with notice that they were required to do so.

The Commissioner notes that the record reveals that the tenants were advised on four separate occasions that since the J-51 benefits they referred to in their responses had expired and were no longer being received for the subject building, luxury decontrol was available for the subject apartment and the underlying deregulation proceeding was still being processed, and that they were therefore required to submit a completed answer form and the specified required income verification information to DHCR. Although the tenants submitted responses below to the original notice of petition and the four subsequent DHCR notices requiring them to submit income verification information, the tenants, despite being given five separate opportunities to comply with

their legal obligations, never submitted a completed, filled in answer form and repeatedly did not provide any of the specified income verification information to DHCR as they were explicitly required to do. The tenants received repeated notice that the Administrator had determined that luxury decontrol was available for the subject apartment and that they were therefore required to submit the specified income verification information, but repeatedly chose not to comply and never submitted the required information in the proceeding below, thereby failing to comply with their statutory obligations.

The tenants' repeated failure to provide the required income verification information prevented DHCR and DTF from verifying the level of the relevant household income for the subject apartment and clearly constitutes a failure by the tenants to meet their obligations imposed on them by the Rent Stabilization Code.

The Commissioner further notes that the tenants were explicitly advised in the notices sent to them by DHCR that if they failed to comply with the notices and provide the specified information as required the subject housing accommodation could be deregulated.

Therefore, the Commissioner finds that the Administrator properly found the tenants to be in default. The tenants were given repeated notice of their obligation to submit a completed answer form and provide income verification information and were advised of the consequences if they elected to disregard the notices.

Accordingly, the Commissioner finds that the Administrator properly relied on the tenants' failure to submit a completed answer form and provide the required income verification information in the proceeding below in granting the owner's petition for high income rent deregulation and that the tenants have offered insufficient reason to disturb the Rent Administrator's determination.

THEREFORE, pursuant to the provisions of the applicable statutes and regulations, it is

ORDERED, that this petition for administrative review be denied and that the Rent Administrator's order be affirmed.

ISSUED: OCT 09 2012

WOODY PASCAL
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza, 92-31 Union Hall Street
Jamaica, NY 11433

Right to Court Appeal

In order to appeal this Order to the New York Supreme Court, within sixty (60) days of the date this Order is issued, you must serve papers to commence a proceeding under Article 78 of the Civil Practice Law and Rules. No additional time can or will be given.

In preparing your papers, please cite the Administrative Review Docket Number which appears on the first page of the attached Order.

Court appeals from the Commissioner's orders should be served at Counsel's Office, Room 707, 25 Beaver Street, New York, New York 10004. In addition, the Attorney General must be served at 120 Broadway, 24th Floor, New York, New York 10271.

Since Article 78 proceedings take place in the Supreme Court, you may require the professional help of an attorney.

There is no other method of appeal.

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