

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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AMY L. ROBERTS, THOMAS I. SHAMY, DAVID  
AND ANNMARIE HUNTER, MARGARET :  
CARROLL, KELLEY AND TONY LANNI, EVAN :  
HORISK, and BETH ROSNER GIOKAS, on behalf of :  
themselves and all others similarly situated, :  
:  
Plaintiffs-Appellants, :  
-against- :  
TISHMAN SPEYER PROPERTIES, L.P., PCV ST  
OWNER LP, METROPOLITAN INSURANCE AND :  
ANNUITY COMPANY and METROPOLITAN :  
TOWER LIFE INSURANCE COMPANY, :  
:  
Defendants-Respondents. :  
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New York County Clerk's  
Index No. 100956/07

AFFIDAVIT OF DAVID AUGARTEN  
IN SUPPORT OF PCV/ST  
DEFENDANTS' MOTION FOR LEAVE  
TO APPEAL TO THE COURT OF  
APPEALS AND A STAY

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID AUGARTEN, being duly sworn, deposes and says:

1. I am a senior managing director of Tishman Speyer Properties, L.P., a defendant in the above action (together with defendant PCV ST Owner LP ("PCV/ST"), "PCV/ST Defendants"). I am fully familiar with the management and operations of PCV/ST and the facts and circumstances hereinafter set forth. I respectfully submit this affidavit in support of the PCV/ST Defendants' motion for (A) leave to appeal to the Court of Appeals this Court's Decision and Order entered March 5, 2009, reversing the judgment of the Supreme Court, New York County (Richard B. Lowe III, J.) entered August 24, 2007, which had dismissed the complaint (the "Decision") and (B) a stay of proceedings and the effectiveness of the Decision pending determination of the motion for leave to appeal, and, if leave is granted, pending determination of the appeal by the Court of Appeals.

2. Unless immediate leave to appeal and a stay are granted, PCV/ST, government officials, owners and tenants will face a prolonged period of tremendous uncertainty in which numerous parties will be forced to make costly, irreversible and likely inconsistent decisions. Earlier today, the Corporation Counsel of the City of New York issued a statement regarding these issues which stated: "There is substantial uncertainty on the statutory interpretation question decided by the Appellate Division last week, and it is important that the issue be resolved promptly."

3. In this action, plaintiffs, on behalf of thousands of current and former tenants of Peter Cooper Village ("Peter Cooper") and Stuyvesant Town ("Stuyvesant"), seek to declare that Defendants were not permitted to utilize the luxury deregulation provisions of the Rent Stabilization Law ("RSL"), enacted in 1993 as part of a compromise by the Legislature to continue the rent stabilization system. RSL §§ 26-504.1, 26-504.2(a).

4. The luxury deregulation provisions at issue generally permit buildings subject to the RSL to deregulate apartments where: (a) the legal regulated rent is \$2,000 or more per month and the tenant has a household income above \$175,000 for two consecutive years or (b) the apartment was vacated and the next regulated rent is \$2,000 or more per month. Such apartments can be deregulated unless a building "became or become[s] subject to [the rent stabilization] law . . . by virtue of receiving [certain] tax benefits" – including what are commonly referred to as "J-51 benefits." RSL §§ 26-504.1, 26-504.2(a).

5. The buildings at issue here – Peter Cooper and Stuyvesant – have been permitted to utilize luxury deregulation since its enactment in 1993, as neither building became subject to the RSL by virtue of receiving J-51 benefits. Peter Cooper and Stuyvesant had "become subject to" rent regulation decades prior to receiving J-51 benefits. PCV/ST acquired Peter

Cooper and Stuyvesant towards the end of 2006, years after its prior owner applied for J-51 tax benefits and was permitted to luxury decontrol apartments meeting the statutory criteria.

6. Since 1993, over 4,000 apartments in Peter Cooper and Stuyvesant have been deregulated. This deregulation took place in the face of, among other things, (i) the language of the statute; (ii) the Legislature twice modifying the statute but leaving intact this interpretation; (iii) the Rent Stabilization Code ("RSC"), 9 NYCRR §§ 2520.1 to 2520.13, in which the New York State Division of Housing and Community Renewal ("DHCR") – the agency charged by the Legislature to administer rent stabilization – interpreted the statute to permit deregulation; (iv) a DHCR advisory opinion; and (v) the practice of the New York City Department of Housing Preservation & Development ("HPD"). PCV/ST was not alone in this understanding of the statute and its implementation by City and State officials. I am advised that owners and landlords of all types and sizes throughout the City of New York have done the same and, as such, many thousands of units throughout the City have been luxury deregulated.

7. The Court's Decision overturns this fifteen-year period of well-settled application of the luxury deregulation statutes. It has created immediate confusion for both PCV/ST and the entire real estate community making it virtually impossible to manage and operate the buildings. Among other things, PCV/ST, like many other building owners, made important decisions in light of the longstanding right of such buildings to utilize luxury deregulation. For example, in valuing, purchasing and financing the unprecedented \$5.4 billion acquisition of these buildings, PCV/ST was operating in the face of the previously well-settled right of buildings, such as those in this case, to utilize luxury decontrol, as reflected in the rent stabilization laws, rent stabilization code and practices of the DHCR and HPD. Like other landlords, PCV/ST's ability to continue debt and mortgage servicing is heavily dependent on the projected rent rolls which included the projected value of luxury deregulated units. As a result,

without luxury deregulation, many owners will face potential defaults and may be forced into foreclosure or bankruptcy. They will not be able to wait until a final judgment of the Supreme Court to percolate to the Court of Appeals for final resolution of these issues.

8. Absent immediate review of the Decision, the value of residential properties will be undeterminable during what could be a period of prolonged uncertainty. As a result of the Decision it is unclear what rents are applicable to apartments that would otherwise be subject to luxury decontrol. Are market rate tenants entitled to an immediate reduction in market rents? Are new leases on apartments that would otherwise be permitted to be leased at market rents required, as a result of the Decision, to be rented at lesser, stabilized rents? These and other uncertainties can be expected to impact the willingness of financing sources to lend to such buildings where there is such uncertainty with respect to the precise amount of the anticipated rent rolls. To the extent that there is less financing available for purchases of new apartment buildings, and improvements to existing properties, this would further harm the already weakened New York economy.

9. A reduction in projected rent rolls will also greatly reduce building and property values, thereby significantly reducing City tax revenues at a time when the City can ill afford such lost revenue. New York City tax assessors will face difficulties in determining tax assessments, because, again, future income will be impossible to project with any certainty. Owners may seek claims for refunds of real estate taxes previously paid and for reduced tax abatements due to luxury deregulated units.

10. PCV/ST, like thousands of other owners, is also faced with daily decisions that could be impacted by resolution by the Court of Appeals of the statutory interpretation issues in this case.

11. PCV/ST and its current luxury deregulated tenants are faced with numerous uncertainties with respect to the thousands of presently deregulated apartments. By way of example, at present, thousands of tenants, like Plaintiffs David and Annmarie Dodd Hunter, have leased units at market rates agreed-upon after the units had been vacancy deregulated. (Appendix A-134) These tenants were never rent stabilized. They rented apartments at negotiated rents without any expectation of rent stabilization and many have been paying market rents for years. As a result of this Court's Decision, numerous potential issues have arisen. Is PCV/ST obligated to refund any amounts over a stabilized rent, even though these tenants negotiated a market rate rent? Is there an obligation to offer rent stabilized leases to these tenants, many of whom make well over \$175,000 per year and are deemed by the Legislature not to warrant rent stabilization protection? Is PCV/ST entitled to continue to collect market rate rents and escrow any excess amounts pending the final outcome of the litigation? PCV/ST, and the numerous other owners throughout the City, should not be forced to face these significant decisions and questions until after the Court of Appeals has had an opportunity to provide an interpretation of the applicable provisions of the rent stabilization laws.

12. If PCV/ST forgoes tens of millions of dollars in rent, it will be unable to make improvements to its complexes to the detriment of both the economy and tenants. As a practical matter, PCV/ST will never be able to recoup such funds in the event the Court of Appeals reaches a different interpretation at the ultimate conclusion of this case.

13. As to lease renewals and vacant apartments or apartments that will become vacant, PCV/ST and other landlords are in a similarly risky position. Typically, PCV/ST receives approximately 150-300 lease applications and renewals each month. Until the Court of Appeals expresses its view on the statutory interpretation at issue here, PCV/ST is faced with numerous uncertainties in how to handle them. Can an owner enter into a lease with a new tenant at market

rates? As a practical matter, it would be impossible for PCV/ST or any owner in such a situation to collect back-due market rent after the fact should Defendants ultimately prevail. Owners across the City are facing the same situation; an interruption in apartment leasing could cause a further reduction in the housing stock.


14. We also anticipate that there will be a flood of litigation before the DHCR, in Civil Court and in Supreme Court that PCV/ST will be forced to defend or prosecute. Indeed, within five days of the Decision, the PCV Defendants had already received a new purported class action complaint that appears to seek to stay administrative proceedings before the DHCR and undo stipulations previously entered into before the DHCR.

15. Tenants may seek reclassification before the DHCR, bring plenary actions for overcharges in Supreme Court or unilaterally withhold rent requiring a non-payment action to be brought by PCV/ST in Civil Court. The courts and administrative bodies will be flooded with these types of matters, the outcomes of which will depend on a final determination by the Court of Appeals. Many tenants will simply withhold all or some of their rent. Calculating retroactively what stabilized rent may now apply is extremely complicated. Such unilateral withholding and the resulting loss of income is of concern itself. But, countless needless disputes will arise if tenants act precipitously on their own prior to the final resolution of this case.


16. Furthermore, because J-51 benefits under the circumstances here are of far less value than the ability to utilize luxury decontrol, any owners like PCV/ST which have been subject to the rent stabilization laws prior to receiving any J-51 benefits would also forgo, or withdraw pending, J-51 applications. This would result in owners either permanently forfeiting such tax incentives or forgoing needed repairs, causing further deterioration of the City's housing stock and a further reduction of jobs.

17. PCV/ST, as well as owners across the City, cannot operate in this state of flux, nor can they afford to wait until an appeal from a final adjudication of all of the issues. Granting a stay and permitting the PCV/ST Defendants to appeal to the Court of Appeals would simply maintain the status quo that had existed for more than fifteen years prior to the Decision and allow for a more prompt resolution for all parties, including Plaintiffs and other tenants living in luxury deregulated units at Peter Cooper and Stuyvesant. Indeed, Plaintiffs would not be prejudiced at all because former tenants only have at most a claim for damages, and current tenants either voluntarily entered into market rate leases or were high-income decontrolled from rent stabilization by an order issued by the DHCR when their rent was \$2,000 or more and their income was \$175,000 or more. Any necessary rent adjustments could be made at the conclusion of the litigation.

18. For the foregoing reasons and for the reasons set forth in PCV/ST's moving papers, I respectfully request that the Court grant PCV/ST's motion for leave to appeal to the Court of Appeals and for a stay pending determination of this motion.

  
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DAVID AUGARTEN

Sworn to before me this 11<sup>th</sup>  
Day of March, 2009

  
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Notary Public

**KERRI A. GARRETT**  
**Notary Public, State of New York**  
**No. 01GA6022001**  
**Qualified in Queens County**  
**Certificate Filed in New York County**  
**Commission Expires March 23, 2011**