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COURT OF APPEALS
STATE OF NEW YORK

LIGGETT,

Appellant,

-against-

NO. 63

LEW REALTY LLC,

Respondent

20 Eagle Street
Albany, New York
May 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar,
2 Number 63, Liggett v. Lew Realty.

3 MR. SACHAR: Good afternoon. Roger Sacher,
4 Newman Ferrara. May I request four minutes of rebuttal
5 time, Your Honor?

6 CHIEF JUDGE WILSON: Yes.

7 MR. SACHAR: Thank you. May it please the court?
8 The analysis here starts with rent stabilization code
9 Section 2521. It tells us how the rent after an apartment
10 decontrol is set. And it says it's the rent agreed to by
11 the landlord.

12 JUDGE GARCIA: Counsel?

13 MR. SACHAR: Yes, sir.

14 JUDGE GARCIA: If - - - if we agree with you - -
15 - now, this is a motion to dismiss, right? So if we were
16 to reverse - - - deny the motion to dismiss, what's your
17 view of what happens next?

18 MR. SACHAR: What happens next is a question of
19 whether or not there's fraud. And we can talk a lot about
20 Regina's footnote 7 and go down that path in the recent
21 legislation - - -

22 JUDGE HALLIGAN: Why is that the next question?

23 MR. SACHAR: Because if there's fraud, you set
24 the rent one way, and that's by the use of the default
25 formula. If there is not - - -

1 JUDGE HALLIGAN: So is it your view that there
2 would be no other way? I take it right now, the question
3 is, does the 2000 stipulation provide a permissible path to
4 the regulation, right?

5 MR. SACHAR: Correct.

6 JUDGE HALLIGAN: Okay. So if, as Judge Garcia
7 said, we were to agree with you that the answer to that is
8 the 2000 stip itself doesn't do that, why wouldn't the
9 landlord have an opportunity to pursue other paths to
10 proving that the apartment would have been lawfully
11 deregulated, for example, by application of the formula?

12 MR. SACHAR: I'm sorry. By application of which
13 formula, Your Honor?

14 JUDGE HALLIGAN: By considering what increases
15 would have been permissible and whatever vacancies occurred
16 in the intervening time. I'm saying, why wouldn't there be
17 another bite at the apple to demonstrate that the apartment
18 would have been lawfully deregulated?

19 MR. SACHAR: Because there's no starting point.
20 Because when you're taking a vacancy increase, for example,
21 you're taking and - - - you know, it used to be, that's no
22 longer the law. But you're taking twenty percent off of
23 something. And what you're trying to do is unscramble the
24 egg.

25 JUDGE HALLIGAN: But that - - -

1 JUDGE GARCIA: But the - - - to try this another
2 way, the - - - what is arguably against public policy is
3 there's no challenge to the fair market rents that was set
4 at that time.

5 MR. SACHAR: I don't agree, no. The first
6 starting point is it's not the fair market rent. The
7 starting point is that they never set the rent properly in
8 the first place.

9 JUDGE GARCIA: Okay. So why isn't the remedy:
10 you go back, you determine what the fair market rent was
11 then, and then you apply whatever they would have been
12 entitled to, to see if it's now decontrolled?

13 MR. SACHAR: Because of your majority opinion in
14 Regina, you can't go beyond four years to determine what
15 the legal regulated rent is. This is what I was trying to
16 get at. You have two options. Option number one, default
17 formula.

18 JUDGE CANNATARO: Wait a minute. But you can't
19 go beyond four years when there's a lease in place. That
20 would be the - - - the rule limiting and overcharge. But
21 if the declaration or the result of this appeal is that
22 that stipulation that - - - that was entered into, and I
23 think it was the year 2000, 1999 - - -

24 MR. SACHAR: Yeah.

25 JUDGE CANNATARO: - - - is void, there's no

1 agreement. There's no statute of limitations to worry
2 about. We've been - - - you know, we've been living under
3 a nullity for the last twenty-four years. So why can't we
4 go back, figure out what the fair market rent should have
5 been at the time Mr. McKinney was given his lease, and then
6 add in whatever increases that the law allowed up to today
7 and determine whether or not the apartment's regulated,
8 deregulated, and what the next permissible rent increase
9 should be?

10 MR. SACHAR: Because you can't. Because you've
11 been telling all of these tenants who've been vacating,
12 hey, you're not rent stabilized.

13 JUDGE CANNATARO: Well, so I mean, how many
14 tenants are we talking about here?

15 MR. SACHAR: We - - - we don't even know how many
16 in the interim. You know, there's a big difference in New
17 York City between paying 650 and paying 1,655. Find a 650
18 apartment - - -

19 CHIEF JUDGE WILSON: Let me see - - - let me see
20 if I can get at this a different way. Suppose we knew
21 there was no fraud, do you lose?

22 MR. SACHAR: No. You just set the rent at the
23 four-year rule.

24 CHIEF JUDGE WILSON: You said you only go back
25 four years?

1 MR. SACHAR: Absolutely. That's what Regina
2 says.

3 CHIEF JUDGE WILSON: Well, Regina is talking
4 about a situation, though, where we're not talking about
5 the first rent after decontrol, right? We're talking about
6 subsequent rents, where the first rent after decontrol has
7 been established through a means that nobody is
8 challenging.

9 This seems to be a different situation that may
10 not be controlled by Regina.

11 MR. SACHAR: Well, and that - - - that - - - that
12 - - -

13 CHIEF JUDGE WILSON: Is that fair?

14 MR. SACHAR: It's - - -

15 CHIEF JUDGE WILSON: Possible, at least?

16 MR. SACHAR: Well, it's possible.

17 CHIEF JUDGE WILSON: Okay.

18 MR. SACHAR: The - - - the issue is there's also
19 another segment of Regina that comes into play here. It's
20 - - - there's a portion of the default formula that says
21 when there's fraud or there's no reliable rent history.
22 And in Regina, we read the Regina majority - - - and Judge
23 Garcia, I know you were on that majority - - - we - - -
24 there's a section of Regina that says we know what the rent
25 is. If we know what the rent is, there's a reliable rent

1 history. That has now handicapped people saying, you can -
2 - - you can only do one of two things: you got default
3 formula, you got four-year rule for fraud. So I would - -
4 - you know, if - - - if we want to reopen that?
5 Absolutely. Because you don't have a reliable rent history
6 here.

7 CHIEF JUDGE WILSON: I don't know if that's
8 reopening it. I think it may be that this is a different
9 situation. And the question is, if you have a different
10 situation and what you're trying to do is to determine what
11 - - - you know, let's assume that we think the stipulation
12 is not a way that this can be done. Right? Then it seems
13 to me you've got - - - maybe there's more options, but it
14 seems to me if - - - if you put aside fraud for a minute,
15 assume there's no fraud, you have - - - and if there is
16 fraud, then I take your point. Maybe we treat it as fraud.
17 But otherwise, maybe there's two different ways to think
18 about it. One is, you could say, I think, exactly what my
19 colleagues have been sort of intimating, which is you go
20 back and try to figure out what the fair market rent would
21 have been at that point. And there's - - - you know, I'm
22 sure you can find people who will estimate that and then
23 you can have an evidentiary hearing about it, and somebody
24 will reach a decision. The other thing you do, I think, is
25 to impose a rule that says, whatever the person paid, we're

1 going to use as the rent. I'm not suggesting that I prefer
2 one or the other of those, but absent fraud, it seems to me
3 this is a different situation where what you're trying to
4 figure out is what should the first legal rent have been,
5 which is different from the question we were trying to
6 address.

7 MR. SACHAR: Right. And we can answer that
8 question. We know what the first rent should have been.
9 It's because it says it's the rent agreed to by the
10 landlord and the tenant and reserved in a lease.

11 JUDGE CANNATARO: Well, there are two numbers - -
12 - excuse me - - - two numbers agreed to. I just - - - I'm
13 so excited my glasses are flying off my face. There were
14 two numbers agreed to by - - - by the parties here. There
15 was a preferential rent and there was a legal rent.

16 MR. SACHAR: Except the language in the statute -
17 - - or in the code section, I should say - - - tracks the
18 first paragraph in the parties' stipulation, which says
19 you're going to pay a rent of 650. We're agreeing that
20 we're going to give you a lease that says a 650 rental.
21 That - - - they can agree what the fair market rent - - -
22 they can talk about fair rent all they want. The way you
23 read the code section it says the first rent is the rent
24 agreed to.

25 JUDGE CANNATARO: I mean, I would assume they're

1 filing rent registrations while all this is going on.
2 Right?

3 MR. SACHAR: For - - - they don't file the rent
4 registration until this is done. Because remember - - -
5 and I'm taking you back to civil court days.

6 JUDGE CANNATARO: Yeah, it's all coming back to
7 me now.

8 MR. SACHAR: When an apartment is rent
9 controlled, there's one 1984 rent, no rents thereafter
10 until the apartment becomes rent stabilized. So not until
11 they reach this stipulation; then, there's a filing. And -
12 - -

13 JUDGE CANNATARO: But my - - - my only question,
14 though, is when they filed that initial rent registration,
15 they're putting the legal rent on the registration as well.
16 They're not just reporting to DHCR what the preferential
17 rent is?

18 MR. SACHAR: Correct.

19 JUDGE CANNATARO: So I mean, I think I'm still
20 back at my question. Yes, I remember enough of this to
21 know that it's the rent that the parties agreed to, but
22 they've - - - to my mind, they've agreed to a couple of
23 things.

24 JUDGE HALLIGAN: They agreed to 650 and 1,650,
25 both, correct?

1 MR. SACHAR: No. Careful, careful, careful.
2 They agreed that he would register it at 1,650 and McKinney
3 would pay 650 - - -

4 JUDGE HALLIGAN: And why does "agreed to" mean -
5 - -

6 MR. SACHAR: - - - subject to rent guidelines.

7 JUDGE HALLIGAN: - - - and - - - and so my
8 question for you is why does "agreed to" mean 650 and not
9 the 1,650?

10 MR. SACHAR: Because if it means something
11 otherwise, you've completely handicapped rent
12 stabilization, that's why.

13 JUDGE GARCIA: But wouldn't that apply all the
14 time then if you're having a preferential rent? So if I
15 file a statement that says 1,200 dollars and I give you a
16 preferential rent of 1,000 because - - - you know, I think
17 that's fair for you, but whatever happened, even if I don't
18 have the challenge rider, the rent is still 1,000 under
19 your view?

20 MR. SACHAR: I - - - I - - - no. No. Well, it -
21 - - the - - - the real answer is it depends on what year
22 you're talking about. There's three different - - -

23 JUDGE GARCIA: This year that - - -

24 MR. SACHAR: - - - answers to that.

25 JUDGE GARCIA: - - - we're talking about now.

1 MR. SACHAR: You - - - no, no, no. You can't do
2 now because now you can't pull a preferential - - -

3 JUDGE GARCIA: No, no. The year in this case.

4 MR. SACHAR: Oh, the year in this case? Okay.
5 2000. In the year 2000, if you reserve a preferential rent
6 in a lease and you say you can pull that preferential rent
7 in a lease - - - this is the Missionary Sisters case.

8 JUDGE HALLIGAN: What do you mean by saying you
9 can "pull that rent"?

10 MR. SACHAR: So pull - - - when you pull a
11 preferential rent is at renewal. It used to be that if
12 there's a legal, regulated rent of, say, 1,500 and a
13 preferential rent at 1,000, at renewal, you could pull that
14 and go all the way up to 15,000 just - - -

15 JUDGE HALLIGAN: Yeah. You mean you can pull it
16 out?

17 MR. SACHAR: Yes, you can pull it out.

18 JUDGE RIVERA: Well, you're - - -

19 JUDGE HALLIGAN: But isn't - - -

20 JUDGE RIVERA: - - - refusing a lease at the
21 preferential rent, you're going to whatever other rent
22 you've got.

23 MR. SACHAR: No. Whatever the legal regular - -
24 -

25 JUDGE RIVERA: Yeah, yeah.

1 JUDGE HALLIGAN: But isn't this - - -

2 MR. SACHAR: And that is key here.

3 JUDGE HALLIGAN: - - - point that you're making,
4 to the extent you know it - - - it's correct, wouldn't that
5 be applicable only to the first rent after it moves from
6 rent control to rent stabilization and not after that?

7 MR. SACHAR: Can - - - can I ask you to rephrase
8 that one for me?

9 JUDGE HALLIGAN: Sure. I take it that you are
10 saying that we are obligated to treat the 650 as the rent,
11 as opposed to the 1650, and that's because that's what was
12 actually paid. And that to do otherwise would allow you to
13 - - - you know, undermine the objectives of the rent
14 stabilization law. Do I have that - - -

15 MR. SACHAR: You have that correct.

16 JUDGE HALLIGAN: - - - am I right so far? Okay.
17 So is - - - are you making that point only with respect to
18 the juncture at which an apartment moves from rent control
19 to rent stabilization, in other words, the initial legal
20 regulated rent? Or are you arguing that that's the case
21 going forward after that as well?

22 MR. SACHAR: No, it just matters for the first
23 tenant - - -

24 JUDGE HALLIGAN: Yes, okay.

25 MR. SACHAR: - - - in the way that you decontrol

1 the unit. Because there's a difference here, Judge Garcia,
2 between a normal preferential rent and this preferential
3 rent. Here's the big difference. Normally, just as I was
4 saying, you could pull a preferential rent. Here, McKinney
5 and the respondent agreed that they would not pull the
6 preferential rent.

7 JUDGE GARCIA: So let's say that was the
8 agreement but it didn't have the waiver of the challenge to
9 the fair market value, your position then would be the same
10 here?

11 MR. SACHAR: Exactly. The fair market value is
12 just a whole separate thing where McKinney says, I'm not
13 even going to exercise - - - I'm waiving my rent stabilized
14 rights - - -

15 JUDGE GARCIA: The fact that they couldn't pull
16 the rent, as you say, that makes it the same as - - -

17 MR. SACHAR: Right. Because here's the problem.
18 They have set one rent for McKinney, set another rent for
19 every tenant that comes after him, that he never has to pay
20 and never has any incentive to challenge.

21 JUDGE RIVERA: Now, now, why - - - why is that
22 any different from it's 650 this year, next year it's still
23 6 - - - I don't ever pull it? What - - - I don't - - - I'm
24 not understanding your argument.

25 MR. SACHAR: Because the - - - they're treating

1 him as - - - they're treating 650, for the duration of
2 McKinney's tenancy, as a legal regulated rent. That's what
3 they're doing. But they're registering a different legal
4 regulated rent that is not - - -

5 JUDGE RIVERA: And just treating it as the rent
6 they're willing to let them pay?

7 MR. SACHAR: No, no, no.

8 JUDGE RIVERA: That's all that is.

9 MR. SACHAR: It's - - - because it's capped. It
10 - - - his - - - that's what the stipulation says. It's
11 capped at Rent Guidelines Board increases. So each year at
12 renewal he gets the two percent, the four percent, the
13 seven percent increase off the 650. Once he vacates, then
14 the landlord can register it at 1,650.

15 JUDGE RIVERA: Yes, I know that.

16 MR. SACHAR: So what you've done is you've taken
17 away - - - and this is what Justice Gesmer was talking
18 about. You've taken away the - - - the open arm
19 transaction - - -

20 JUDGE HALLIGAN: Let me ask you to go back to the
21 - - -

22 JUDGE GARCIA: So they did that every year - - -
23 I'm sorry. If they did that every year instead of doing it
24 this way, and every year they just said to him, okay, we'll
25 renew you at 650, that would be okay because they could

1 have pulled it? It's agreeing that we won't, in your view,
2 is what - - -

3 MR. SACHAR: That makes it worse. Yes. It - - -
4 it - - -

5 JUDGE GARCIA: But it makes it worse. So if they
6 did it the other way, that too would be bad. So if every
7 year they renewed at a preferential rent, although he was
8 not entitled to it under any of these documents, still bad?

9 MR. SACHAR: It's stuck - - - the bad is the 650.
10 It makes it worse when he's limited - - - when there's - -
11 - he's waiving - - - when there's Rent Guidelines Board
12 increases, and it gets even worse when he waives his fair
13 market rent appeal.

14 JUDGE RIVERA: Why is it bad at the 650?

15 JUDGE SINGAS: May I ask you to go back - - -

16 JUDGE RIVERA: I'm not understanding that.

17 MR. SACHAR: I - - - I'm sorry. It - - -

18 JUDGE RIVERA: You said it's bad at the 650.
19 What - - - explain that.

20 MR. SACHAR: Right. Because they registered a
21 lower - - - they - - - they registered that as a
22 preferential rent, and that should have been the legal
23 regulated rent.

24 JUDGE SINGAS: And you're saying you can't do
25 that. You can't agree - - -

1 MR. SACHAR: Absolutely, you cannot do that.

2 JUDGE SINGAS: - - - to a lower preferential
3 rent?

4 JUDGE RIVERA: Because they locked themselves
5 into it, is that what you mean?

6 MR. SACHAR: No. They did not - - -

7 JUDGE RIVERA: Because they locked themselves
8 into it - - -

9 MR. SACHAR: - - - themselves into it.

10 JUDGE RIVERA: - - - and - - - and treated it - -
11 - they locked themselves into it in the sense that they
12 treated it as the legally recognized rent with the
13 increases; is that what you mean by that?

14 MR. SACHAR: Yes, they - - - yes, I understand.
15 Yeah. Yeah, at the 650.

16 JUDGE GARCIA: Thank you.

17 JUDGE HALLIGAN: Besides - - -

18 JUDGE CANNATARO: Leaving aside the - - - the - -
19 - the waiver of the - - - I'm sorry, Judge. Leaving aside
20 the waiver of the FMRA and the promise not to ever do
21 anything but the preferential rent, is there any problem
22 that you perceive with having a first stabilized lease
23 after exit from control that contains both a preferential
24 rent and a legal rent in it? You know, taking those other
25 things that you don't like out of the transaction, there's

1 nothing wrong with just having a legal rent and a
2 preferential rate, right?

3 MR. SACHAR: No, I disagree. I's supposed to be
4 the rent reserved in the lease, subject to a fair market
5 rent appeal, because that's what they are agreeing that the
6 apartment is worth.

7 JUDGE CANNATARO: So your argument would be, if
8 you see this constellation of events, if you see a legal
9 rent and a preferential rent in a first - - - a first
10 stabilization lease, that's a - - - that's an automatic
11 sign that you've got a plot to remove the apartment from
12 regulation?

13 MR. SACHAR: It - - - it - - - it is indicia - -
14 -

15 JUDGE CANNATARO: Indicia?

16 MR. SACHAR: - - - of - - - yeah, we're - - -
17 we're - - -

18 JUDGE HALLIGAN: Well, wait. Are you telling us
19 that that alone requires the voiding of the stipulation, in
20 other words the lease, or not, when you say it's indicia?

21 MR. SACHAR: Okay. We're - - - I think what - -
22 - this - - - this stipulation is different than the normal
23 situation that Judge Cannataro was talking about, where we
24 see - - - in a rent history, we see this.

25 JUDGE HALLIGAN: Yes.

1 MR. SACHAR: The stipulation itself is void.
2 Sorry, I didn't mean to cut you off.

3 JUDGE HALLIGAN: And is it your position that the
4 stipulation would be void because of the way in which the
5 650 and the 1,650 are set up, regardless of the FMRA
6 waiver? If there was no waiver of the FMRA, is it your
7 position that it would still be void?

8 MR. SACHAR: Yes. This was a circumvention of
9 rent regulation.

10 JUDGE HALLIGAN: Okay. On the fraud question, if
11 I can?

12 MR. SACHAR: Absolutely.

13 JUDGE HALLIGAN: You suggested, I think, that
14 that was an open issue. But the Appellate Division says
15 that circumstances - - - and it lists two - - - one of them
16 is evidence of fraud - - - I'm at 162 of the record - - -
17 are not present here. So why hasn't the Appellate Division
18 concluded that there is no evidence of fraud here?

19 MR. SACHAR: Oh, that's a big question.

20 JUDGE HALLIGAN: I look forward to your answer.

21 MR. SACHAR: Here - - - here - - - here's
22 essentially what has happened recently. If you look at the
23 three cases cited in Regina: Thornton, Grimm, and Conason -
24 -

25 JUDGE HALLIGAN: Yeah.

1 MR. SACHAR: - - - the murderer's row of rent
2 stabilization cases. In those cases, reliance would never
3 have been present. Then Regina comes along. Regina.
4 footnote 7 cites those three cases with approval, and then
5 it gets into - - - and then it says in footnote 7, "Fraud
6 exists of", the common law fraud definition: scienter,
7 reliance, and all of those things. Okay? The First
8 Department has now taken that in - - - and the Second
9 Department has too, in a case called Gridley, which is my
10 case. And Woodson is actually my case as well.

11 It has taken that and said you have to prove
12 common law fraud. And, actually, in Burrows it says as
13 long as there's a public - - -

14 JUDGE HALLIGAN: Yeah. I take it they're
15 distinguishing between fraud and something that would
16 require, for example, here, if - - - if we were to agree
17 with you that a stipulation be voided. In other words,
18 something can be void as against public policy I take it,
19 the suggestion is here, and not fraudulent. Do you agree
20 that that's consistent with the Appellate Division's
21 reading?

22 MR. SACHAR: Well, the Appellate Division's
23 reading has now been superseded. That's - - - that's what
24 I'm getting at. So when they're reading fraud, they're
25 talking about scienter, reliance, those sorts of things.

1 However, on March 1st, 2024, Governor Hochul signed into
2 law the recent amendments to the rent regulations, which
3 says it's not common law fraud. It says you're supposed to
4 consider the totality of the circumstances. And if the
5 totality of the circumstances indicate that the landlord
6 was taking some act in violation of law, that's fraud. So
7 it's - - -

8 JUDGE SINGAS: Are you suggesting there's fraud
9 here? Is that your - - -

10 MR. SACHAR: Under that definition. I am
11 suggesting that we're not there yet because we're not a
12 liability determination.

13 JUDGE HALLIGAN: So you're basically saying that
14 - - - that you could contemplate - - - sorry, Chief, I see
15 his light is on. But that you could contemplate arguing
16 that this amendment from two months ago allows you to argue
17 that there was fraud back in 20 - - - 2000?

18 MR. SACHAR: Absolutely.

19 JUDGE HALLIGAN: Okay. And one last question, if
20 I can? What about - - - what about repose concerns? I
21 mean, this was a long time ago.

22 MR. SACHAR: It was a long time ago.

23 JUDGE HALLIGAN: And - - - and your position
24 seems to me to be that that has no relevance here.

25 MR. SACHAR: Zero.

1 JUDGE HALLIGAN: Okay. And - - - and why exactly
2 should we be comfortable with that?

3 MR. SACHAR: Because there is no statute of
4 limitations to the deregulation of an apartment.

5 JUDGE HALLIGAN: So if we - - - if we agree with
6 you that this is a status question and not a rent amount
7 question, it could be fifty years, doesn't matter, is your
8 view?

9 MR. SACHAR: Thirty-five or three, and then - - -
10 then that goes to the RSL which says you have to keep
11 records four years before the last registration.

12 CHIEF JUDGE WILSON: So if this is a status
13 question, do we need to - - - is it necessary that we say
14 more than simply a reversal? That is, do we need to say,
15 here's what has to happen next or how it should happen?

16 MR. SACHAR: No. Absolutely not. I mean, I'd
17 love for some discussion of fraud in the new amendments,
18 but we don't have to get there. We get to - - - it's a
19 simple question, status question. We've gotten where we
20 need to be, reverse. That has - - -

21 JUDGE CANNATARO: It sounds to me like the reason
22 why you're so confident in your answer to the Chief Judge
23 on that is that the only option available on remand would
24 be the default formula, as far as - - - as far as you see
25 it; is that fair to say?

1 MR. SACHAR: I - - - I wouldn't go that far. I
2 think there - - - there is a - - - a - - - certainly, a
3 possibility that they could, you know, say their counsel
4 told them this was okay and therefore the four-year rule
5 applies. And it's not really the four-year rule. It's
6 June 14th, 2015. But I think that that is - - - I feel
7 comfortable going down and making an argument that they've
8 reached an illegal agreement and there's no reliable rent
9 history.

10 JUDGE CANNATARO: Thank you.

11 MR. ZAUDERER: May it please the court, Mark
12 Zauderer for respondent.

13 I think there have been some serious distortions
14 in that presentation and - - - you know, take the
15 opportunity to address them. First of all, I think to get
16 to the heart of this case, one has to go back to 2000 and
17 how this arose. You had here somebody who had only a
18 claim; he was a squatter in the view of the landlord. And
19 they litigated.

20 There's no question that what they litigated here
21 was a bona fide dispute and a bona fide settlement. And
22 what the landlord did was in complete compliance with the
23 law as it was in 2000. I followed it.

24 You know, I think we agree to the general
25 principle that something is legal until it's illegal. In

1 other words, a statute or some court decision has to make
2 it illegal.

3 So look at the situation the landlord was in. He
4 had a tenant who was claiming he could be a stabilized
5 tenant, which he didn't recognize. It could be thirty
6 years, forty years, he could even, perhaps, pass on the
7 apartment with another succession claim. So he entered
8 into a compromise and basically did what was required under
9 the law, not just what was permitted.

10 JUDGE CANNATARO: Counsel, it sounds like you're
11 articulating the same set of facts that the Appellate
12 Division approved of in Kent - - - I'm sorry, over here.

13 MR. ZAUDERER: I'm sorry.

14 JUDGE CANNATARO: In Kent.

15 MR. ZAUDERER: Yeah.

16 JUDGE CANNATARO: That's the holding of Kent,
17 isn't it? That - - - you know, they negotiated. They had
18 no status. And they got a good deal because - - - you
19 know, it's entirely possible that they could have been
20 thrown out of the apartment had they not made this deal.
21 Is that essentially what you're saying now?

22 MR. ZAUDERER: Well, I'm saying something else in
23 addition. Which is that he followed the law. Section
24 2521.1 has to be read with the succeeding section. It does
25 two things. It says that the landlord must reach agreement

1 - - - he had to do this to implement the stipulation on
2 what the legal rent was. And the next section says, if the
3 legal rent is different from a - - - a lower rent, that is
4 a preferred rent. And then when it - - - that is over, at
5 some point you go back to the registered rent.

6 CHIEF JUDGE WILSON: But so - - - let me - - -

7 MR. ZAUDERER: He followed it. He followed the
8 statute.

9 CHIEF JUDGE WILSON: So let me - - - let me ask
10 you this.

11 MR. ZAUDERER: Sure.

12 CHIEF JUDGE WILSON: Suppose they had agreed that
13 the rent actually paid would be 650, as it was.

14 MR. ZAUDERER: Yes.

15 CHIEF JUDGE WILSON: And the legal rent that they
16 registered would be \$100,000 a month.

17 MR. ZAUDERER: Right. Yeah.

18 CHIEF JUDGE WILSON: That still follows the law?

19 MR. ZAUDERER: Okay. There's - - - I'm not wise
20 enough to say where that limiting principle would be.

21 There's some suggestion that - - - in the law, that if it
22 was over the 2,000 amount, you know, it would take it out
23 of regulation and be impermissible. I don't know that.

24 But the - - - that's not this case.

25 CHIEF JUDGE WILSON: I understand. But - - -

1 MR. ZAUDERER: I don't think we need to set a
2 limit - - -

3 CHIEF JUDGE WILSON: - - - but does the - - - but
4 - - -

5 MR. ZAUDERER: - - - I would say on its face that
6 would look ridiculous.

7 CHIEF JUDGE WILSON: Right. And so it would look
8 ridiculous because we don't think that that 10,000 or
9 100,000 dollars bears any reasonable relationship to what
10 the fair market value of the apartment was at the time - -
11 -

12 MR. ZAUDERER: Yes.

13 CHIEF JUDGE WILSON: - - - fair market rental
14 value?

15 MR. ZAUDERER: Correct.

16 CHIEF JUDGE WILSON: Right. So is it fair to say
17 that what - - - what the statute is aiming to do, in
18 setting that first deregulated rent, is to establish the
19 fair market rental value of the apartment and then
20 stabilize that value?

21 MR. ZAUDERER: Yes. But there's nothing in this
22 record to suggest that that deviated from it, and there was
23 nothing the landlord could do in this situation.

24 JUDGE GARCIA: But the thing that does suggest
25 that to me is the waiver of the right to challenge the fair

1 market rent. Because I take your argument up to this point
 2 to go to, they didn't have to offer him a rent control
 3 deal, they were settling that. And I think no one's
 4 looking to argue here that the apartment is still rent
 5 controlled. And then it becomes a rent stabilization
 6 issue, and they offer him a lease and they're doing it this
 7 way. The problem I think I'm having, at least, is the
 8 waiver of challenging the fair market value. Because that
 9 doesn't only - - - in our precedent and Appellate Division
 10 precedent - - - go to that tenant at the time, it goes
 11 forward to future tenants.

12 MR. ZAUDERER: So allow me to address that if I
 13 may? I think if we put in our mind's eye - - - let's go
 14 back to 2020 - - - to 2000, and let's assume that the
 15 landlord was prescient and know we'd be having this
 16 argument today. He could not make that settlement because
 17 on the one hand, in any settlement, which there was, you
 18 give up something and you get something. He gave up the -
 19 - -

20 JUDGE GARCIA: He gives up his rent control
 21 argument.

22 MR. ZAUDERER: He gave up - - - he gave - - -
 23 that tenant had, in the landlord's view, had no right to
 24 anything. He was a squatter.

25 JUDGE GARCIA: But that's the compromise, right?

1 MR. ZAUDERER: That would - - - yes - - -

2 JUDGE GARCIA: He gives up - - -

3 MR. ZAUDERER: - - - would - - -

4 JUDGE GARCIA: - - - that claim - - -

5 MR. ZAUDERER: Yes.

6 JUDGE GARCIA: - - - and you give him a rent
7 control - - -

8 MR. ZAUDERER: So now - - -

9 JUDGE GARCIA: - - - stabilized apartment.

10 MR. ZAUDERER: So to address your question. I
11 think it's very important to recognize what this court said
12 in Riverside in 2008, which I'm going to - - - I'm going to
13 come to. But all the cases which are underlying the
14 principle that you're asserting, are completely different
15 from this. Those are cases where there is a benchmark,
16 there is an established rent, such as in rent
17 stabilization. And what was done here was - - - and - - -
18 is to ignore that. And for example, if it says it's 2,000
19 dollars and in the cases that are cited, the tenant and
20 landlord reach an agreement for 3,000 dollars, that's a
21 demonstrable illegal agreement. In this case, there was no
22 benchmark. There was no established rent, legal rent. And
23 the landlord did what he was commanded to in that situation
24 by following the regulations.

25 JUDGE HALLIGAN: But what about - - - what about



1 your adversary's argument that by allowing for the initial
2 legal regulated rent to be set, at least ostensibly
3 significantly higher than what was actually paid, that that
4 provides a ready path towards evading the objectives of the
5 rent stabilization laws?

6 MR. ZAUDERER: Then that's a problem with the
7 legislature. I mean, the landlord in his wisdom followed
8 what the law told him.

9 JUDGE HALLIGAN: Well, and - - - and therefore is
10 precluded. It's not something that's permissible, I think,
11 is what he's arguing. Not that there should be legislative
12 change.

13 MR. ZAUDERER: Right. And I say you would not
14 find that impermissible in the situation the landlord was
15 in when he followed what the regulations said.

16 JUDGE RIVERA: No, I don't know that that's
17 necessarily impermissible. Obviously, they're negotiating
18 the leases - - -

19 MR. ZAUDERER: Right.

20 JUDGE RIVERA: - - - in part of contract as well
21 as a property interest. Okay.

22 MR. ZAUDERER: Except for this - - -

23 JUDGE RIVERA: And they're trying to get - - -
24 yes, of course. And they're trying to get out from under
25 the - - - the risk. Both of them are taking a major risk

1 if they proceed with the litigation. Right? One may be
2 out on the street. One may have a rent-controlled tenant.
3 Right? So it's a big risk, okay. Every - - - everybody's
4 got an interest perhaps in getting out of this in a way
5 that's fair. I'm with my colleagues that there seems to
6 really be a problem with a stipulation that says you waive
7 an appeal to the fair market rent. That's what's - - - I
8 don't think the 650 is that controversial. It's this issue
9 of you're waiving that, because the 650 only applies to you
10 in that sense, because you're calling it a preferential
11 rent. But this other fair market rent that now someone,
12 who would otherwise perhaps be incentivized to challenge,
13 has gotten a deal so they're not going to do that, means
14 that all the other tenants pay a price.

15 MR. ZAUDERER: You could not have a settlement
16 unless that - - - you're not going to make a settlement and
17 say, well, I'll give - - -

18 JUDGE RIVERA: Well, you can make the settlement.
19 It's just your client didn't want or the person at the time
20 - - - the entity at the time - - - didn't want to risk the
21 appeal and they wouldn't get whatever it was, the 1650.

22 MR. ZAUDERER: So to answer your - - - you
23 question.

24 JUDGE CANNATARO: You could - - - I'm sorry. I
25 just want to clarify something you just said to Judge

1 Rivera.

2 MR. ZAUDERER: Sure.

3 JUDGE CANNATARO: You're saying you could not
4 have had a settlement without a provision in the
5 stipulation that the tenant waives their right to a fair
6 market rent appeal?

7 MR. ZAUDERER: The landlord would never settle.
8 Look, may I - - - well, look - - -

9 JUDGE CANNATARO: Well, you know, that might be a
10 - - - a strong negotiating posture for the landlord to
11 take. But we've learned in the years since this
12 stipulation was entered into, that that's - - - that's
13 actually violative of public policy.

14 MR. ZAUDERER: I respectfully disagree. Let me
15 get to the - - - the court's decision in - - - in Riverside
16 in 2008. There they found an illegal agreement of the kind
17 I described. Where there was a benchmark and an attempt to
18 agree on a number that was demonstrably different from the
19 lower number that was legal. And this court said, if I
20 might remind it, in finding the agreement, it said, "Within
21 neither the letter nor spirit of the law, because it was
22 not a bona fide settlement of the parties' dispute. The
23 argument for upholding the agreement would be stronger if,
24 in 1996, the parties had had a dispute about the amount of
25 the legal maximum rent and had compromised it at a figure

1 above the tenant's and below the landlord's." And they go
2 on to say, "The obvious purpose of the settlement was not
3 to resolve a dispute about what the law permitted, but to
4 achieve something the law indisputably does not - - - did
5 not and does not permit."

6 And there was an affirmative policy here of
7 encouraging, in disputed matters, settlement. There was
8 nothing illegal about this.

9 JUDGE HALLIGAN: I - - -

10 JUDGE RIVERA: Yes. But - - -

11 JUDGE HALLIGAN: - - - can I - - -

12 JUDGE RIVERA: - - - without violating public
13 policy. I mean, that - - - you're kind of going around in
14 circles on this. Yes, of course. Of course. That's what
15 I'm saying. I - - - I can't see the issue over the 650.
16 But the question is whether or not the waiver is a
17 violation of public policy, because one could see it as
18 rigging the game moving forward.

19 MR. ZAUDERER: You could see that, but you could
20 also look at it from the perspective of what was the option
21 of a landlord in this situation?

22 JUDGE RIVERA: Well, if we see it that way, do
23 you lose?

24 MR. ZAUDERER: Sorry?

25 JUDGE RIVERA: If we see it that way? As rigging

1 the game moving forward, do you lose?

2 MR. ZAUDERER: I - - - I'm sorry.

3 JUDGE RIVERA: If, indeed, what you said, you
4 could see it that way. When I said you could see it as - -
5 -

6 MR. ZAUDERER: Yes. Yes. And - - - and I - - -
7 and - - -

8 JUDGE RIVERA: - - - perhaps changing things
9 going forward. If we see it that way - - -

10 MR. ZAUDERER: Can I suggest - - -

11 JUDGE RIVERA: - - - do you lose? Does he win?

12 MR. ZAUDERER: I - - - but I suggest to you that
13 is the way that this should be looked at, from the
14 perspective of the policy of promoting a settlement - - -

15 JUDGE SINGAS: Are you suggesting that the that
16 the price of 1,650 was fair at that time and therefore this
17 - - - this agreement, this settlement, there was nothing
18 untoward about it? Is that your suggestion - - -

19 MR. ZAUDERER: I'm saying - - -

20 JUDGE SINGAS: - - - and was that - - - and was
21 that in fact true? Was that rent commensurate with what
22 was being received at that time, in that area?

23 MR. ZAUDERER: There's nothing in the record to
24 say that it wasn't. And, again, put it in perspective, if
25 you might, of the landlord in that situation. The law does

1 not require the landlord to do a survey of the market and
2 to see what it is. The landlord - - - the - - - the law
3 tells him, agree on a rent. You can have a preferred rent
4 - - -

5 JUDGE TROUTMAN: And what - - - what is the
6 effect - - - over here.

7 MR. ZAUDERER: I'm sorry.

8 JUDGE TROUTMAN: What is the effect that he never
9 was going to pay this the 1,650?

10 MR. ZAUDERER: Well, when you say what is the
11 effect, I'm not sure.

12 JUDGE TROUTMAN: The - - - the idea, he gets this
13 lower rent.

14 MR. ZAUDERER: Right.

15 JUDGE TROUTMAN: So it looks a little untoward
16 that he's getting around the - - - the law by - - - by
17 doing something that he's otherwise not permitted to do.

18 MR. ZAUDERER: I respect - - -

19 JUDGE TROUTMAN: - - - I agree to this you can
20 set this higher rent, but I'm never going to pay it.

21 MR. ZAUDERER: Yes. And that's expressly what
22 the law says is okay. It's Section 25 - - -2521.2. It
23 says, "Where the legal regulated rent is established and a
24 rent lower than the legal negotiated rent is charged and
25 paid by the tenant, upon vacancy of such tenant, the legal

1 regulated rent previously established plus applicable
2 guideline increases may be charged to new tenants."

3 JUDGE CANNATARO: And is the legal regulated rent
4 established in this situation, where you have the first
5 lease after the apartment is leaving rent control, it's - -
6 - it's being set and it will be registered, but it - - - it
7 - - -

8 MR. ZAUDERER: Yes.

9 JUDGE CANNATARO: - - - that's not the same thing
10 as being established? I mean, it sounds to me like we're
11 talking about the sort of situation where you might be
12 entitled to make some sort of overcharge claim because
13 there's an established legal rent, and you're being charged
14 - - - you know, something else. But to - - - I think, what
15 your adversary was saying - - - and I asked him about this,
16 about whether the first lease could have a preferential
17 rent and a - - - a legal rent, and he said no. Because the
18 first lease is the one that sets the rent. So it's not
19 established.

20 MR. ZAUDERER: I - - - I disagree. Section - - -
21 these two sections are part of the same law. They are one
22 after the other. The first, 2521.1, talks about the rent
23 agreed to. And the very next section refers back to that
24 as the established rent. That's what's in 2521.

25 CHIEF JUDGE WILSON: Yeah, but - - -



1 MR. ZAUDERER: That's what they established by
2 agreement.

3 CHIEF JUDGE WILSON: But I think - - -

4 MR. ZAUDERER: They have to be married together.

5 CHIEF JUDGE WILSON: But I think you conceded
6 earlier that it can't simply be any rent agreed to. Right?
7 There's some point - - - and you said you can't draw the
8 line, and I accept that. There's some point where it just
9 doesn't work to say, well, we agreed to some number. And I
10 have to say that something that, you know, I - - - I looked
11 a little strangely at is the - - - the tenant here gets a
12 650-dollar rent for an apartment that is worth 1,650
13 dollars a month rent, and he can keep that for as long as
14 he wants, and he moves out the next year. I wouldn't do
15 that. Now, we don't know.

16 MR. ZAUDERER: Maybe he got - - -

17 CHIEF JUDGE WILSON: Maybe he got sick. Maybe he
18 got another job somewhere else, maybe whatever.

19 MR. ZAUDERER: Yeah.

20 CHIEF JUDGE WILSON: But it - - - it's a lot.

21 MR. ZAUDERER: But from the landlord's point of
22 view, that tenant may be there forever. That's a big, big
23 risk from the landlord's point of view.

24 CHIEF JUDGE WILSON: Yep.

25 MR. ZAUDERER: On the other hand, what happened

1 here, perhaps unexpectedly, the tenant moved out within a
2 year or two. But at the time this agreement was made,
3 nobody could know when, if the tenant might move out - - -

4 CHIEF JUDGE WILSON: Right.

5 MR. ZAUDERER: - - - whether succession rights
6 would be claimed and passed on to somebody else.

7 CHIEF JUDGE WILSON: Or - - - or perhaps the deal
8 wasn't really as good as it looks on paper. It wasn't
9 really a 1,650 apartment. It was really a 650 apartment
10 all along. We don't know.

11 MR. ZAUDERER: We don't know. I don't think,
12 based on the conduct here, that anybody suggests it was
13 really as low as 650 - - -

14 JUDGE GARCIA: Counsel - - -

15 MR. ZAUDERER: - - - based on what happened. And
16 we have in the record the next tenant paid - - - .

17 JUDGE RIVERA: It's a big jump from what the rent
18 control was. I mean, the rent control was not even 200.

19 MR. ZAUDERER: Yes. That's what the landlord
20 gave up.

21 JUDGE RIVERA: I mean, it's a lot to pay, right,
22 from - - -

23 MR. ZAUDERER: Well, the tenant was - - - the
24 tenant wasn't - - - if there was arm twisting, the vantage
25 was to the tenant. Because the tenant, you know, could

1 have - - - you know, 650 was willing to pay, because
2 probably, to answer your question, it's well below market.

3 JUDGE GARCIA: Counsel, let's say we were to find
4 the waiver void on public policy grounds, what, one, would
5 we then be doing with this case? And if we did send it
6 back, what would happen in the proceedings below?

7 MR. ZAUDERER: I - - - I suggest that there's - -
8 - that's not the appropriate path because the - - -

9 JUDGE GARCIA: Assume we do it, appropriate or
10 not, in your view, what would happen?

11 MR. ZAUDERER: Well, you know, the parties
12 charted their own course here. They litigated this as a
13 legal issue. No factual issues in this case. That's the
14 way it was presented.

15 JUDGE HALLIGAN: But it's a motion to dismiss.
16 So presumably, as with any motion to dismiss, if we reach
17 that conclusion, something would happen next.

18 MR. ZAUDERER: I disagree. In this - - - in this
19 - - - where the way the case was argued, nobody argued.
20 The plaintiff didn't argue, which they normally do in
21 opposition to a motion to dismiss, that there are factual
22 issues. They haven't argued that. They've argued on its
23 face that it's illegal. And we've argued on the face it's
24 legal. So I don't think there's a - - - you know, a
25 logical basis to send this back.

1 JUDGE GARCIA: But let's say, we say it's illegal
2 because the waiver is void for public policy, then they
3 just win? We don't have to send it back? We just - - -
4 what do we do?

5 CHIEF JUDGE WILSON: What - - - what do they win?

6 JUDGE GARCIA: Yeah.

7 CHIEF JUDGE WILSON: Right.

8 MR. ZAUDERER: I think - - -

9 JUDGE RIVERA: When they're going to DHCR, what
10 are they - - - what are they doing?

11 MR. ZAUDERER: I'm sorry. I think - - -

12 JUDGE RIVERA: Are they going to DHCR? What are
13 they doing?

14 MR. ZAUDERER: What are they doing?

15 JUDGE RIVERA: If we don't remit?

16 MR. ZAUDERER: If you don't - - - I suggest that
17 we've presented the right path to a legal conclusion on
18 this. If you send it back, I don't think there's any
19 precedent for this that I could cite.

20 JUDGE HALLIGAN: But if we disagree with you - -
21 -

22 MR. ZAUDERER: Yes.

23 JUDGE HALLIGAN: - - - and - - - and we are not
24 persuaded, do you have any views on how the case might
25 unfold going forward?

1 MR. ZAUDERER: I think that - - - I think that
2 would be presumptuous of me, frankly - - -

3 JUDGE HALLIGAN: Okay.

4 MR. ZAUDERER: - - - to suggest that path to you.

5 JUDGE HALLIGAN: Can I ask you about your statute
6 of limitations defense?

7 MR. ZAUDERER: Yes.

8 JUDGE HALLIGAN: If we were to disagree with you
9 and conclude that this was a status case and not a case
10 about the amount of rent, does your statute of limitations
11 defense have any remaining viability? And, if so, why, or
12 how?

13 MR. ZAUDERER: The first is I would respectfully
14 disagree with that premise for this - - -

15 JUDGE HALLIGAN: I understand that. But - - -
16 but - - -

17 MR. ZAUDERER: I'd like to explain that for a
18 moment.

19 JUDGE HALLIGAN: Okay. Maybe you could start
20 with the second part of my - - -

21 MR. ZAUDERER: Of course.

22 JUDGE HALLIGAN: - - - with the - - -

23 MR. ZAUDERER: So I think - - - still you would
24 not meet the bar, which is fraud. There's no evidence
25 here. In fact, the Appellate Division found no evidence of

1 fraud. So I don't think you could, even in a status case,
2 get to the point where you would be ignoring the statute of
3 limitations because there's no evidence of fraud. The - -
4 - there's no basis for fraud here. The way I've described
5 it, I don't think anyone could take issue with - - -
6 there's nothing in the record to suggest that this was some
7 nefarious scheme that's been - - -

8 JUDGE HALLIGAN: But I thought your adversary was
9 arguing - - - and - - - and maybe you have a different
10 view. I'm sure he'll tell me if he wasn't arguing this.
11 That - - - that a question of the status of an apartment,
12 whether it's rent stabilized, whether it's not, is
13 something that - - - for which there is no applicable
14 statute of limitations. Do you have a different take on
15 that?

16 MR. ZAUDERER: I have - - - I agree that if it's
17 status, under certain circumstances, there could be no
18 statute of limitations.

19 JUDGE HALLIGAN: Okay.

20 MR. ZAUDERER: And I'm - - - what I'm saying, I'm
21 engrafting on that is that that would have to rise to
22 fraud. Not just simply because of status that necessarily
23 would - - -

24 JUDGE HALLIGAN: So you - - -

25 MR. ZAUDERER: - - - allow - - -

1 JUDGE HALLIGAN: - - - so your position is that -
2 - - that that the status of an apartment, rent stabilized
3 or not, can only be contested after four years if there's
4 an allegation of fraud? What - - - what - - -

5 MR. ZAUDERER: Yes.

6 JUDGE HALLIGAN: - - - what exactly is the
7 support for that?

8 MR. ZAUDERER: That - - - that's my contention.
9 The - - - the synthesis of the case law, I don't see
10 anything that says that you can open this up just because -
11 - -

12 JUDGE CANNATARO: And that's kind of what the
13 HSTPA was at the time, wasn't it? That that was the - - -
14 the four-year window that you were provided, right?

15 MR. ZAUDERER: Yes. But I read into - - - I
16 engraft in these - - - in the case law that - - - that
17 there has to be some element of fraud.

18 JUDGE CANNATARO: And what about public policy?
19 It doesn't - - - assuming, and it - - - this is a difficult
20 if, but if there is a distinction between fraud and void on
21 public policy grounds, wouldn't public policy also open up
22 the status question as well as - - - as - - - as capably as
23 fraud would?

24 MR. ZAUDERER: In theory, yes. But I don't
25 believe there's a public policy that's negatively

1 implicated here. And I'd like to address that premise for
2 it if I may? Look, the complaint here, it's at page 24 of
3 the record. This was pled as a rent dispute at - - - who
4 was the politician who said the rent is too damn high?
5 That's what they say in paragraph 10. They're not
6 disputing the status. On their own complaint in this case
7 they say the following: "The so-called preferential rent of
8 650 dollars represents the rent agreed to by the owner and
9 the tenant, and should have been the unit's legal regulated
10 rent, with all subsequent increases based off that lower
11 number." They're complaining about the rent.

12 JUDGE CANNATARO: Is that an overcharge claim?

13 MR. ZAUDERER: They said we want it to be 650.

14 JUDGE CANNATARO: Do you view that as an
15 overcharged claim, basically?

16 MR. ZAUDERER: Yes, I do. That's what - - - the
17 way they've pled it. They say - - -

18 JUDGE HALLIGAN: But they also say - - -

19 MR. ZAUDERER: - - - they - - - they say in their
20 brief - - -

21 JUDGE HALLIGAN: - - - that "The purported
22 deregulation is illegal, and plaintiffs are entitled to the
23 benefits and protections of rent stabilization."

24 MR. ZAUDERER: I'm sorry. They say that?

25 JUDGE HALLIGAN: They also make the argument - -

1 -

2 MR. ZAUDERER: Yeah.

3 JUDGE HALLIGAN: - - - in the complaint, they
4 make the allegation that "The purported" - - - I'm just
5 quoting from it, it's the next page. "The purported
6 deregulation is illegal, and plaintiff is entitled to the
7 benefits and protections of rent stabilization."

8 MR. ZAUDERER: Right. Deregulation only occurred
9 by fortuity two years later when the rent went over 2,000.
10 If he had stayed there, it would have been for - - - for
11 years or perhaps decades that way. That's what they're
12 referring to.

13 JUDGE CANNATARO: This current tenant, the tenant
14 who's in this case - - -

15 MR. ZAUDERER: Yeah.

16 JUDGE CANNATARO: - - - they entered into a
17 market rate - - -

18 MR. ZAUDERER: Yes.

19 JUDGE CANNATARO: - - - lease, right?

20 MR. ZAUDERER: Yes.

21 JUDGE CANNATARO: This was not a stabilized
22 lease?

23 MR. ZAUDERER: Right.

24 JUDGE CANNATARO: Okay.

25 MR. ZAUDERER: Thank you.



1 CHIEF JUDGE WILSON: Thank you.

2 MR. SACHAR: Just a - - - a couple of quick
3 points. You heard my adversary say, oh, landlords don't do
4 surveys, you know, they're not required to do this. Well,
5 that's the whole point of a fair market rent appeal is that
6 DHCR does that and it operates as a check on the system.
7 Because what happens? Apartments in Manhattan, and now
8 elsewhere, are scarce - - -

9 JUDGE RIVERA: But then - - - but then your
10 argument is going to be, okay, so now - - - whatever that
11 number was, I think it was 1,650. Excuse me, I've
12 forgotten momentarily. That was the wrong number. Right?
13 You're saying you're going to do the analysis. You're
14 going to figure it out. This is the correct number, and
15 now you're going to move forward. And so isn't the end
16 point of that, from your client's perspective, I will pay
17 less rent and I might have even paid too much rent?

18 MR. SACHAR: Correct.

19 JUDGE RIVERA: I've got an overcharge and I'm
20 going to get reimbursed?

21 MR. SACHAR: If - - - if the way that we are - -
22 -

23 JUDGE RIVERA: Isn't that the point of all of
24 that?

25 MR. SACHAR: - - - if the way that we are



1 resolving this, which we have not yet got there - - -

2 JUDGE RIVERA: Yes.

3 MR. SACHAR: - - - is to say we have to rejigger
4 the rent. We have to go all the way back.

5 JUDGE RIVERA: Yes. You'd have to make out that
6 1,650 was not a fair market rent at that time.

7 MR. SACHAR: Right. And - - - and there is
8 evidence in the record that it is not a fair market rent.
9 As - - - because what happens is after Mr. McKinney
10 vacates, they do a substantial rehab of an apartment that
11 hadn't been touched since the 1970s because it's rent-
12 controlled, and then the tenant pays 1,650. So - - - you
13 know, we've all lived in apartments. We know what - - -
14 you know, you're going to pay more for an apartment that is
15 a - - - a brand-new apartment than one that has brown shag
16 carpeting. It's just the nature.

17 JUDGE GARCIA: Counsel, one - - - one of the
18 things I think has been touched upon, I think, by Judge
19 Halligan and others, is this idea that we have twenty-year-
20 old agreement and - - - and in many of the cases, and maybe
21 not all, but many of them, it's - - - the issue is I enter
22 an agreement with the tenant - - - landlord, tenant.
23 Tenant then thinks better of this later on and challenges
24 that agreement saying it's void against public policy or
25 whatever reason, and it's that type of dispute. But here

1 you have a tenant who goes in twenty years later, pays a -
2 - - a market rent, gets into a dispute over what that rent
3 should be, goes back twenty years, finds this agreement,
4 then brings this case based on a twenty-year-old agreement
5 between different parties. And I think what I'm struggling
6 with, is there a limiting principle here? I mean, can
7 every tenant now go dig through the records and say, okay,
8 what types of agreements were there? And maybe this one
9 might be void? We'll bring an action. And then the next
10 forty years of rents are, you know, kind of undone. And
11 those tenants in between can then - - - now they can join?
12 What - - -

13 MR. SACHAR: There is - - - there is - - - there
14 absolutely is a limiting factor. And the limiting factor
15 is deregulation. I - - - unless I can allege fraud in a
16 normal rent-stabilized context, I can't go back more than
17 four years. This is pre-HSTPA; we don't need to go there.

18 JUDGE GARCIA: So then do you need to show fraud
19 here in order to get anything?

20 MR. SACHAR: No. Because I'm challenging the
21 deregulation.

22 JUDGE GARCIA: So fraud is not a limiting
23 principle here.

24 MR. SACHAR: Yes.

25 JUDGE GARCIA: So what is a limiting principle?



1 JUDGE CANNATARO: So let me - - -

2 MR. SACHAR: The limiting principle is fraud or
3 dereg - - - I'm sorry, Judge.

4 JUDGE CANNATARO: No. Just to clarify Judge
5 Garcia's question before you answer. Are you saying the
6 limiting principle is as long as you're within four years
7 of the deregulation, you're okay?

8 MR. SACHAR: No. You can challenge a
9 deregulation at any time. That's what - - -

10 JUDGE CANNATARO: So - - - so there is - - -

11 JUDGE HALLIGAN: And overcharge - - -

12 JUDGE CANNATARO: - - - there is no limiting
13 period?

14 MR. SACHAR: There is no limiting period. Unless
15 there's not a deregulation, and I'm sorry if I wasn't being
16 clear. If it's a normal rent-stabilized lease - - - if Ms.
17 Liggett had a normal rent-stabilized lease, unless she can
18 allege fraud, she can't go pre - - -

19 JUDGE CANNATARO: No. But this is a market
20 lease.

21 MR. SACHAR: Right.

22 JUDGE CANNATARO: And - - - and this - - - this
23 apartment exited rent regulation before she entered into
24 her lease. And I think I just heard you say that even if
25 that had happened fifteen years before she signed her

1 lease, she still had the right to go back and challenge the
2 exit from regulation.

3 MR. SACHAR: Because of the way that this
4 agreement was set up. This agreement was an agreement
5 between McKinney and respondent that - - - they never met
6 in the middle.

7 JUDGE GARCIA: Anyone in that - - -

8 MR. SACHAR: If they had met in the middle, okay.

9 JUDGE GARCIA: - - - and anyone in an apartment
10 that was luxury deregulated, who's paying a market rent in
11 a luxury building, now can go back to the files for forty
12 years looking for agreements that they can argue void
13 against public policy?

14 MR. SACHAR: Absolutely. Thank you.

15 CHIEF JUDGE WILSON: And their damages would be
16 limited to a four-year period from whenever it is they
17 filed?

18 MR. SACHAR: Yes. If it was filed before June
19 14th of 2019.

20 CHIEF JUDGE WILSON: That's right.

21 MR. SACHAR: Okay. Thank you.

22 CHIEF JUDGE WILSON: Thank you.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Liggett v. Lew Realty LLC, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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