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COURT OF APPEALS

STATE OF NEW YORK

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RIVERA,

Appellant,

-against-

No. 24

DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Respondent.

-----  
MATTER OF ENRIQUEZ

Respondent,

-against-

No. 25

DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Appellant.

-----

20 Eagle Street  
Albany, New York  
February 9, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

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Appearances :

JASON CHANG, ESQ.  
LAW OFFICE OF JASON CHANG  
Attorney for Appellant Rivera  
252 West 37th Street  
Suite 600  
New York, NY 10018

IAN MANAS, ESQ.  
LAW OFFICES OF JOSEPH A. ALTMAN P.C.  
Attorney for Respondent Enriquez  
951 Bruckner Boulevard  
Bronx, NY 10459

JEREMY W. SHWEDER, ESQ.  
NEW YORK CITY LAW DEPARTMENT  
Attorney for Respondent/Appellant HPD  
100 Church Street  
New York, NY 10007

1 CHIEF JUDGE DIFIORE: The next matters on the  
 2 calendar are appeals number 24 and 25, 24, Rivera v. the  
 3 Department of Housing Preservation and Development of the  
 4 City of New York; and number 25, Matter of Enriquez v. the  
 5 Department of Housing Preservation and Development.

6 Counsel.

7 MR. SHWEDER: May it please the court, Jeremy  
 8 Shweder for the Department of Housing Preservation and  
 9 Development. I'd like to reserve three minutes of rebuttal  
 10 time.

11 CHIEF JUDGE DIFIORE: Three, sir?

12 MR. SHWEDER: Yes.

13 CHIEF JUDGE DIFIORE: You may have three.

14 MR. SHWEDER: Nearly fifty years ago, the New  
 15 York City Council determined that when tenants are forced  
 16 to vacate their homes due to the negligent or intentional  
 17 acts of the owner, the - - - of the - - - the at-fault  
 18 landlord and not the city should bear the costs with  
 19 relocating those tenants until permanent housing can be  
 20 found. And the reason that the city council allowed this -  
 21 - - this relocation lien was because land - - - landlords  
 22 were regularly allowing the apartments they owned to fall  
 23 into dangerous states of disrepair, and they were using  
 24 city agencies for the purpose of vacating tenants that they  
 25 couldn't otherwise legally vacate.

1                   JUDGE STEIN: Has - - - has HPD commenced any  
2 foreclosure proceeding in - - - in Rivera?

3                   MR. SHWEDER: No. In neither of the cases here  
4 have there been foreclosure proceedings. And of course,  
5 that's - - -

6                   JUDGE STEIN: Is there a reason for that?

7                   MR. SHWEDER: Well, there are many reasons.  
8 Foreclosure proceedings are actually rare in these cases,  
9 and there's many reasons for it. One is capacity to - - -  
10 to begin with. There are - - - in - - - in 2016, calendar  
11 year 2016, HPD issued 175 liens. That would be 175  
12 foreclosure actions you're talking about in a year. That's  
13 a - - - a huge capacity.

14                   Second thing is HPD is not really in the business  
15 of wanting to - - - to force a sale of these people's  
16 buildings, and that's what would happen in a foreclosure  
17 proceeding if - - - if they won. You also - - - I don't  
18 know where - - - in each case where HPD would be in the  
19 priority of liens. They may not actually be able to get  
20 any money after the foreclosure hearing. There's a lot of  
21 good reasons. And of course, the Lien Law allows our  
22 adversaries to force a foreclosure hearing if they want HPD  
23 to have to prove its lien. They haven't done so. And - -  
24 - and landlords rarely do so, probably because they don't  
25 want to face having to pay this and have their - - - have

1 their apartment sold.

2 JUDGE WILSON: But they do have the right to  
3 start that proceeding and you then have to respond within  
4 thirty days, right?

5 MR. SHWEDER: Absolutely. They can - - - they  
6 have the right to force us to do it or the lien is going to  
7 be vacated.

8 JUDGE FAHEY: So - - -

9 MR. SHWEDER: Sorry.

10 JUDGE FAHEY: Let me just ask a - - - a practical  
11 question. Aren't they - - - I shouldn't say aren't they.  
12 Are the relocation costs part of the insurable damage for a  
13 - - - a fire?

14 MR. SHWEDER: For the - - - for the landlord?

15 JUDGE FAHEY: Yeah.

16 MR. SHWEDER: I - - - I don't know the answer to  
17 that question.

18 JUDGE FAHEY: Yeah.

19 MR. SHWEDER: That - - - that may be something -  
20 - -

21 JUDGE FAHEY: I'll ask them.

22 MR. SHWEDER: - - - that the landlord can  
23 answer.

24 JUDGE FAHEY: Yeah.

25 MR. SHWEDER: I just don't know.

1 JUDGE FAHEY: What's your experience?

2 MR. SHWEDER: You know, I - - - I don't know. I  
3 - - - I really can't answer that question because I just  
4 don't know here - - -

5 JUDGE FAHEY: Okay.

6 MR. SHWEDER: - - - whether - - - whether that  
7 is. You know, it - - - it would depend on the contract.

8 JUDGE FAHEY: I - - - the only reason I ask is  
9 because, let's say, on - - - on number 24, the Rivera case,  
10 I couldn't imagine that if they were you wouldn't have four  
11 years of relocation costs covered under any policy so - - -

12 MR. SHWEDER: Well, and also, I don't know what  
13 the policies say about whether the relocation is due to the  
14 negligent or intentional act of the owner, which is the  
15 only reason that the - - - the HPD can get its - - - its  
16 costs paid for is if they can prove that the relocation  
17 costs are due to the negligent or intentional act of the  
18 owner. So it may be that the insurance policies exempt  
19 those types of actions.

20 JUDGE FAHEY: That may be.

21 MR. SHWEDER: And I - - -

22 JUDGE ABDUS-SALAAM: Does HPD have a policy or is  
23 there any requirement that relocation take place within any  
24 given amount of time?

25 MR. SHWEDER: There - - - there isn't, and

1 there's a good reason for that. And - - - and this is why  
2 the First Department's decision that has this kind of one-  
3 size-fits-all theory about it doesn't make any sense. HPD  
4 is taking these people to relocate them as they come. You  
5 can have very different types of situations for each person  
6 that's relocated. You can have somebody who is disabled.  
7 It may be very hard to find them an appropriate apartment.  
8 You can have a very large family. It may be very difficult  
9 to find them an appropriate apartment.

10 In each case, HPD has to work with the individual  
11 to find them an apartment that's suitable for them. And  
12 that's why any decision about the reasonableness, the  
13 amount, the length, has to go to a foreclosure trial where  
14 this - - - where you're going to look at the facts. At the  
15 summary discharge stage, all you're going to look at is the  
16 face of the notice of the lien and is this a lienable  
17 expense. Is this the - - -

18 CHIEF JUDGE DIFIORE: Are there - - - are these  
19 circumstances under which a summary proceeding would be the  
20 appropriate vehicle to void a lien on its face?

21 MR. SHWEDER: There are three circumstances.

22 CHIEF JUDGE DIFIORE: Oh, go ahead.

23 MR. SHWEDER: One is when the lien is not for the  
24 appropriate character if a lienable expense. Two - - -

25 CHIEF JUDGE DIFIORE: Yes.

1 MR. SHWEDER: - - - is when the lien - - - the -  
2 - - and that, you only look at the face of the notice of  
3 the lien to determine that. Two, is when the lien itself  
4 doesn't have all the - - - the information required by Lien  
5 Law number 9. And three, is when it wasn't properly filed.  
6 Those are the only three reasons that courts can discharge  
7 a lien at the summary discharge stage.

8 JUDGE FAHEY: I - - - thought there was labor  
9 performed or materials furnished. Isn't - - -

10 MR. SHWEDER: Well, that's part of - - - that's  
11 part of what you have to - - -

12 JUDGE STEIN: On the face of the lien and that  
13 should be actionable. So here, you - - - oh, I thought  
14 that was a theory, sort of.

15 MR. SHWEDER: Well, it - - - it's part of one of  
16 the things you have to put under Lien Law number 9.

17 JUDGE FAHEY: Um-hum.

18 MR. SHWEDER: Lien Law Section 9. There are - -  
19 - there a number of things you have to list.

20 JUDGE FAHEY: Right.

21 MR. SHWEDER: And that's one of them. And here,  
22 it's the relocation costs. I mean that's - - - that's what  
23 it says, and I - - - I - - - well, I take that back.  
24 Rivera does argue that the - - - the notice of lien doesn't  
25 comply with Lien Law number 9. Enriquez doesn't argue

1 that, and I don't - - - I think, you know, we've gone  
2 through it in our brief why it completely complies with - -  
3 - with Lien Law number 9.

4 I think the bigger issue here is whether the  
5 First Department was right that it could say per se any  
6 lien that goes for over a year is not of the character  
7 that's a lienable expense. And I - - - and I think you can  
8 really look to the legislative history - - - history here  
9 to understand - - - understand why that was wrong.

10 If you go to the 1997 amendments - - - and you  
11 have to understand what those amendments did. Prior to  
12 that, HPD could only put a lien after everybody has left  
13 their care. And what was happening was because shelter was  
14 taking a long time, landlords were selling their  
15 apartments, and they weren't able to put a lien on them.  
16 So the city council amended it and said you can put rolling  
17 liens. We see there's a problem here. And the very  
18 foundation of that was an understanding that liens were  
19 taking - - - sorry, shelter was taking a year or more to  
20 get people out of. So they - - - they recognized a  
21 problem, they amended the law to allow rolling liens, and  
22 it's interesting because this is one of these rare cases  
23 where the legislative history really answers this question.  
24 A year - - - the city council has acknowledged that a year  
25 or more of shelter is totally fine. In fact, they wanted

1 to make it easier.

2 JUDGE FAHEY: So what's the average shelter time  
3 now?

4 MR. SHWEDER: I - - - at the time I filed the  
5 brief, it was 500 days. I don't know what it is today. It  
6 may be the same. But it's - - -

7 JUDGE FAHEY: So it's around a year-and-a-half.

8 MR. SHWEDER: And that's - - - yeah. It's - - -  
9 it's a long time. And - - - and this is due to the unique  
10 circumstances of what's going on in New York with - - -  
11 with affordable housing. But that's another reason why you  
12 really need to go to a factual determination about whether  
13 it was reasonable for the length of time, for the amount of  
14 time, for this tenant. All those are questions that are  
15 answered at a foreclosure trial, which, at any point, my  
16 adversaries can force us to do.

17 JUDGE RIVERA: When you're trying to do that  
18 placement, is there a particular priority that other  
19 tenants may be placed higher on the priority listing for  
20 any particular apartment or home that you find?

21 MR. SHWEDER: You know, Your Honor, I don't know  
22 the answer about whether you get in a line and you're first  
23 in line. I - - - a lot of it may have to do with the  
24 individual characteristics of the person and whether this  
25 apartment meets their needs. I don't know the answer about

1           whether they're trying to place them in the same borough or  
2           things like that. I - - - I just don't know the answer to  
3           that.

4                       CHIEF JUDGE DIFIORE: Thank you, counsel.

5                       Counsel.

6                       MR. MANAS: May it please the court, my name is  
7           Ian Manas with the firm Joseph A. Altman P.C. representing  
8           the respondent Leonardo Enriquez. The issue before the  
9           court is not who should bear the costs. The issue before  
10          the court is what costs does the statute and does HPD's own  
11          rule permit the HPD to - - -

12                      JUDGE STEIN: Isn't that what a trial is for,  
13          though? I mean if you - - - if you agree that the - - -  
14          the nature of the expense, that relocation and housing  
15          expenses are - - - are recoverable and are lienable, then  
16          when you talk about how long, how much, isn't that what a  
17          trial is for?

18                      MR. MANAS: So first of all, we - - - we don't  
19          agree that - - - that hotel expenses, which is what it says  
20          on the notice of lien, are in fact lienable. The  
21          administrative code does not include that. It includes a  
22          total of six specific factors - - - six specific items that  
23          are lienable and it says "other reasonable allowances."

24                      JUDGE GARCIA: But the First Department didn't  
25          even agree on that front, right?

1 MR. MANAS: That's correct. The First Department  
2 did not agree on that, neither - - - neither did the Second  
3 Department. In the Retek case, they both - - - they both  
4 simply looked to the rules and said the rules allow so,  
5 therefore, it's okay. And the - - - so the rule - - - the  
6 code is of the - - -

7 JUDGE STEIN: So no amount of - - - so - - - so  
8 we could stop right there. The fact that they're asking -  
9 - -

10 MR. MANAS: And that would be a fac - - -

11 JUDGE STEIN: - - - for hotel expenses - - -

12 MR. MANAS: Sorry.

13 JUDGE STEIN: - - - you argue, is - - - is  
14 enough to invalidate the lien on its face - - -

15 MR. MANAS: And that precis - - - would be  
16 precisely what the facial challenge to the - - - to the  
17 notice of lien would be based on - - - based on the  
18 character of the labor furnished that the - - - that the  
19 HPD was not allowed to do that in the first place.

20 JUDGE STEIN: And what if we disagree with you on  
21 that?

22 MR. MANAS: And if you disagree with me on that,  
23 then the HPD would only be permitted to - - - to provide -  
24 - - to put a lien for temporary shelter which is the word  
25 that they used in the - - - in their rules throughout their

1 - - - throughout their rules along with the fact that the  
2 rules have some time limits in them such as a seven-day  
3 time limit for where the - - - the HPD has to issue an  
4 application to the Housing Authority, has a thirty-day - -  
5 - a thirty-day relocation incentive where they will pay a  
6 bonus to somebody that moves out of a temporary shelter  
7 within thirty days.

8 JUDGE STEIN: Assuming all of that and assuming  
9 that they comply with all of those obligations and they  
10 cannot find a suitable place for Mr. - - - you know, for -  
11 - - for a particular tenant.

12 MR. MANAS: Um-hum.

13 JUDGE STEIN: Then isn't that something that - -  
14 - that has to be reviewed in a factual - - -

15 MR. MANAS: Well, with - - - with all due respect  
16 then, then the - - - the legislature or somebody else has  
17 to be able to make the determination. HPD is not a  
18 legislative body. They don't have the power - - -

19 JUDGE STEIN: No. But that's - - - that's the  
20 purpose for the foreclosure proceeding, isn't it?

21 MR. MANAS: So - - - I'm sorry. I don't  
22 understand your question.

23 JUDGE STEIN: Well, the - - - there is a process  
24 in the law for conducting such - - -

25 MR. MANAS: Right.

1 JUDGE STEIN: - - - such a determin - - -

2 MR. MANAS: So the - - - the Appellate decisions  
3 on that, they all - - - they all talk about the validity of  
4 the law, which sounds like the notice of the lien, on its  
5 face, is - - - has all the required information. There's  
6 no facial challenge to it. And then they - - - then we  
7 need - - - you would need to go to a foreclosure proceeding  
8 to challenge the valid - - - the validity of the law.  
9 Here, it is our position that this is a question of law  
10 regarding other reasonable allowance. The question of  
11 reasonable is - - - is subject to statutory interpretation  
12 based - - - the code said other - - - the code says "other  
13 reasonable allowances."

14 JUDGE ABDUS-SALAAM: What - - - what standard  
15 would we measure that by? What would be reasonable?

16 MR. MANAS: It would be measured by the other  
17 words that are included in Code 26-305. There's - - -  
18 there's - - - it says department - - - "departmental costs,  
19 bonuses, and moving expenses and other reasonable  
20 allowances." So it would be some type of comparison to the  
21 other words that go along with it which is a statutory - -  
22 - which is a way of - - - of statutory interpretation.

23 JUDGE STEIN: Don't we general - - - as a matter  
24 of general practice say that what is reasonable is a  
25 question of fact? There are circumstances, indeed, where

1 we can say this is unreasonable as a matter of law. You're  
2 correct about that. But those - - - those circumstances  
3 are pretty rare, aren't they?

4 MR. MANAS: I - - - I don't know how rare or how  
5 not rare they are. There is a case where they talked about  
6 other like occurrences, and I believe the - - - the court  
7 determined - - - determined as a question of law what - - -  
8 what that meant.

9 JUDGE FAHEY: You know, one of the things I have  
10 in terms of the - - - the difficulty of - - - of this  
11 decision that you're asking us to make is it seems it's  
12 predicated on the nature of the New York City housing  
13 market, and - - - and that seems to be a pure factual  
14 question. It - - - it can change. Usually, it goes up,  
15 the length of time is going to go longer, but it's - - -  
16 it's not something that can measured by a statute. It  
17 invites a trier of fact to try and make a determination as  
18 to what's a reasonable housing allowance in the context of  
19 the city's housing market.

20 MR. MANAS: So I think that - - - that the  
21 statute is what we should be looking to, and the statute  
22 says "other reasonable allowances" and then assuming that -  
23 - - that the - - -

24 JUDGE FAHEY: So you wouldn't say that that's a  
25 fact that would consistently affect these kind of cases in

1 almost every single case?

2 MR. MANAS: That it would be - - - affect  
3 consistent - - -

4 JUDGE FAHEY: It would affect what would be  
5 considered a reasonable housing allowance on every single  
6 case, the nature of the market, how much housing is  
7 available in a particular neighborhood for particular  
8 tenants, that kind of thing.

9 MR. MANAS: I don't think that that - - - that  
10 would come into play. I think that the - - -

11 JUDGE FAHEY: I see.

12 MR. MANAS: - - - the lawmakers, the legislature  
13 would have to rewrite the statute to include that.

14 JUDGE FAHEY: I see.

15 MR. MANAS: Or the HPD would have to - - -

16 JUDGE WILSON: Isn't some amount of the delay  
17 also in the control of the landlord? That is if he brings  
18 facilities up to - - - to standards quickly, the tenants  
19 can come back in?

20 MR. MANAS: So in the - - - the old rules of the  
21 - - - of the HPD, there's nothing in there about the  
22 landlord fixing up anything. In the new rules that they -  
23 - - I think made in 2015 they included something about  
24 returning - - - returning to former shelter. But just my  
25 final thought, my red light is on, is that - - - is that if

1           you look at the legislative history, this is not about  
2           punishing landlords. It's about avoiding windfalls for  
3           landlords from getting - - - from getting the tenant  
4           removed from there. So there's no need to say that the  
5           landlord should be extra - - - punished in a - - - in a  
6           greater sense or anything along those lines because he  
7           didn't fix up the - - - his apartment when he didn't have  
8           to in the first place. And the whole purpose of this is to  
9           - - - to shift the relocation expenses that the city pays  
10          for onto the landlord without necessarily punishing the - -  
11          - the landlord.

12                    JUDGE RIVERA: But isn't the - - - isn't the  
13          tenant out because of the landlord's conduct, when you say  
14          it's not the tenant's - - - it's not the landlord's fault  
15          to begin with?

16                    MR. MANAS: I - - - it is the landlord's fault  
17          but the purpose of the statute and the rules are not to  
18          punish the landlord in these - - - without a maximum amount  
19          that we could - - - that we could put a lien on it. The  
20          purpose is to shift relocation costs because the city  
21          deemed it unfair that a landlord whose building - - - the  
22          value of the building is increased because it's empty now  
23          has - - - didn't even have to pay for getting rid of the -  
24          - - getting rid of the tenant.

25                    JUDGE STEIN: Well, isn't it - - - couldn't it -

1 - - it be said that, really, if the legislature had  
2 intended to put a maximum amount of either time or expense  
3 then it would have done so and could still do so? So  
4 doesn't that sort of go the other way?

5 MR. MANAS: Well, the legislator - - - the  
6 legislature didn't even include temporary shelter - - -  
7 shelter in the first place. But it - - - the fact that  
8 they did means that it would have - - -

9 JUDGE STEIN: But they know that this has been  
10 the practice. They've never moved to - - - to clarify that  
11 or anything.

12 MR. MANAS: And I think because the - - - the  
13 issues weren't before them, I don't think there's any  
14 conclusions we can draw from there about whether they were  
15 in favor or - - - or against them.

16 JUDGE STEIN: And we can't draw any conclusions  
17 from their amendment?

18 MR. MANAS: From the amendment from - - - the  
19 HPD's amendment?

20 JUDGE STEIN: Um-hum.

21 MR. MANAS: I don't think the HPD's amendment  
22 changed anything for this. They left in the same temporary  
23 shelter. They just moved it under - - - into the defi - -  
24 - into a definitional section. And then instead of  
25 repeating temporary shelter over and over again, they just

1 used that definitional word. But - - -

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 Counsel.

4 MR. CHANG: May it please the court, I'm Jason  
5 Chang on behalf of appellant David Rivera. I'd like to  
6 follow up with an assertion that in reading the statute and  
7 HPD's own regulations, there is nothing that - - - there's  
8 no intent that civil penalties or punishment, which has  
9 been argued before, is in the statute or in the  
10 regulations. In fact, everything in them goes to the - - -  
11 the minimizing of HPD's expenses, whether reimbursable or  
12 not.

13 JUDGE ABDUS-SALAAM: Well, if - - - if there's a  
14 foreclosure proceeding where these facts are put before a  
15 trier of fact, isn't it possible that the trier of fact may  
16 say, well, two years or a year was unreasonable and this  
17 amount of money for this type of shelter was not proper?  
18 Can't that happen?

19 MR. CHANG: I would argue that the right to force  
20 a foreclosure is not - - - is not a proper benefit in the  
21 balancing act of Carl Morse v. Rentar and Niagara Venture  
22 v. Sicoli, which says that there is an undeniable cloud on  
23 title, an impingement on the owner's economic interest, and  
24 you have to balance that in order to justify the lien. And  
25 you - - - and the remedy of forcing a foreclosure is not a

1 benefit such as in a mechanic's lien where you have the  
2 added value, the improvement to the property, the consent  
3 of the owner, and - - - and the public interest of  
4 protecting the - - - the construction industry. None of  
5 that is present in the HPD lien. So you have nothing to  
6 balance it, and the right to foreclose is not a benefit.  
7 In fact, it's the contrary.

8 JUDGE WILSON: Why isn't there a public benefit?  
9 That is if - - - if the housing is substandard, doesn't  
10 meet public safety codes, and - - - and the clock is  
11 running on the temporary shelter, it gives the landlord an  
12 incentive to bring it up to code as quickly as possible.

13 MR. CHANG: In the - - - in this instance, even  
14 though it's not before the court, the landlord did  
15 immediately correct the violations. There was a rescission  
16 of the vacate order and a new certificate of occupancy.  
17 But the owner didn't know about the HPD lien until four  
18 years later. So - - -

19 JUDGE FAHEY: Why - - - why didn't they move  
20 back? It was done within four months, wasn't it, the work?

21 MR. CHANG: Yes. But - - -

22 JUDGE FAHEY: So why - - -

23 MR. CHANG: I can't answer - - -

24 JUDGE FAHEY: I was confused by that on the  
25 record too.

1                   MR. MANAS: Yeah. I can't answer why HPD didn't  
2 follow up on that because the owner has no notice.

3                   JUDGE STEIN: But to me, it seems like, okay, so  
4 here you are four years later. That's a perfect argument  
5 to bring to a trier of fact. I think what I hear you  
6 saying is is that the - - - the right to force the  
7 foreclosure action has some other risks to - - -

8                   MR. CHANG: It's not only - - -

9                   JUDGE STEIN: - - - to the owner and - - - and  
10 makes the owner very, very reluctant to utilize that  
11 remedy. Is - - - is that what you're saying?

12                  MR. CHANG: The - - - the reluctance is that the  
13 owner now has to take money out of his or her own pocket.  
14 It's a - - - it may take a year or years, and it requires  
15 that the owner be involved in and delve into the arcane  
16 complexities of HPD's incurring of expenses, how it manages  
17 it, how it tries to minimize its costs. It's - - -

18                  JUDGE RIVERA: So there's - - - there's a reason  
19 not to let the property go into disrepair. And the sooner  
20 you move on it, the less likely it is that your client and  
21 landlords have these - - - as you're saying, these  
22 skyrocketing - - -

23                  MR. CHANG: I would - - -

24                  JUDGE RIVERA: - - - debts that they're going to  
25 have to deal with - - -

1 MR. CHANG: I - - -

2 JUDGE RIVERA: - - - taking it out of their  
3 pocket.

4 MR. CHANG: Yes. And I would argue that to place  
5 and end this balancing act with regard to a lien, it is not  
6 fair to the owner if there's no benefit because again - - -  
7 to weigh against the adverse effect on the owner's  
8 interests in the property - - -

9 JUDGE WILSON: It has taken you almost two years  
10 to get a judgment here, and it's hard for me to believe  
11 that the fact finding in a foreclosure would have taken you  
12 longer. And although I'm new here, the procedures seem  
13 pretty arcane.

14 MR. CHANG: In practice, it's been suggested that  
15 these foreclosure trials aren't completed or if they're  
16 ever brought. So what we have is a ten-year lien which  
17 impinges upon the owner's interest without the finding of  
18 liability. That's - - - that's the key, I think, is that  
19 in mechanic's lien there's a contractual liability. The  
20 owner has an increased value in the property. He hasn't  
21 paid for it. This is - - -

22 JUDGE ABDUS-SALAAM: The owner - - - the owner  
23 has no - - - I'm - - - I'm sorry. You said the owner  
24 didn't get notice of the lien until sometime later?

25 MR. CHANG: Until four - - - four years, four-

1 and-a-half years later - - -

2 JUDGE ABDUS-SALAAM: Four or five years later?

3 MR. CHANG: - - - after the fire. Yes.

4 JUDGE ABDUS-SALAAM: So the - - - are you saying  
5 that there is no time limit on when the lien needs to be  
6 filed?

7 MR. CHANG: No. Apparently, these liens last ten  
8 years.

9 JUDGE ABDUS-SALAAM: Right. I - - - that's  
10 understood. But - - - but once the lien is filed, the - -  
11 - the landlord would have notice of it?

12 MR. CHANG: Yes. The landlord would have notice  
13 of it. But you're - - -

14 JUDGE ABDUS-SALAAM: So if they were to file  
15 within thirty days, the landlord would know.

16 MR. CHANG: The landlord would know, and you're  
17 saying that the - - - that the remedy is for the landlord  
18 to force a foreclosure. But we're arguing that per se  
19 there is no justification for the HPD lien because there's  
20 no benefit as required or invoked by the two cases that I -  
21 - -

22 JUDGE STEIN: I'm - - - I'm confused. Are you  
23 arguing that - - - that there should be no right for HPD to  
24 have a lien under these circumstances? That - - - that the  
25 legislation, that there is somehow invalid or - - -

1 MR. CHANG: There is no benefit to the owner to  
2 balance it. The - - -

3 JUDGE STEIN: I understand that.

4 MR. CHANG: Yes.

5 JUDGE STEIN: But the administrative code  
6 provides for this lien. Now we can argue about whether it  
7 covers, you know, hotel expenses or - - - or what it  
8 actually covers, but - - - but the law provides for this  
9 lien. So I'm - - - I'm just confused as to whether you're  
10 arguing that it shouldn't provide for such a lien because  
11 there's no contractual relationship and so on and so forth.  
12 I mean the - - -

13 MR. CHANG: I'm - - - I'm saying that because  
14 there's no balancing of the interests that these statutes  
15 and regulations should be strictly construed - - -

16 JUDGE STEIN: Okay.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. CHANG: And also - - - if I may make another  
19 - - -

20 CHIEF JUDGE DIFIORE: You could complete your - -  
21 - your last thought.

22 MR. CHANG: Thank you. If the incurring of hotel  
23 expenses incurs - - - is incurred for a great length of  
24 time, it serves to entrench the tenant. It does not serve  
25 to relo - - - to induce the tenant to relocate voluntarily.

1 This is a change in the character of the labor and  
2 materials. This is a change in what the HPD regulations  
3 and statutes indicates, that it is supposed to just be to  
4 induce the tenant to relocate voluntarily. If you pay the  
5 - - -

6 JUDGE RIVERA: The tenant - - - the tenants have  
7 an incentive to find housing so they're not in these  
8 hotels.

9 MR. CHANG: Yes.

10 JUDGE RIVERA: I don't know that's your strongest  
11 argument.

12 MR. CHANG: In light of what - - - what I said,  
13 I'm - - - I'm suggesting that these statutes be strictly  
14 construed. And that if HPD views these relocation expenses  
15 as a - - - a civil punishment or penalties for an at-fault  
16 owner, then it goes beyond what the statute and the  
17 regulations suggest.

18 CHIEF JUDGE DIFIORE: Thank you, Mr. Chang.

19 MR. CHANG: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MR. SHWEDER: Thank you.

22 JUDGE FAHEY: Counsel, before you start, do you  
23 think you could clear up what is this four-to-five years,  
24 and they didn't receive notice or it seemed like it might  
25 not have been filed. What is that period?

1 MR. SHWEDER: Your Honor, I have no idea. That's  
2 something that he's saying today. That's not in the record  
3 whether he received notice or not.

4 JUDGE STEIN: Is that when the last payment for  
5 the hotel expenses was made?

6 MR. SHWEDER: I think what he's saying is that he  
7 didn't know that the - - - I guess what he's saying is that  
8 he didn't know that there was a - - - that the shelter  
9 expenses were accruing all these years. But that's not - -  
10 - I mean - - -

11 JUDGE STEIN: Right. Because they don't have to  
12 - - - you don't have to file a lien immediately, right?  
13 You have to file a lien within a certain period of time  
14 after the last expense is incurred, right.

15 MR. SHWEDER: That's - - -

16 JUDGE STEIN: So could - - -

17 MR. SHWEDER: That's correct.

18 JUDGE STEIN: - - - that be what happened here?  
19 You were - - - you were paying these expenses and you  
20 didn't bother to file a lien until four or five years  
21 later?

22 MR. SHWEDER: Well, that's right. And let me say  
23 as a policy, HPD notifies owners when they take in their  
24 tenants at the time they take them in. And there's no  
25 factual development here, which is another reason why we

1 can't be doing this at a summary discharge stage. I have a  
2 lot to cover, and I'm going to try to do it quickly. I  
3 want to go through the code quickly because my adversaries  
4 talk about the reasonable allowance provision as being the  
5 key one. I - - - I think that that applies, but I don't  
6 think it's the key one. You start with 26-301 which says  
7 that the "Commissioner has to provide relocation services  
8 that" - - - that he deems - - - "he or she deems  
9 necessary." Then you go to 26-305 says whenever relocation  
10 services are provided, under 301, those relocation services  
11 can be re - - - the cost of those can be recouped. That's  
12 what 305(1) says. You go to (2), and (2) basically has a  
13 non-exhaustive nonexclusive list of some of the examples  
14 that they include. We don't need to rely on this  
15 reasonable allowances as the one that provides shelter.

16 JUDGE STEIN: It's kind of curious, though, since  
17 it seems like the - - - the hotel expenses are - - - are  
18 the vast majority of - - - at least in these two cases, of  
19 what's being liened, that - - - that's not set forth in - -  
20 - in the code.

21 MR. SHWEDER: well, they - - - they very  
22 specifically didn't set forth everything. I mean they very  
23 specifically said here's the non - - -

24 JUDGE STEIN: Well, I'm saying that this is - - -  
25 you know, this is a - - - seems to be a major one - - - a

1           signification part of it. So - - -

2                   MR. SHWEDER: So if there's concerns about that  
3           you look to the legislative history. And you can - - -  
4           I've already described the 1997 history. We can go back to  
5           1968. In 1968 - - - and it's not in my brief,  
6           unfortunately, I looked at this when I was rereading the  
7           168 legislative history in preparation for this - - -  
8           there's a letter from the Real Estate Board of New York  
9           which says we are very opposed to this law because it's  
10          going to allow HPD to provide shelter, and there's not a  
11          time limit on it and we're very concerned about that. And  
12          the committee said we've received this letter, we recognize  
13          it, we - - - we suggest that you approve this law. So you  
14          can - - - and all the legislative history here really  
15          answers the questions if you have any concerns about the  
16          intent.

17                   JUDGE RIVERA: Yeah. But the issue about the  
18          hotel not being listed is a different one, is it not?

19                   MR. SHWEDER: Well, hotel is shelter. I mean we  
20          - - - they use - - -

21                   JUDGE RIVERA: No, no. I get your point. But  
22          I'm saying I don't know that you were responsive to Judge  
23          Stein.

24                   MR. SHWEDER: Well, I - - - I think point is if  
25          she - - - if her concern is that it's not specifically

1 listed and we're trying to figure out was it meant to be  
2 there, you can look to the legislative history and  
3 understand very clearly that the legislature meant it to be  
4 there. And in 1997 they made it easier to recoup these  
5 very expenses that were lasting for a year or more, which  
6 is the number that the First Department said can't work.

7 JUDGE RIVERA: Well, it's also no surprise that  
8 hotels are being used.

9 MR. SHWEDER: Right. And it is the main - - -

10 JUDGE RIVERA: For a very long time.

11 MR. SHWEDER: Right. Made that - - - but these  
12 are SROs. They're not - - -

13 JUDGE RIVERA: No. I understand.

14 MR. SHWEDER: Yeah. Okay. And I want to - - - I  
15 want to address this idea of a windfall. And I think that  
16 that's a really inappropriate way to describe what is  
17 happening here. First of all, from HPD's perspective, they  
18 want to move these people out as quickly as they can. They  
19 need the space. They have many people that are coming into  
20 their care. They also don't get a dollar-for-dollar  
21 recoupment of their expenses. Now they can recoup their  
22 shelter expenses, but there are many other costs that go  
23 into this that they don't even attempt to recoup. So  
24 there's a - - - there's a wide divide between what their  
25 costs are for doing this program and what they actually

1 have the - - -

2 JUDGE RIVERA: What are the other - - - what are  
3 the other types of expenses?

4 MR. SHWEDER: Well, there's moving expenses.  
5 There's - - - there's storage expenses, which they don't  
6 charge, even though they could, because it's very hard to  
7 break down individually how much would this be responsible  
8 for. There's the administrative costs of going through and  
9 trying to find permanent housing. So what they do is they  
10 really - - - they charge shelter, and they charge a small  
11 administrative cost, and that's all they charge. I think  
12 there was some discussion about whether this is something  
13 for the legislature. If - - - and, you know, to the extent  
14 there is a problem because these liens are taking a long  
15 time, that is not something that this court should be  
16 getting involved. I - - - I believe that the landlords, if  
17 they're concerned now because they're facing potentially  
18 large amounts, they can go to the legislature. They can  
19 say put a limit on this. But that hasn't happened. And in  
20 fact, every time it has come before the legislature, they  
21 have made it easier for HPD to do this because they  
22 recognize there are - - - there's a problem. The landlords  
23 here really just want to bring us back to 1968, pre-1968.  
24 Because the repercussions of the First Department's  
25 decision is that a landlord just has to sit on his hands

1 and not fix the apartment for a year or more and then the  
2 lien is going to be completely voided. There's not even  
3 going to be the amount that's appropriate. I mean the  
4 First Department looked at this and they said it's  
5 completely void. They didn't even say, well, there's an  
6 amount that you should be able to get. They just voided  
7 it, and that makes no sense. And really, what the First  
8 Department's decision does is give landlords incentive to  
9 do nothing, which is what they were doing prior to 1968 and  
10 why this law was needed then.

11 MR. SHWEDER: Thank you, counsel.

12 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Rivera v. Department of Housing Preservation and Development, No. 24 and Matter of Enriquez v. Department of Housing Preservation and Development, No. 25 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001

Date: February 16, 2017