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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CALLEN,

Respondent,

-against-

NO. 4

NEW YORK CITY LOFT BOARD,

Appellant.

20 Eagle Street
Albany, New York
January 5, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 4, Matter of
2 Callen v. New York City Loft Board.

3 Counsel?

4 MS. LAWLESS: Good morning, Your Honors. May it
5 please the court, Diana Lawless for the Appellant, New York
6 City Loft Board.

7 May I reserve three minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may have three minutes.

9 MS. LAWLESS: Thank you, Your Honor.

10 This court should reverse because it was rational
11 for the Loft Board to reject the tenant's attempts to
12 withdraw their Loft Law coverage application and direct
13 further investigation into coverage.

14 What the Appellate Division held here was that
15 the only thing the Loft Board could do is to accept a
16 withdrawal. But all that the - - - the Loft Board did was
17 do something routine. It rejected the settlement, and its
18 regulations allow it to remand.

19 Under - - -

20 JUDGE CANNATARO: So when you say reverse, you
21 really just mean reverse that one part of the Appellate
22 Division - - -

23 MS. LAWLESS: Yes. Yes, Your Honor.

24 JUDGE CANNATARO: Two thirds of it I would
25 imagine you are amenable to?



1 MS. LAWLESS: We're amendable to everything it
2 says about the agreement being reasonable for the Loft
3 Board to find that the agreement was - - - should - - - was
4 unreasonable underneath - - - under the law, and it should
5 not be enforced.

6 JUDGE CANNATARO: And - - - and the remittal,
7 right? Because they sent it back to the Loft Board for
8 further proceedings.

9 MS. LAWLESS: Sure. But I - - - I believe it
10 would be a different remittal.

11 The remittal that the - - - I believe, that the
12 current remittal would be that the Loft Board has to accept
13 a withdrawal remittal if we win is that would go back to
14 further proceedings or adjudication of the coverage
15 application.

16 JUDGE CANNATARO: Okay.

17 JUDGE GARCIA: So Counsel, just to follow up on
18 that - - -

19 MS. LAWLESS: Sure.

20 JUDGE GARCIA: - - - for me. What happens?
21 Let's say we agree with you, and the case goes back. What
22 happens in front of the Loft Board?

23 MS. LAWLESS: Sure. So this is a threshold
24 determination for coverage. The applications have been put
25 in at the earlier stage, right before there was a



1 settlement negotiation, there was a - - - a petition, there
2 was an answer, there was a - - - the landlord and the
3 tenants were not aligned on the different issues that had
4 to be resolved as to coverage - - -

5 JUDGE GARCIA: So let's say this never had
6 happened and that's where you were, right, in the
7 beginning. And the - - - and the tenant comes in and says,
8 you know what, forget it, I want to withdraw my
9 application. What does - - - what happens?

10 MS. LAWLESS: Well, I think it's - - - well, if -
11 - - if - - - if there had never been settlement
12 negotiations?

13 JUDGE GARCIA: Yeah.

14 MS. LAWLESS: If there'd never been settlement
15 negotiations, then the tenant would withdraw the
16 application, I think, under most circumstances. As my
17 adversaries point out, the Loft Board does look beyond it
18 and there's reasons like can you withdraw, and the only
19 situations where really the Loft Board has - - - had
20 withdrawals accepted in the past have to do with situations
21 where the tenant vacates the building, or there's no more
22 occupancy at issue. So in a case like this, the Loft Board
23 retains jurisdiction over a case when the occupancy is at
24 issue and needs to be resolved.

25 JUDGE GARCIA: So other than those circumstances



1 you described, and again, forgetting this history of up and
2 back, the parties come in, they say we want to withdraw,
3 and they don't meet those special circumstances, the Loft
4 Board says, no, keep going. And then what happens if they
5 don't show up?

6 MS. LAWLESS: Well, I - - - I - - - I've - - -
7 well, as my adversaries point out, they don't show up,
8 there is a situation where the Loft Board is allowed to say
9 that there's a default for the tenants, for not processing
10 their application.

11 However, here, I think it's - - - it's a - - -
12 it's very significant for the court to focus on the
13 situation here where we know, right, we know the reason,
14 and the reason - - -

15 JUDGE GARCIA: But - - - but again, I'm - - -
16 sorry - - -

17 MS. LAWLESS: Sure.

18 JUDGE GARCIA: - - - so stick with my
19 hypothetical. So then let's say there's a default, but the
20 Loft Board knows this is illegal based on what's already
21 been presented. And now there's a default. Aren't you in
22 the same circumstances you're in here?

23 MS. LAWLESS: No, Your Honor, we're not in the
24 same circumstances because we're not being forced to accept
25 that the only thing that can happen is to accept the



1 illegality of the agreement, right? The agreement should
2 not be enforced, but we're basing - - - and a term of the
3 agreement is the withdrawal. And the agency is not being
4 forced to say, we can't do anything about your illegal
5 agreement, we're going to have to basically put our stamp
6 on your illegal agreement.

7 JUDGE GARCIA: But why can't they - - - if they
8 didn't want to withdraw anymore, I think they would have
9 said that. Why can't they agree just to withdraw outside
10 the agreement now? We don't want to go back, you know,
11 it's - - - we want to withdraw now. And if they did that
12 in front of the Loft Board, you say, what - - - what could
13 you do? You'd default them, but the - - - the end game is
14 the same, and there's no adjudication on the Loft status,
15 and potentially, they're illegal.

16 MS. LAWLESS: Well, I think the difference, Your
17 Honor, is just the - - - the circumstances as it presented
18 itself. It didn't present itself as a pure, we want to
19 come here, and we've seen the light, this is not a lawful
20 building, we walk away. Then it's the Loft Board - - -
21 it's not the Loft Board's problem.

22 This became the Loft Board's problem because
23 they're, like, we're here before the Loft Board, we want to
24 resolve this dispute. It's a threshold issue. We still
25 don't - - - I cannot tell you whether or not these units,



1 these tenants, qualify for this protection under the Loft
2 Law.

3 JUDGE CANNATARO: Counsel, I agree that it's a
4 problem. But I think what - - - what Judge Garcia is
5 getting at is that in - - - in some ways, you're just sort
6 of delaying the inevitable. He's put - - - he's put forth
7 the scenario where the applicants just don't come back.
8 And one imagines that the application's going to be denied
9 based on their failure to appear to defend it. And now
10 you're stuck again with an illegal living situation and
11 that has to be resolved.

12 I'll propose another scenario to you. In this
13 case, the landlord has raised the defense that the
14 applicants don't fall within the correct window to qualify
15 for Loft Law coverage. Let's say somehow you could compel
16 them to continue litigating the application, and the ALJ
17 comes to the conclusion, yes, indeed, they do not fit
18 within the window. You're right back there. You're - - -
19 you're - - - you're at the illegal situation which you say
20 that you cannot tolerate.

21 So you know, it feels like on some level that
22 you're just kind of delaying the inevitable, or at least
23 there's a good possibility that you're just delaying the
24 inevitable with respect to this so-called illegal
25 situation.



1 MS. LAWLESS: Well, Your Honor, I'd like to take
2 the - - - the second part of what you said with this
3 hypothetical, that we're delaying the inevitable if there's
4 not a finding of coverage. Actually, that is - - - becomes
5 the inevitable, right? The threshold determination of the
6 Loft Board as an adjudicatory body, is to determine if
7 there is coverage, right? So there are plenty of
8 applications where coverage is denied. The Loft Board's
9 role is at an end there. So I think in your second
10 situation, our role is fulfilled.

11 But as to this idea that we're just delaying the
12 inevitable, yes, of course, these parties are now saying,
13 oh, well, we're just trying to walk around the Loft Law,
14 but I think it's - - - the importance here is a ruling from
15 the court. If the court rules that, you know, these
16 parties - - - the Loft Board has no choice, and these
17 parties have to walk away, then that's where we are. But
18 if the - - - if there's a reversal and the ruling is like
19 the ruling of the Second Department, where the - - - the
20 withdrawal can't be tolerated to allow them to waive the
21 Loft Law, then it's - - - maybe you know once there's a
22 ruling from this court - - -

23 JUDGE CANNATARO: Can I ask you - - -

24 MS. LAWLESS: - - - the court - - - sure.

25 JUDGE CANNATARO: Can I ask you about a different



1 scenario? Let's say you remand it to - - - to the AL - - -
2 or you remit it to the ALJ, and they - - - they maintain -
3 - - the applicants maintain, we do want to withdraw. If
4 the - - - if the ALJ says, you know, something like an
5 allocution, well, I can't force you to litigate this, but
6 you should know that if you withdraw the petition, it's - -
7 - the application, it's going to be denied. And in my
8 view, that's going to be an illegal tenancy and you'll be
9 subject to immediate removal by DOB.

10 Would that fulfill the - - - the - - - the Loft
11 Board's mandate to litigate through the issues to their
12 natural conclusion?

13 MS. LAWLESS: I - - - I - - - I don't think so
14 because I think that they're - - - they're full willing to
15 say now that we want to walk away from it. I think the
16 problem is in the idea of the agreement that they're
17 putting forward, which is they want their own private - - -
18 it's not like, oh, we - - - what you're saying, oh, well,
19 we don't qualify. They say there's a risk they don't
20 qualify. But they're, like, either way we want our private
21 version of the Loft Law.

22 JUDGE CANNATARO: I - - - you know, I get that,
23 but I think the problem I - - - I'm personally having is
24 that the - - - the Loft Board is expressing an intolerance
25 with the situation that there are several scenarios that it



1 has no power to address.

2 You - - - the Loft Board cannot issue a C of O.
3 The Loft Board cannot classify buildings as Class A or
4 Class B residential. The Loft Board is not DHCR. You
5 can't bring someone into rent regulation that way. And
6 it's - - - it's unfortunate that you don't have that sort
7 of plenary power, but there are plenty - - - the result of
8 that is, there are going to be plenty of situations where
9 you're going to leave people in illegal living situations.
10 And there's really, unfortunately, nothing you can do about
11 it.

12 However, I mean, with all due - - - you know,
13 with - - - I say that, acknowledging that the Appellate
14 Division in this case actually did view that there was a
15 path toward regulation even with a denial. So it - - - you
16 know, we could argue whether or how many cases end up with
17 an illegal tenancy, but you can't prevent all of those from
18 happening.

19 MS. LAWLESS: I - - - I think that's right, Your
20 Honor. But I think that where we are is the way that this
21 case was - - - the unique specific circumstances that were
22 presented here, which is within the Board's authority to
23 review an agreement. So I think that's the - - - it's a
24 very narrow case.

25 And under these circumstances, where there - - -



1 the Board was presented with an agreement, the terms were
2 illegal, the withdrawal was a term, to say that the only
3 thing the Board can do is to accept the withdrawal goes
4 against the explicit board regulation allowing that to
5 happen, and to the spirit and the intent of the - - - the
6 statute which is to set up a process to allow this dispute
7 to be resolved.

8 JUDGE GARCIA: Well, Counsel, what if we said - -
9 - I'm sorry, may I, Chief - - -

10 CHIEF JUDGE DIFIORE: Yes.

11 JUDGE GARCIA: If we said, you know, one, that's
12 not before us whether or not, I think, the argument being
13 that whether or not it was rational to reject the
14 agreement.

15 So let's say, you know, we've - - - that's
16 affirmed or not appealed, and our view would be could - - -
17 could this court just then send it back to the Loft Board
18 to say, you know, you can look to it - - - because you've
19 in - - - in essence, rejected the entire agreement - - -
20 I'm sorry, I'm not articulating this well - - - the entire
21 agreement, including the provision about withdrawal, which
22 was with prejudice, so we send it back to the Loft Board.
23 And there, they can seek to withdraw the application. And
24 then the Loft Board will decide it.

25 MS. LAWLESS: Well, Your Honor, they could always



1 seek to withdraw the application. But I think that if a -
2 - - a reversal in our favor would mean that the process
3 would continue so the Board could continue to evaluate the
4 application. Indeed, the Board could continue to evaluate
5 the terms of the settlement agreement.

6 JUDGE GARCIA: And I guess the problem you're
7 hearing up here is how can they force them to do that, and
8 force them to keep litigating that, when in an ordinary
9 case, they would just move to withdraw and - - - or
10 default? So what would, I guess, be the purpose of sending
11 it back?

12 MS. LAWLESS: Well, I think the purpose is that
13 the - - - it - - - it establishes under the - - - the
14 agency's authority as given to it by the - - - by the
15 legislature, that this statute isn't indifferent to the
16 resolution of a dispute like that. The objection is for
17 the buildings to become legalized, and the Loft Board has
18 the say about how the process continues.

19 And to say that the Board's hands are tied at a
20 part which is an early dispute resolution portion of - - -
21 of a proceeding, it - - - it - - - as I said, it runs
22 against what the - - - what the Board's regulations itself
23 say, and at - - - I believe it runs against the spirit of
24 the statute. And I think that that's what the Dom Ben
25 Court properly recognized as the - - -



1 JUDGE RIVERA: Counsel, I'm sorry, if I can just
2 interrupt you, I'm on the screen.

3 MS. LAWLESS: Yes, sorry.

4 JUDGE RIVERA: Hello, happy New Year. My
5 apologies.

6 So I just want to clarify something that I'm not
7 sure is so obvious from the law, the regs, or what you've -
8 - - you - - - the position you have taken.

9 Is it the Board's position that it - - - if
10 there's no application you could go and investigate and
11 determine on your own that this building is - - - needs to
12 go through the Loft Board process; do you have that
13 authority? Or must you - - -

14 MS. LAWLESS: No - - -

15 JUDGE RIVERA: - - - act only upon an
16 application?

17 MS. LAWLESS: The way the statute's set up it
18 acts upon registration or application, so - - -

19 JUDGE RIVERA: Okay. That's - - - that's what I
20 thought, okay.

21 So now then let - - - let me ask you this. Let's
22 take the hypothetical where there is an application, if
23 it's - - - it's hotly contested, it's no so obvious what -
24 - - what the outcome will be, and as you're already hearing
25 from other members of the bench, the tenants decide to



1 withdraw, maybe they've reached the conclusion this is not
2 worth it or - - - for whatever reason. Not - - - not the
3 one you have in this case necessarily. And - - - so the
4 Loft Board would then choose not to let them withdraw
5 because of course you don't know whether or not it's
6 illegal?

7 MS. LAWLESS: I - - - I think that there's been -
8 - - you know, there's businesses and agencies that's
9 existed for forty years. There's many administrative
10 decisions. There's been within the administrative
11 decisions, there's been evaluations, there's a multiple-
12 factor test about that the agency looks at internally about
13 whether or not the application should be withdrawn with
14 prejudice. But I think in the great, the largest set of
15 circumstances, it's when there's no longer an occupancy.

16 But yes - - -

17 JUDGE RIVERA: Okay. Well, so let me - - - so
18 it's a yes. Thank you. Okay.

19 So then if - - - but if - - - if you didn't let
20 them withdraw, you would then proceed with an investigation
21 without their participation?

22 MS. LAWLESS: Well I don't have a yes - - -

23 JUDGE RIVERA: Is that the position of the Board?

24 MS. LAWLESS: So I'd say first of all, I don't
25 have a categorical, yes, that we would let these people



1 withdraw specifically, it's this specific case.

2 But no, there's no further role for the Loft
3 Board, right? They're left to the devices, right, they're
4 left to the other harsher, right, remedies, because right
5 now - - - right now, for sure, this is an illegal
6 occupancy. So they're kind of left to - - - left to the -
7 - - the wolves of the other more harsh government
8 enforcement of a vacate order on the building and - - - and
9 other things. So this is a presumptively illegal
10 occupancy.

11 They have no - - -

12 JUDGE RIVERA: Okay. Let me - - - let me ask you
13 this. In - - - in a situation where there is another path,
14 obviously the Appellate Division here thought there was
15 another path, what would you do?

16 MS. LAWLESS: Well, there is no other path. So
17 I'd like to - - - to focus on that part of the - - -

18 JUDGE RIVERA: Well, no, no, take my hypothetical
19 that - - -

20 MS. LAWLESS: Okay.

21 JUDGE RIVERA: - - - there is an actual other
22 path, that you're not disputing the other path.

23 MS. LAWLESS: I - - - I can't - - - I'm sorry,
24 Your Honor, I'm having trouble taking your hypothetical
25 because there is not another path.



1 JUDGE RIVERA: So I'm giving you a hypothetical
2 where the parties, and even the Loft Board, sees that there
3 might be another path. I understand that you think
4 factually and legally the path they've described for this
5 particular building, this horizontal way of aggregating the
6 - - - the units, would not count. But let's assume for one
7 moment, there is. What - - - what would be the - - - what
8 would be the danger? Why doesn't that - - - why doesn't
9 that support the purposes of the - - - sort of the rent
10 stabilization law generally to allow them to pursue the
11 other path?

12 MS. LAWLESS: Well, I apologize for fighting your
13 hypothetical, Your Honor, but the - - - the path - - - but
14 they see a separate path too. They see a separate path to
15 rent regulation. I don't see another path to legalization
16 of the building. So if there were another path, then there
17 could be another path. But I just don't see another path
18 to legalization of the building. This is the only form
19 that the legislature has allowed for this specific set of
20 buildings, which are commercially residential - - -
21 commercial C of Os, residential occupancy, no residential C
22 of O to convert while the tenants are living inside.

23 So it's a very narrow circumstance and I - - - we
24 firmly believe that is the only path to legalization,
25 whether or not DHCR has accepted or taken an application



1 for - - -

2 JUDGE RIVERA: So in your view, the sticking
3 point is that they would continue to reside during the
4 process?

5 MS. LAWLESS: The - - - right, they would reside
6 illegally - - -

7 JUDGE RIVERA: So if they - - - if they had some
8 agreement where they would temporarily leave the premises
9 while they - - - they pursued the path to legalization,
10 that would not be a problem, correct?

11 MS. LAWLESS: They wouldn't - - - I don't believe
12 under the circumstances, they would even need the Loft Law
13 - - -

14 JUDGE RIVERA: Um-hum.

15 MS. LAWLESS: - - - because they wouldn't be
16 living there. Nobody would be living there during - - -
17 would be living - - -

18 JUDGE RIVERA: But the point - - - the point is
19 to change it, right, so that the - - - so - - - so that
20 there is no barrier. That - - - you have to do something.
21 You're either going through the Loft Law or you're going
22 through some other path.

23 MS. LAWLESS: There would have to be another path
24 that I don't see existing. Yes, Your Honor.

25 JUDGE RIVERA: Okay, thank you.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel - - -

2 JUDGE CANNATARO: Would you permit withdrawal in
3 that last scenario?

4 MS. LAWLESS: Wait, which - - - wait, Judge
5 Rivera's scenario? I'm sorry.

6 JUDGE CANNATARO: When they agreed to vacate,
7 would - - - would you permit withdrawal then?

8 MS. LAWLESS: If the tenants left the occupancy,
9 we would most - - - we would - - - yes, we would allow
10 withdrawal if the tenants were not occupying the building.

11 JUDGE CANNATARO: Sorry, Chief.

12 CHIEF JUDGE DIFIORE: Thank you, Counsel.

13 MS. LAWLESS: All right. Thank you, Your Honors.

14 CHIEF JUDGE DIFIORE: Counsel?

15 MS. SANDERCOCK: May it please the court, my name
16 is Margaret Sandercock. I represent the tenants in this
17 case with the exception of Richard Fiscina. He was
18 represented by counsel at the time he entered into the
19 settlement here, but he is pro se at the present time.

20 I will argue today that the decisions below by
21 the Supreme Court and the Appellate Division must be
22 affirmed because parties must not be compelled to litigate
23 Loft Law coverage against their will.

24 JUDGE GARCIA: Counsel, I'm sorry to interrupt
25 you. But it's the - - - is the agreement to withdraw with



1 prejudice part of an overall agreement or is it separate?

2 MS. SANDERCOCK: It's part of an overall
3 agreement, Judge.

4 JUDGE GARCIA: So if they had the authority to
5 reject that, what's the harm in now us sending you back to
6 the Loft Board where you can move to withdraw your
7 application?

8 MS. SANDERCOCK: Well, Your Honor, the settlement
9 is in other ways very beneficial to my clients. It will
10 prevent them from having to engage in perhaps several other
11 rounds of litigation because the Loft Law is a litigious
12 statute. And there are various points which - - -

13 JUDGE GARCIA: But even without - - - even
14 assuming everything else is rejected in that settlement
15 agreement. I mean because - - - that's not here, as I
16 understand it. So all we're deciding here is do you as
17 tenants get to withdraw your application before the Loft
18 Board with prejudice assuming everything else in that
19 agreement's no good. But you still want that? You still
20 want to withdraw with prejudice?

21 MS. SANDERCOCK: Well, Your Honor, the Loft Board
22 can't stop my clients from refusing to litigate the
23 coverage here themselves.

24 JUDGE GARCIA: No, no, no, I get that point. But
25 what is the difference then if this goes back to the Loft



1 Board because that overall agreement was rejected and - - -
2 with basis. And the only issue now is you go before the
3 Loft Board and you say, despite the fact that you've
4 rejected my agreement, I - - - tenants, we still want to
5 withdraw this application with prejudice.

6 MS. SANDERCOCK: Your Honor, I feel that the
7 policy that the Loft Board occasionally adopts is quite
8 arbitrary because there's only been six rejected cases in
9 the history of the Loft Board. And there's been at least
10 125 settlements that weren't rejected.

11 It interferes with my ability to counsel my
12 clients, and other counsels' ability in the same regard.
13 We can't prevent people from wasting money on litigation
14 that they may not win, for example.

15 JUDGE GARCIA: But this would be one proceeding,
16 you're back in front of the Loft Board, or you file a
17 letter, or a stip saying we move to withdraw with
18 prejudice.

19 MS. SANDERCOCK: Let me try to go around it this
20 way.

21 JUDGE GARCIA: Well, you've tried so far.

22 MS. SANDERCOCK: The - - - the problem that we
23 have with the city's position is that there are many other
24 types of tenancies in New York City that are not subject to
25 a C of O requirement. Tenement buildings typically don't



1 have a C of O. Brownstone houses typically don't have a C
2 of - - - C of O. AIR - - -

3 JUDGE GARCIA: But why couldn't you - - -

4 MS. SANDERCOCK: - - - artist in residence law,
5 don't have - - -

6 JUDGE GARCIA: - - - argue this all - - -

7 MS. SANDERCOCK: - - - don't have a C of O.

8 JUDGE GARCIA: - - - why can't you make this all
9 in a - - - all we're talking about is a process here. So
10 why can't you make all of these, which sound like very
11 sound arguments, to the Loft Board in a letter saying, we
12 would - - - we - - - the tenants seek to withdraw their
13 application with prejudice?

14 MS. SANDERCOCK: Your Honor, I feel that we've
15 already done - - - done that because the agreement says
16 we're going to withdraw it with prejudice.

17 JUDGE GARCIA: But the agreement was rejected.

18 MS. SANDERCOCK: The - - - the Loft Board very
19 regularly allows people to settle their cases without
20 investigating the settlement in any way.

21 JUDGE CANNATARO: Counsel, I'm a little confused
22 because you started by saying that you wanted to affirm the
23 Appellate Division's decision. And one of the elements of
24 the Appellate Division decision is that the Loft Board - -
25 - the Loft Board does maintain the right to reject



1 settlements that it finds inappropriate.

2 But now, I think I hear you answering questions
3 intimating that you - - - you want to be able to withdraw
4 the petition, but you want to preserve the settlement terms
5 that were arguably the quid pro quo for the withdrawal.
6 And that's - - - that would not be an affirmance, would it?

7 MS. SANDERCOCK: Your Honor, I believe that the -
8 - - the decision of the Appellate Division is sufficiently
9 favorable to the issues that are important to my clients
10 and other Loft Law tenants, that an affirmance would be
11 appropriate.

12 JUDGE CANNATARO: The decision for - - -

13 MS. SANDERCOCK: The Appellate Division found
14 that there is other - - - there are other paths to
15 legalization and what we want is to be able to pursue one
16 of those other paths for this building.

17 JUDGE CANNATARO: Well, I think the one thing
18 that is indisputably true at this point is that if - - - if
19 you were allowed to withdraw your application at this point
20 without receiving coverage under the Loft Law, your - - -
21 your clients are living in a building without a C of O and
22 there is no legal basis for their residence at the moment
23 it happens; is that not correct?

24 MS. SANDERCOCK: Your Honor, the Loft Board, and
25 other city agencies, do always retain the discretion and



1 the jurisdiction to remove people from buildings if they
2 feel there's any actual risk.

3 One of the problems in this case is there's been
4 no factfinding that there's any actual risk to - - - to my
5 clients. And as I had already briefly mentioned, there are
6 various categories of other buildings in the City of New
7 York that lack Cs of O. They are not supervised by the
8 Loft Board to see if they get their C of O. We have an
9 agreement here in place that a C of O will be obtained for
10 this building.

11 So I - - - I don't see how there's any harm that
12 should be troubling the Loft Board relative to - - -

13 JUDGE WILSON: The - - - the point that is
14 confusing me which maybe is also what's confusing Judge
15 Cannataro is that - - -

16 MS. SANDERCOCK: Um-hum.

17 JUDGE WILSON: - - - the Appellate Division found
18 that the agreement you have in place is against public
19 policy.

20 MS. SANDERCOCK: I have to say, Your Honor, that
21 I don't - - - I don't read the agreement that way. How I
22 read the Appellate Division's decision in this case, and
23 I'm - - - Dom Ben Realty, the Second Department decision
24 is, of course, completely different - - - but how I read
25 the Appellate Division's decision in this case is that



1 there's an alternative plan to - - - an alternative path to
2 legalization for these tenants. And that they need to be
3 allowed to pursue that. And that is what we seek to have
4 affirmed.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 MS. SANDERCOCK: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MS. CRUZ: Good morning, Your Honors. May it
9 please the court, Magda Cruz, for the owner of this - - -
10 of this building.

11 I would like to begin by clarifying that there is
12 a C of O for my client's building, both the front of it as
13 well as the rear building which is at issue here. In fact,
14 it is a mixed use building. There - - - it provides for
15 partial residential use.

16 JUDGE WILSON: Where is that C of O in the
17 record?

18 MS. CRUZ: So it is not in the record, Your
19 Honor. However, I - - - I indicated in my brief where it
20 is in the Department of Building records, and I provided
21 the citation. It's a public record. It's irrefutable.
22 And the city doesn't contest that.

23 So - - -

24 JUDGE RIVERA: So is your position, Counsel - - -
25 I'm sorry, I'm on the screen. Is - - - is your - - -



1 hello.

2 MS. CRUZ: Hello.

3 JUDGE RIVERA: Is your position then that the
4 issue is moot?

5 MS. CRUZ: No, it's not that it's moot because
6 clearly the existing C of O is not a complete residential
7 use for this building. It is only one floor, so therefore,
8 the lofts at issue are technically categorized as non-
9 residential on the existing C of O.

10 But our position, Your Honor, is not that these
11 units are illegal per se; there's never been a
12 determination of that, Your Honors. This proceeding came
13 before the Loft Board, and right from the beginning,
14 there's never been a coverage determination. We don't know
15 if these tenants would even qualify for Loft Law coverage.
16 The matter was settled transparently in front of an ALJ.

17 We are basically being punished by the city or
18 the Loft Board for coming forward, coming together, to try
19 to legalize these units, to actually go through the process
20 to render these tenancies as rent stabilized. These
21 apartments, today, are registered with DHCR, these tenants
22 are protected under the rent stabilization law, my client
23 cannot evict them, their rents are registered as legal
24 regulated rents - - -

25 JUDGE CANNATARO: Leaving coverage out of it, and



1 going back to the C of O, is it your position that this
2 mixed use C of O that's somewhere at - - - at DOB actually
3 authorizes the residents that are taking place right now,
4 to the extent that if a determination is made that there is
5 no Loft Law coverage, or a withdrawal results in no Loft
6 Law coverage, that this would not be an illegal tenancy?

7 MS. CRUZ: I can only tell you definitively that
8 to date, there has never been a Department of Buildings
9 violation issued against this building for illegal
10 occupancy. And I can also tell you definitively that there
11 is a C of O for the rear building in which one of the
12 floors permits residential use. It is a mixed use C of O.

13 JUDGE WILSON: Can I - - - can I try to get us
14 back to what I think is the issue before us, which is
15 whether it was irrational for the Loft Board to say, no,
16 you can't withdraw the application?

17 MS. CRUZ: No, absolutely it was irrational.

18 JUDGE WILSON: Why?

19 MS. CRUZ: Because as my colleague indicated, as
20 well as the questioning of the bench, when a tenant comes
21 before the Loft Board with a coverage application, at any -
22 - - at - - - certainly, at the beginning of the
23 proceedings, there's no mandate for the tenant to prosecute
24 it. And there have been many instances where tenants
25 before the Loft Board, living in admittedly illegal lofts,



1 meaning there's only commercial use allowed for the loft,
2 and they withdraw.

3 JUDGE WILSON: And there have been other
4 circumstances where they haven't withdrawn?

5 MS. CRUZ: I am not aware of a case before the
6 Loft Board where they have precluded withdrawal.

7 JUDGE WILSON: Different - - - that's a different
8 question.

9 MS. CRUZ: And - - -

10 JUDGE WILSON: That's a different question. What
11 I'm asking is, is it a foregone conclusion that every time
12 the Loft Board concludes that an agreement is against
13 public policy - - -

14 MS. CRUZ: Um-hum.

15 JUDGE WILSON: - - - the tenant has withdrawn the
16 case?

17 MS. CRUZ: No. I - - -

18 JUDGE WILSON: Okay, so we don't - - -

19 MS. CRUZ: - - - cannot say that.

20 JUDGE WILSON: - - - so we don't know - - -

21 MS. CRUZ: Yes, but - - -

22 JUDGE WILSON: - - - what the result here is
23 going to be.

24 MS. CRUZ: - - - but we also don't know whether,
25 a, this - - - these - - - these tenants would qualify for



1 coverage - - -

2 JUDGE WILSON: Right.

3 MS. CRUZ: - - - we don't know that the occupancy
4 is illegal - - -

5 JUDGE WILSON: Right. And so if we don't know
6 these things, why shouldn't we say, this goes back to the
7 Loft Board and you can make whatever arguments you want
8 about that, or I move to withdraw?

9 MS. CRUZ: They will most definitively - - - most
10 definitely they will withdraw the application. And so this
11 is really an act of futility - - -

12 JUDGE WILSON: But why - - -

13 MS. CRUZ: - - - and let me just clarify quickly
14 - - -

15 JUDGE GARCIA: I'm sorry, Counsel? Counsel?
16 Counsel, I'm sorry, to what - - -

17 MS. CRUZ: I'm sorry, my time is up. May I?

18 JUDGE GARCIA: - - - why if they will - - - are
19 going to withdraw, why is it irrational and the Board - - -
20 and they certainly have authority to send it back for
21 further proceedings, why is it irrational to send it back
22 and ensure that the tenants, without the benefit of the
23 rest of this agreement, which has been rejected, now wish
24 to pursue a withdrawal with prejudice, and just have them
25 make that before the Board? You're not precluded from



1 doing that.

2 MS. CRUZ: Well, at this time, two - - - two of
3 the Supreme Court and the Appellate Division both held that
4 there was no rationality to force a remittal for that - - -
5 that process, to simply come before and say, I withdraw.

6 But let me just say something also to clarify
7 based on your questioning. The Appellate Division did not
8 find that the settlement agreement per se was against
9 public policy. That's the argument of the city. In fact,
10 we argued that it was not against public policy, that these
11 units were now rent stabilized, that they would probably be
12 deemed rent stabilized without the need even to go through
13 Loft Law coverage.

14 I cite in my - - - in my brief the case of Milne,
15 in - - - in which this court held that when units are
16 subject to rent stabilization, or rent control, more
17 specifically, there's no need to go through Loft Law
18 coverage proceedings. It is not an inconsistent situation
19 for a building to be protected under the rent laws under
20 one statutory scheme to forego Loft Law legalization
21 process. They may not even need it.

22 Accordingly, Your Honors, I respectfully request
23 that this court affirm the Appellate Division's order to
24 the extent that it held it was not irrational to allow
25 these tenants to withdraw their Loft Law coverage



1 application.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 MS. CRUZ: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

5 MS. LAWLESS: Thank you, Your Honors.

6 To start, I just want to clarify the irrefutable
7 certificate of occupancy. Even on page 7 of - - - of my
8 colleague's brief, it says that it's a five-story building
9 approved for dwellings on the first story and for factory
10 and storage on the upper floors. I - - - I don't - - - I'm
11 under the impression that doesn't cover the current
12 occupancies, and also I believe they pleaded that. I - - -
13 I couldn't find the exact page, but I believe they pleaded
14 that in their Article 78 petition. I think it's also - - -
15 acknowledges just the front building C of O in the - - -
16 the agreement itself.

17 Going to - - - to Judge - - - what Judge Wilson
18 was saying, does it always, is it inevitable, do we know
19 what's going to happen? You know, we looked into it. I -
20 - - I don't know that we know. There's - - - I know for
21 sure there's two cases, the Parrish case and the Dom Ben
22 case, which were litigated through the courts. I know that
23 neither of those cases were resolved with an ultimate
24 withdrawal. One, there was the - - - no longer an
25 occupancy. And the other is continuing, there is a



1 registration by the landlord. And there is a continuing
2 process before the Loft Law about that case.

3 As - - - as Your Honors have noted, this - - -
4 everything is together in - - - in the agreement that they
5 - - - basically, the Appellate Division said that you had
6 to reject it. And I believe - - - I read the decision to
7 say, as Your Honors have said in - - - in my opening
8 argument, that - - - that Appellate Division found it was
9 rational to reject the agreement as public policy. So we
10 only want the second part of that, which is the Board's
11 allowed to do what its rules allow it to do, which is to
12 continue the process. Once the agreement is rejected for
13 the parties to come anew back to the Loft Board in changed
14 circumstances, as - - - as Judge Garcia said, the
15 circumstances are changed, the agreement's been rejected.
16 The parties can come together now before the Loft Board and
17 continue to hash out the issues.

18 JUDGE CANNATARO: Can I just ask you, and I think
19 this might be a version of another question you got.

20 If - - - if that were to happen, and let's say
21 the tenants default, they don't show up, would the Board be
22 authorized to continue its investigation under the
23 authority that you referred to, to self-prosecute?

24 MS. LAWLESS: Oh, Your Honor, I don't think I
25 mentioned - - - I didn't mean to mention anything about



1 self- prosecuting. So I don't think that the Board would
2 be continuing an investigation into a building where
3 there's no coverage - - - because all the Board does is,
4 right, the coverage, the issues from coverage through the C
5 of O and the legalization.

6 So I don't think there's an independent
7 investigatory authority of the Loft Board to hash out
8 whether or not buildings are covered or not without an
9 application by someone.

10 JUDGE CANNATARO: So if the applicants default,
11 the case is over?

12 MS. LAWLESS: So far as it concerns the Loft
13 Board, but not as it concerns the - - - the - - - the
14 violations of the MDL.

15 JUDGE CANNATARO: Sure. But - - -

16 MS. LAWLESS: Correct.

17 JUDGE CANNATARO: - - - that's kind of outside
18 your purview, that's what I was saying before.

19 MS. LAWLESS: Correct.

20 JUDGE CANNATARO: Yeah.

21 JUDGE SINGAS: Counsel, can I just ask, how would
22 you frame the issue that's before this court?

23 MS. LAWLESS: I think I'd frame the issue is
24 whether it is rational once the Loft Board rejected the
25 tenant's attempts to with - - - I guess - - - hold on.



1 It's a little hard because there's two parts.

2 I think that is it rational for the Board to be
3 required to accept the withdrawal under its rules, under
4 its authority, after it properly determined that it
5 rejected a - - - a settlement agreement.

6 JUDGE SINGAS: Okay.

7 MS. LAWLESS: So I think it's that limited issue
8 on the withdrawal.

9 And just to clarify one more point about what
10 everyone's been saying about rent stabilization. I think
11 rent stabilization and legal occupancy are two very
12 different things. And I think that this court so held in
13 the Chazon case.

14 CHIEF JUDGE DIFIORE: Thank you.

15 JUDGE RIVERA: Counsel, can I ask you - - -

16 CHIEF JUDGE DIFIORE: Yes.

17 JUDGE RIVERA: - - - I'm on the screen again.

18 So I just want to clarify the understanding - - -
19 your understanding of what the Appellate Division decided
20 on the settlement. Was that I - - - I understand why the
21 landlord's attorney is taking a different position on this.
22 It does seem that the Appellate Division is saying that
23 you're - - - you're within your authority to reject a
24 proposed settlement, right?

25 MS. LAWLESS: Right. So - - -



1 JUDGE RIVERA: But - - - but - - - but once they
2 decided to withdraw, the authority's done. So yes, you - -
3 - yes, it was rational to reject the settlement, you could
4 do that. But once they decided to withdraw, you can't then
5 deny their opportunity with - - - to withdraw.

6 So I don't see that as saying that the
7 settlement, on its face - - - on its face, violates public
8 policy.

9 MS. LAWLESS: Oh, Your Honor, I'm trying to flip
10 through and find where I - - - I - - - they said - - - I
11 guess I'll turn to the last page - - -

12 JUDGE RIVERA: I'm looking - - - I'm looking at
13 the sentence. Perhaps, I'm looking at the - - -

14 MS. LAWLESS: Right. Page 738.

15 JUDGE RIVERA: Excuse me. Counsel?

16 MS. LAWLESS: Yes.

17 JUDGE RIVERA: Excuse me. Because I see what
18 they wrote. They say that we find that there's no valid
19 reason for the Board's refusal to grant the tenant's
20 request to withdraw the conversion application. We do not
21 agree with the tenants that the Loft Board's rejection of
22 the settlement, as a vehicle for conversion to rent
23 stabilization, has no rational basis - - -

24 MS. LAWLESS: Right.

25 JUDGE RIVERA: - - - I think recognition - - -



1 let me finish.

2 I think it's a recognition of the argument you
3 were making before about your concern about people being in
4 a - - - a unit that it's - - - it's illegal, pure and
5 simple, as this court has recognized before. But as - - -
6 as the Appellate Division then goes on to say, but once
7 they've chosen to withdraw, the authority ends. So yes,
8 you could deny the settlement, but that's as far as you can
9 go.

10 I - - - again, I don't see that as sort of the
11 express statement that you make it to be. It - - - it's
12 just a recognition that, of course, it's not irrational of
13 you to say, no, you can't enter an agreement that we're not
14 certain will lead to a legal unit.

15 MS. LAWLESS: Well, Your Honor, I guess I just
16 read it more broadly about the rationality of - - - of the
17 agency's decision.

18 But I - - - I think I want to just focus on the
19 end point, the reasoning they gave for the - - - saying
20 that the withdrawal has to happen. It's because the
21 tenants relinquished their rights to proceed to conversion
22 pursuant to the Loft Law. And we see that as there's no
23 choice. And the Appellate Division - - - you accepted the
24 arguments that there was a choice, that stabilization
25 equals legal occupancy. And I think that's - - - that's



1 clear from the Appellate Division decision.

2 So I think the error is that there is not
3 actually a choice, and that the - - - the Loft Board should
4 be allowed to - - - to continue to resolve the issue.

5 JUDGE RIVERA: Well, there is a choice, it - - -
6 well, even under your view, there is a choice if they leave
7 the premises? Even under your view.

8 MS. LAWLESS: Sure. They can leave the premises,
9 yes.

10 JUDGE RIVERA: Right. So there is a choice.
11 Whether - - - whether or not you agree with the Appellate
12 Division's assessment of the argument for why they think
13 they can legally convert this thing is another story. But
14 you can't say that there's never a choice. That strikes me
15 as not correct.

16 MS. LAWLESS: Well, I - - - I - - -

17 JUDGE RIVERA: I mean, whether or not it's a
18 valid one, is another story.

19 MS. LAWLESS: No, I agree. Right. No, I - - - I
20 agree, Your Honor.

21 I guess we would say there's two valid choices.
22 The two valid choices are leave or for the landlord to
23 register. The other choice that exists that we believe is
24 an invalid one under the MDL is to just walk away, ignore
25 everybody, and take their chances on - - - on a vacate.



1 JUDGE RIVERA: But I think the Appellate
2 Division's decision is a narrow one in this sense. It - -
3 - the Appellate Division's decision is, look, there's
4 another path. And so if they want to withdraw and pursue
5 that path, you cannot force them to litigate. You have no
6 authority to force them to litigate. That - - - that is -
7 - - to me, it's a very narrow decision.

8 MS. LAWLESS: Um-hum. Yes.

9 And even accepting that, I think, Your Honor, I
10 think that our position is that it's reasonable for the
11 Board under these very specific circumstances, these very
12 narrow circumstances, presented with this agreement, where
13 the terms are illegal and they want to withdraw, that it
14 was rational for the Board to make a - - - it was a
15 reasonable interpretation of its own regulations that
16 explicitly allow for a remand to let the remand happen
17 instead of the Appellate Division saying you can't remand
18 at all, the only thing you can do is let them walk away.

19 CHIEF JUDGE DIFIORE: Okay, thank you - - -

20 JUDGE RIVERA: So remand it - - -

21 CHIEF JUDGE DIFIORE: - - - thank you, Counsel.

22 JUDGE RIVERA: - - - like Judge Garcia has argued
23 for - - -

24 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
25 you.



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

I, Amanda M Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Callen v. New York City Loft Board, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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