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COURT OF APPEALS

STATE OF NEW YORK

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PAULA WHITE,

Respondent,

-against-

No. 43

DENNIS FARRELL, et al.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
February 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's start with  
2 number 43. Counselor, do you want any rebuttal time?

3 MR. CIRANDO: Yes, Your Honor. If it  
4 please the court, two minutes, if necessary.

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure.

6 MR. CIRANDO: Thank you.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. CIRANDO: May it please the court, my  
9 name is John Cirando from Syracuse, New York. And  
10 before I begin, Your Honor, I'd like to congratulate  
11 Judge Rivera on becoming a member of the Court of  
12 Appeals. It's sort of bittersweet. Last time I was  
13 with Judge Rivera I was asking her some questions.

14 CHIEF JUDGE LIPPMAN: I know that,  
15 counselor. Now this time, the table's turned.

16 MR. CIRANDO: The tables are turned.

17 CHIEF JUDGE LIPPMAN: Yes.

18 JUDGE RIVERA: I'll be just as kind.

19 MR. CIRANDO: Thank you.

20 CHIEF JUDGE LIPPMAN: Counselor, tell us,  
21 is there anything beyond this Di Scipio case that  
22 supports your position as to the formula for damages  
23 in this kind of situation?

24 MR. CIRANDO: No, Di Scipio, I think is  
25 dispositive of the determination. And I think what

1 the - - -

2 JUDGE GRAFFEO: Do you think it was part of  
3 the rationale of the Appellate Division, or was it  
4 dicta in that case, since they were really looking at  
5 a request for consequential damages?

6 MR. CIRANDO: No, I don't think it was  
7 dicta. I think with - - - insofar as the Fourth  
8 Department is concerned - - - and if I may digress,  
9 the Fourth Department previously in the case relied  
10 on by the trial court here, Ryan v. Corbett,  
11 specifically said they're not going to follow  
12 Di Scipio. And they followed two other cases in the  
13 Third Department that were - - - that the Third  
14 Department doesn't even follow anymore, because it  
15 seems like Di Scipio is the rule of law in the Third  
16 Department.

17 CHIEF JUDGE LIPPMAN: Why isn't Di Scipio  
18 just a wrong statement of the formula?

19 MR. CIRANDO: No, I don't think it's a  
20 wrong statement of the formula.

21 CHIEF JUDGE LIPPMAN: Why not?

22 MR. CIRANDO: Because it says the damages  
23 are either the difference between the contract price  
24 and the lower sale price - - -

25 CHIEF JUDGE LIPPMAN: Um-hum.

1                   MR. CIRANDO: - - - okay. But if there's  
2 no sale, then you look at the difference between the  
3 contract price and the fair market value of the time  
4 of the breach. And I think when you look at the  
5 other two cases in the Third Department, you'll see  
6 that those cases were cases that were after trials.  
7 And the question there was, was the evidence of the  
8 fair market value at the time of the breach otherwise  
9 as opposed to the two.

10                   And at the bottom line - - - I keep going  
11 back and forth on the two cases - - - but at the  
12 bottom - - -

13                   CHIEF JUDGE LIPPMAN: Sure, go ahead.

14                   MR. CIRANDO: - - - line of the Ryan v.  
15 Corbett case, the Fourth Department indicated the  
16 evidence of the expert in that case did not outweigh  
17 the evidence of value established by the subsequent  
18 sale. So the subsequent sale, I think, is the  
19 harbinger of what the value is for the end point in  
20 regard to the damages.

21                   JUDGE SMITH: Well, in a lot of - - - in a  
22 lot of cases, the subsequent sale is the best  
23 evidence of market value - - -

24                   MR. CIRANDO: Yes.

25                   JUDGE SMITH: - - - right?

1 MR. CIRANDO: Yes.

2 JUDGE SMITH: And it's - - - you don't  
3 often - - - it looks like it doesn't often come up  
4 where you have the market value and the subsequent  
5 sale really as real evidence that they're different.  
6 Why - - - I mean, so - - - assuming we have our  
7 choice, which is the better rule? I mean, you're  
8 talking about the case where there's a - - - the  
9 default and then the seller resells, moving with due  
10 diligence, but in the interval, the market declines.  
11 What should the value be in that case - - - the  
12 measure of damages?

13 MR. CIRANDO: Well, I think, how do we  
14 determine the measure of damages? The best way - - -  
15 the fairest way to determine the measure of damages  
16 or the value is how much can you sell it for in an  
17 arm's-length sale.

18 JUDGE SMITH: Well, I mean, I understand  
19 that - - - I think - - - I think all the cases, as I  
20 read them, seem to say that the arm's-length sale is  
21 evidence of market value.

22 MR. CIRANDO: Yes.

23 JUDGE SMITH: But here, it looks as though  
24 the courts below seem to have thought maybe - - -  
25 whether they're right or wrong - - - that the market

1 value was the price in the defaulted contract, and  
2 that the later con - - - the later sale was, for some  
3 reason, below market, or at least it was below what  
4 the market had been.

5 MR. CIRANDO: Well, taking the analogy in  
6 the Fourth Department of Ryan v. Corbett, the  
7 question becomes was the - - - is there evidence that  
8 the fair market value at the time of the breach was  
9 otherwise, and the evid - - - is there evidence from  
10 someone else other than the sale. And when you look  
11 at what's in the record from this case, you've got  
12 the testimony of a real estate agent who "I know  
13 where they're going to sell; believe me, I really  
14 do." She gave some considerations - - -

15 JUDGE SMITH: Well, I can - - - I can see  
16 where you - - - why you would quarrel with the  
17 evidence of market value. But you're not saying deny  
18 summary judgment and have a trial, or are you?

19 MR. CIRANDO: No. No, I - - -

20 JUDGE SMITH: Well, why - - - why not, if  
21 what you're really saying is that too much weight was  
22 given to that broker's testimony? I mean, the  
23 broker's testimony is admissible, isn't it?

24 MR. CIRANDO: If you consider it as expert  
25 testimony, which we don't submit that it is, but if

1           you considered it as expert testimony, then to look  
2           at it - - - to say if the expert testimony is  
3           admissible, you have to - - - I believe you have to  
4           say what basis is - - - what is the basis of this  
5           expert's testimony.

6                    JUDGE SMITH: Why isn't that - - - why  
7           isn't that for the finder of - - - I mean, first of  
8           all, how could she not be an expert? She talks  
9           forever about how she's the only person in the world  
10          who knows anything about the values in that part of  
11          the state. I mean - - -

12                   MR. CIRANDO: Being polite, Your Honor?

13                   JUDGE SMITH: But a juror - - - a jury  
14          could find her to be an expert. Or a court could  
15          rationally qualify her as an expert.

16                   MR. CIRANDO: Well, I - - - I don't even  
17          think she could qualify as an expert based on - - -  
18          based on what she said at her examination - - -

19                   JUDGE SMITH: Okay, but I mean - - -

20                   MR. CIRANDO: - - - before trial.

21                   JUDGE SMITH: - - - if - - - assume we  
22          disagree with you about it. Assume we think there's  
23          some evidence from which a court could find or a jury  
24          could find that the val - - - that the market value  
25          did not decline, that the market value was correct as

1 of the date of the sale and did not get any lower,  
2 despite the fact that the actual sale was lower. On  
3 that assumption, do you lose the case?

4 MR. CIRANDO: No, because the question  
5 still becomes does it outweigh evidence of the value  
6 established by the subsequent sale.

7 JUDGE SMITH: Are we supposed to be in the  
8 weighing evidence business?

9 MR. CIRANDO: You? No.

10 JUDG READ: What about the - - -

11 JUDGE GRAFFEO: Does the period of time  
12 that the property is on the market have any bearing  
13 in your - - - what I think is your rule that you want  
14 us to adopt?

15 MR. CIRANDO: The period of - - - if we're  
16 going to say that the fair market value is determined  
17 by the - - - what an arm's-length sale would bring  
18 out, no, Your Honor. I don't think you can say - - -

19 JUDGE GRAFFEO: So - - -

20 MR. CIRANDO: - - - after so many days or  
21 months - - -

22 JUDGE GRAFFEO: - - - if the fir - - - if  
23 the first sale falls through, and then the property's  
24 on the market, say, for three years, and there's a  
25 zoning change in the neighborhood or some other

1 economic impact in the neighborhood, the more recent  
2 contract of sale is going to be, we can assume, for a  
3 lesser amount than the original fair market value, if  
4 there's been some negative factors - - -

5 MR. CIRANDO: There could be.

6 JUDGE GRAFFEO: - - - on the value.

7 MR. CIRANDO: Yes. Yes.

8 JUDGE GRAFFEO: So what - - - what happens  
9 in that situation?

10 MR. CIRANDO: Breaching party beware, I  
11 would say.

12 CHIEF JUDGE LIPPMAN: Counsel, what is - -  
13 - what is the exact rule you want us to adopt?

14 MR. CIRANDO: That - - -

15 CHIEF JUDGE LIPPMAN: What's the rule?

16 MR. CIRANDO: - - - the fair market - - -  
17 it's the difference between the contract price and  
18 the lower sale price. If there's no sale, the  
19 difference between the contract price and the fair  
20 market value at the time of the breach.

21 JUDGE PIGOTT: You set no time limits - - -

22 JUDGE READ: So it's exactly the Third  
23 Department - - -

24 JUDGE PIGOTT: - - -though, apparently, on  
25 how long it takes to sell?

1 MR. CIRANDO: No.

2 JUDGE READ: So it's exactly the Third  
3 Department rule?

4 MR. CIRANDO: Yes.

5 JUDGE SMITH: Does the - - - does the  
6 seller have to - - - the seller has to proceed with  
7 due diligence, doesn't he?

8 MR. CIRANDO: Oh, yes. Yes, Your Honor. I  
9 mean - - -

10 JUDGE SMITH: So in Judge Graffeo's three-  
11 year case, you might also have an issue as to how  
12 diligent they'd been in trying to sell that property.

13 MR. CIRANDO: But then the problem - - -

14 JUDGE GRAFFEO: Not unusual upstate,  
15 though, for residential property to sit for several  
16 years?

17 MR. CIRANDO: Yes. Yes. And the thing - -  
18 - the thing becomes, does the - - - you know, those,  
19 I think, would be factors then that you would show.  
20 Because the kicker would be, is the expert - - - if  
21 you bring in an expert, is the evidence - - -  
22 outweighs the evidence established by the subsequent  
23 sale. So I think you may - - - you seem to be  
24 putting in factors that you could consider to say  
25 wait a minute, the subsequent sale - - - sale price

1 should be modified because - - -

2 JUDGE GRAFFEO: Adjustments.

3 MR. CIRANDO: - - - of things that occur  
4 during - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor.  
6 You'll have your - - -

7 MR. CIRANDO: Thank you.

8 CHIEF JUDGE LIPPMAN: - - - rebuttal time.  
9 Thank you - - -

10 MR. CIRANDO: Thank you.

11 CHIEF JUDGE LIPPMAN: - - - counselor.

12 Counsel?

13 MR. HUNT: Thank you, Your Honor. May it  
14 please the court, Brad Hunt for the respondent, Paula  
15 White.

16 CHIEF JUDGE LIPPMAN: What's the rule that  
17 you want us to adopt?

18 MR. HUNT: I think straight - - -

19 CHIEF JUDGE LIPPMAN: Is it the Fourth  
20 Department rule, or - - -

21 MR. HUNT: The Fourth Department rule is  
22 actually, as articulated in the Ryan case, I don't  
23 necessarily agree with the application of it in that  
24 case, but the rule, I think, is fine. I think you  
25 can look at the subsequent sale price, and frequently

1 that will determine damages. But this only becomes  
2 an issue when there's evidence that the subsequent  
3 sale price is different from the market.

4 CHIEF JUDGE LIPPMAN: Why - - - why is that  
5 a good rule from a policy perspective? Why does that  
6 make sense?

7 MR. HUNT: I think it's important to have  
8 that rule, and specifically, I think it's important  
9 that the rule not be that the subsequent sale price  
10 necessarily determines damages, because you need to  
11 give sellers in these situations an incentive to  
12 mitigate damages by selling - - - by selling their  
13 property diligently.

14 And if you have the rule that, as I  
15 understand it they are arguing for, then there's  
16 actually an incentive to just sit on the property - -  
17 -

18 JUDGE PIGOTT: Well, you're implying that  
19 that's - - - most people that are selling homes  
20 aren't in the commercial home-selling business.  
21 They're trying to sell their home to someone else.  
22 Someone comes in and buys it - - - this is a little  
23 bit different, I guess - - - but - - - and they're  
24 relieved; they're going to buy another house. I  
25 mean, they're counting on this one. And then all of

1 a sudden, your - - - their buyer says, oh, I've  
2 decided not to. And I don't know if this drainage  
3 issue was real or not, but they come up with some  
4 excuse to say we can't do it.

5 And then the dominoes start to fall. So it  
6 would seem to me that it would be a better rule,  
7 wouldn't it, to say, you know, you signed the  
8 contract; you breached it; therefore the damages are  
9 the difference between the contract price and the  
10 value of the property at the time of the breach?

11 MR. HUNT: I don't think so. Again, I  
12 think often the subsequent sale price will be the  
13 best evidence of the value at the time of breach.

14 JUDGE SMITH: Could not that have been - -  
15 - could not a finder of fact say that was true here?  
16 I mean, I guess, even assuming your rule, is what I'm  
17 asking, why should you get summary judgment?

18 MR. HUNT: On this record, you know, I  
19 think there easily could have been an issue of fact  
20 if the sellers had introduced evidence that the  
21 subsequent sale price in fact reflected the market  
22 value at the time of the breach.

23 JUDGE SMITH: Well, you have - - - you have  
24 a guy who's saying I would love to - - - I mean, as I  
25 read it, he said I would have been delighted to get

1           that price, and I tried - - - and I tried to get it,  
2           and I held out for it, and I finally gave up. Isn't  
3           that some evidence that the fair market value was  
4           lower?

5                       MR. HUNT: No. I mean, I think again, that  
6           they could have - - - they could have submitted  
7           opinion testimony to say that. But there's no - - -  
8           there's no evidence in the record here that actually  
9           says the market value, you know, at the time of this  
10          breach in July of 2005, was lower than the contract  
11          price.

12                      JUDGE PIGOTT: Didn't you always get the  
13          realtor - - - I was trying to read her mind, too - -  
14          - I mean, she's the one who consummated the sale.  
15          Let's suppose this property was worth two million  
16          dollars. She's not going to come in and say that, is  
17          she? She's not going to come in and say, yeah, he  
18          had a two-million-dollar piece of property, but I  
19          split the difference and sold it this guy for 1.75.

20                      MR. HUNT: Well, actually, in this case, I  
21          think she - - - she did say that they initially  
22          thought that it was worth a little more than the  
23          1.725 contract price; that it was worth 1.8 or - - -

24                      JUDGE PIGOTT: Which - - -

25                      JUDGE GRAFFEO: Did either party here have

1 an appraiser, a licensed appraiser, that looked at  
2 comps?

3 MR. HUNT: No, there are - - - there are no  
4 appraisals. And we are - - - we are relying on the  
5 testimony of the real estate broker who, you know, on  
6 the record in this case, you know, she is an expert  
7 on the value of properties on Skaneateles Lake, and  
8 apparently is frequently consulted by appraisers  
9 doing - - - who do formal appraisals, because she - -  
10 -

11 JUDGE SMITH: All right, but are you saying  
12 - - -

13 MR. HUNT: - - - understands the market.

14 JUDGE SMITH: - - - are you saying that  
15 expert testimony is the only kind the court is  
16 allowed to look at? Can't the court draw its own  
17 inference from the fact that the property didn't sell  
18 at this supposed market price, despite the owner's  
19 efforts?

20 MR. HUNT: I think there needs to be - - -  
21 I think when you have - - - when you have expert  
22 testimony on one side and that expert testimony  
23 specifically addresses the issue for the court, which  
24 is the market value at the time of breach, I think  
25 they - - - you know, to create an issue of fact

1 warranting a trial, they needed to submit something  
2 to counter that. And simply relying - - -

3 JUDGE SMITH: Okay. So assume - - - assume  
4 you're right. I mean, assume you're right about the  
5 rule - - - or assume you're right about the market  
6 value. And assume that the market value was, what, a  
7 million-725, whatever it was, on the date of the  
8 default, and assume that the market then starts to go  
9 into a steep decline so that he has - - - the owner  
10 can sell it - - - in a hypothetical case - - - sell  
11 it for half that, because there was a disaster in the  
12 market in the interval, why should the innocent party  
13 suffer from that decline and not the breaching party?

14 MR. HUNT: Well, because the seller has a  
15 duty to sell it as quickly as possible before - - -

16 JUDGE SMITH: Yes, but - - -

17 MR. HUNT: - - - before a decline - - -

18 JUDGE SMITH: - - - as - - -

19 MR. HUNT: - - - before the decline occurs.

20 JUDGE SMITH: - - - it's not so easy to  
21 sell in a declining market. And maybe he did, you  
22 know. Even - - - no matter how diligently you sell  
23 it, sometimes you take a beating in a declining  
24 market.

25 MR. HUNT: They could - - - they could

1 certainly, you know, argue when they sell that based  
2 on the look - - - they could look at the facts, given  
3 whatever the particular market may - - - might be and  
4 argue about what the value was.

5 JUDGE SMITH: Well, but I'm - - - you say  
6 the test is value as of the date of breach, right?

7 MR. HUNT: I do.

8 JUDGE SMITH: Suppose - - - take an extreme  
9 case. The date of breach was September 14, 2008,  
10 say. And by September 17, 2008, the market's a lot  
11 worse. It can happen.

12 MR. HUNT: Um-hum.

13 JUDGE SMITH: Why should - - - why  
14 shouldn't the seller - - - why should the seller take  
15 that loss? Why shouldn't the defaulting buyer take  
16 that loss?

17 MR. HUNT: It's not a perfect rule and  
18 there could be injustices in some cases. I think - -  
19 -

20 CHIEF JUDGE LIPPMAN: Would you modify the  
21 rule to reflect that kind of situation?

22 MR. HUNT: I - - -

23 CHIEF JUDGE LIPPMAN: If - - - you know, in  
24 general terms, putting aside what happened here?

25 MR. HUNT: Possibly. But I do think it

1 would still be a better rule than the rule - - - than  
2 a rule that the subsequent sale price necessarily is  
3 what determines - - -

4 CHIEF JUDGE LIPPMAN: A modified version -  
5 - -

6 MR. HUNT: - - - values.

7 CHIEF JUDGE LIPPMAN: - - - of what you're  
8 saying would be better than what your adversary is  
9 calling for?

10 MR. HUNT: Yes, I believe so.

11 JUDGE READ: Is there still an issue of  
12 consequential damages in this case?

13 MR. HUNT: I don't think there's an issue  
14 of consequential damages at - - - you know, as I  
15 argued in my brief. It wasn't appealed to the Fourth  
16 Department.

17 JUDGE READ: So you don't even think it's  
18 preserved?

19 MR. HUNT: I don't think it's preserved.  
20 It's not in the - - - it's not in the notice of  
21 appeal. And I think that we're correct on the merits  
22 of that issue as well, because there are no special  
23 circumstances that warrant consequential damages  
24 here. This is an ordinary real estate - - - real  
25 estate contract and there was nothing particular

1 about it that would entitle the sellers to  
2 consequential damages.

3 JUDGE PIGOTT: Going back to my example,  
4 Mr. Hunt. If the - - - and I don't think it was true  
5 in this case - - - if the seller was counting on the  
6 money from this sale to consummate a subsequent sale,  
7 and then because of - - - this sale fell through,  
8 felt compelled to sort of sell at a fire sale, even  
9 though the realtor might say this is worth 1.75, he  
10 said I had to close my other deal, you know,  
11 otherwise I'm - - - you know, I've got a problem, so  
12 I sold it for 1.5. I think that my original pur - -  
13 - the original purchaser ought to be responsible for  
14 the difference between what I sold it for, having  
15 been forced to do so, and that fair market value.  
16 Would that make sense to you? Forget - - - taking it  
17 out of this case, but just in a hypothetical.

18 MR. HUNT: Right. No, I don't think so. I  
19 mean, I don't - - - first of all, I mean, your  
20 question didn't really specify whether the breaching  
21 buyer would have knowledge of the other sale he's  
22 trying to consummate, and if they don't, you know,  
23 that - - -

24 JUDGE PIGOTT: Assume they don't.

25 MR. HUNT: - - - kind of relates to the

1 consequential damages issues. I don't think - - -  
2 what's that?

3 JUDGE PIGOTT: I said, assume they don't.  
4 I'm just saying that for the realtor to come in and  
5 say I think it was 1.725; and he says, yeah, I agree,  
6 but I couldn't sell it for 1.725, because I had to  
7 close on another deal within thirty days, and the  
8 only other person I had standing around in my yard  
9 looking for this house said 1.5. So I suffered  
10 225,000 dollars in damages.

11 MR. HUNT: No. I do not think that the  
12 breaching buyer should be responsible for that  
13 difference. And again, I would say, I mean, it's not  
14 going to be a perfect rule. I could see how there  
15 could be some unfairness to sellers in some  
16 situations. But it's a better rule.

17 CHIEF JUDGE LIPPMAN: But in your  
18 situation, you believe that the rule that you're  
19 espousing covers the situation. With - - -

20 MR. HUNT: Oh, I do. The only - - -

21 CHIEF JUDGE LIPPMAN: - - - out adding in  
22 these other hypotheticals.

23 MR. HUNT: In - - -

24 CHIEF JUDGE LIPPMAN: But what you're  
25 acknowledging, I gather, is that there might be

1           circumstances where that rule would have to be - - -  
2           have the edges rounded a little bit?

3                   MR. HUNT:   Possibly.   But certainly, you  
4           wouldn't round it in the way of just saying that the  
5           subsequent sale price determines it.   I mean, that's  
6           - - -

7                   CHIEF JUDGE LIPPMAN:   No, no.   We see your  
8           point.

9                   MR. HUNT:   And in this case, I mean, there  
10          is - - - there is undisputed expert evidence that the  
11          value - - -

12                   CHIEF JUDGE LIPPMAN:   Well, your adversary  
13          disputes the expert nature of it.

14                   MR. HUNT:   He does, but, you know, he's a  
15          lawyer, and there's not - - -

16                   CHIEF JUDGE LIPPMAN:   So are you.

17                   MR. HUNT:   As am I - - - as am I - - -

18                   JUDGE RIVERA:   So, counsel, I'm sorry to  
19          interrupt you but - - -

20                   MR. HUNT:   Yes.

21                   JUDGE RIVERA:   - - - I think I just want to  
22          go back to something you were starting to discuss at  
23          the top.   What do you see as the incentives and  
24          disincentives for the seller under both of these  
25          different formulas?

1                   MR. HUNT: Oh, I think under the existing  
2 rule, which is what we argue for, the seller has an  
3 incentive to mitigate damages by selling promptly.  
4 And I think under the rule for which they argue,  
5 there's actually - - - not only is there not an  
6 incentive to mitigate, but I think there's actually  
7 an incentive to sit on the property and perhaps  
8 deliberately - - - I'm not saying that this - - -

9                   JUDGE GRAFFEO: Why would you - - -

10                  MR. HUNT: - - - - - in this case - - -

11                  JUDGE RIVERA: If he can afford it. If he  
12 can afford it.

13                  MR. HUNT: If he can afford it, you might  
14 have property that itself has value - - - is income-  
15 producing, you could use that - - -

16                  JUDGE GRAFFEO: What if there's outside  
17 economic forces that depress the sale price? Who  
18 should bear the burden of that, the breaching party  
19 or the owner of the property?

20                  MR. HUNT: The owner of the property should  
21 bear - - -

22                  JUDGE GRAFFEO: Even if - - -

23                  MR. HUNT: - - - bear that burden.

24                  JUDGE GRAFFEO: - - - they have - - - they  
25 have no responsibility for it.

1 MR. HUNT: Again - - -

2 JUDGE GRAFFEO: I mean, we see that all the  
3 time where a major employer pulls out of a small  
4 upstate town, right? I mean, Smith Corona pulls out  
5 of Cortland; I don't know what the major employer in  
6 Skaneateles is, but all of a sudden you've got 3-,  
7 400 people unemployed, and nobody's buying homes  
8 anymore. Should the breaching party be responsible  
9 for that?

10 MR. HUNT: It's - - - it's better that the  
11 rule be what it is, and that the responsibility fall  
12 on them then to change the rule such that the  
13 subsequent sale price necessarily - - -

14 JUDGE PIGOTT: Can I go back?

15 MR. HUNT: - - - determines damages.

16 JUDGE PIGOTT: I get - - - I get your point  
17 on this. And it's a point well taken. But then if  
18 you're saying that your rule will force them to move  
19 the property, to sell the property, doesn't that get  
20 you back to my hypothetical, which is, now you're  
21 saying well the Court of Appeals says that I can't -  
22 - - I can't wait for the market to improve; I've got  
23 to sell this thing or I'm in trouble. So I'm going  
24 to sell it for perhaps less than the market price,  
25 because it's the only arm's-length buyer I've got

1 right now. Shouldn't that be borne by the seller - -  
2 - or excuse me, by the buyer who pulled out?

3 MR. HUNT: Well, I don't think so. And  
4 again, I mean, just because they - - - you know,  
5 there may be particular circumstances - - -

6 JUDGE PIGOTT: That they caused.

7 MR. HUNT: - - - that - - - well, I mean,  
8 they in one respect - - - I mean, they - - - yeah,  
9 the buyer's breach is a contributing cause. But  
10 there are also factors due to the seller's decision  
11 you know, in relation to buying other property and -  
12 - -

13 JUDGE PIGOTT: But aren't you saying to  
14 them - - -

15 MR. HUNT: - - - events that the buyers may  
16 not even know about.

17 JUDGE PIGOTT: - - - you were saying  
18 before, they can't sit on it, and let the price go  
19 down, and then have us pay for that. So they're  
20 saying, all right, we won't sit on it, we'll sell it.  
21 And you're saying yes, but you can't just go sell it  
22 for less than fair market value to mitigate your  
23 damages, because you're going to be responsible for  
24 that, too.

25 MR. HUNT: They - - - you know, obviously

1           what the - - - what the rule - - - you know, the rule  
2           is intended to give them incentive to mitigate, and  
3           the hope is that they can sell the property for - - -

4                    JUDGE SMITH:   But why wouldn't - - -

5                    MR. HUNT:   - - - market value.

6                    JUDGE SMITH:   - - - well, why - - - why  
7           would anybody - - - I mean, you say that you're  
8           giving them an incentive - - - if you have the other  
9           side's rule, you give them an incentive to sit on the  
10          property.  Why would anyone do that?  Why does  
11          anybody say I'm going to sit on the property in a  
12          declining market and lose a lot of money because I  
13          can sue the buyer and get it back?  That doesn't  
14          sound - - -

15                   MR. HUNT:   Well - - -

16                   JUDGE SMITH:   - - - sensible.

17                   MR. HUNT:   - - - I don't know how often it  
18          would happen.  And, you know, I mean, the rule - - -  
19          I mean, you're not always, necessarily, going to have  
20          a declining market.  But I think - - -

21                   JUDGE SMITH:   You're saying that if you let  
22          them speculate - - - they might be speculating at the  
23          buyer's expense?  If it goes up - - -

24                   MR. HUNT:   I think there - - -

25                   JUDGE SMITH:   - - - I keep - - - if it goes

1 up, I keep the money; if it goes down it's his  
2 problem.

3 MR. HUNT: I think if you changed the rule  
4 to the rule that appellants are arguing for, then  
5 there's a - - - then there would be a greatly  
6 increased danger that - - -

7 CHIEF JUDGE LIPPMAN: Okay, counselor.  
8 Okay, counselor.

9 MR. HUNT: - - - okay.

10 CHIEF JUDGE LIPPMAN: Thanks, counselor.

11 MR. HUNT: Thank you.

12 CHIEF JUDGE LIPPMAN: Appreciate it.  
13 Counselor, rebuttal?

14 MR. CIRANDO: Very briefly. Two minute  
15 drill.

16 Judge Rivera, in response to one of your  
17 questions concerning the incentive/disincentive, I  
18 think Mr. Bradley indicated that - - - Mr. Hunt  
19 indicated that you've got to sell the property and  
20 you've got to place it back on the market. And  
21 that's just what happened here. And the property sat  
22 on the market, and the fellow said, I can't afford to  
23 hold this property anymore, and the price was  
24 reduced. That - - -

25 JUDGE PIGOTT: The easy answer to that,

1           though, is the deposit. And that's one of the things  
2           we haven't discussed yet, but you get a down payment  
3           of X number of dollars, in this case 25,000, that you  
4           get to keep no matter what happens. And if you're  
5           concerned about that, why don't you ask for a bigger  
6           down payment?

7                       MR. CIRANDO: Because I think at the time,  
8           you're not - - - you're not thinking that they're  
9           going to breach.

10                      CHIEF JUDGE LIPPMAN: But that does offset  
11           the situation that you're talking about, though,  
12           right? In that you're getting that money.

13                      MR. CIRANDO: Well, there's some cases that  
14           say if you keep the down payment, then you deduct the  
15           value of the down payment from the difference between  
16           the two. I mean, that's something you can always do.  
17           But yeah, we don't want to give the down payment  
18           back, obviously.

19                      And as far as the - - - as far as the other  
20           damages are concerned, I think that that was one of  
21           the reasons we used the language "actual", because I  
22           didn't want to get into the speculation that maybe we  
23           wanted to review the aspect of the keeping of the  
24           down payment. So that's why it would - - - the  
25           phraseology was used - - -

1 JUDGE READ: But you are seeking - - - you  
2 are seeking or you're not still seeking?

3 MR. CIRANDO: I'm still seeking. I - - -

4 JUDGE READ: You're still seeking the - - -

5 MR. CIRANDO: - - - sought at the - - -

6 JUDGE READ: - - - mortgage payments?

7 MR. CIRANDO: Yes.

8 JUDGE READ: Okay.

9 MR. CIRANDO: I still - - - and I did, you  
10 know, brief and argue that at the Appellate Division.  
11 And I think when you look at the manner in which the  
12 complaint, the motion, as well as the decision  
13 itself, and the order, that was based on the bench  
14 decision when the court says the seller has not  
15 demonstrated that he suffered any damages in the  
16 decision. And I think the decision controls. And  
17 that's the reason I used that language.

18 And so we would submit that following  
19 either Di Scipio or even when you add Ryan in, and  
20 the bottom line is that that evidence of I really do,  
21 does not outweigh the evidence of the sale.

22 And I think the industry in Skaneateles is  
23 selling property.

24 CHIEF JUDGE LIPPMAN: Yes, thank you,  
25 counselor.

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Thank you both. Appreciate it.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Paula White v. Dennis Farrell, et al., No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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