

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF BROOKFORD, LLC,

Appellant,

-against-

No. 69

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

20 Eagle Street
Albany, New York
May 2, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Appearances:

VICTOR A. KOVNER, ESQ.
DAVIS WRIGHT TREMAINE LLP
Attorney for Appellant
1251 Avenue of the Americas, 21st Floor
New York, NY 10020

SANDRA A. JOSEPH, ESQ.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL
Attorney for Respondent DHCR
25 Beaver Street, 7th Floor
New York, NY 10004

ROBERT E. SOKOLSKI, ESQ.
LAW OFFICES OF SOKOLSKI & ZEKARIA, P.C.
Attorney for Respondent Friedman
305 Broadway, Suite 1004
New York, NY 10007

Sara Winkeljohn
Official Court Transcriber



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUDGE DIFIORE: The first appeal on this afternoon's calendar is number 69, Brookford v. New York State Division of Housing and Community Renewal.

Counsel.

MR. KOVNER: Good afternoon, Your Honor; and with - - - I'm Victor Kovner, attorney for Brookford, the appellant in this proceeding. And with - - - with the permission of this court would ask to reserve three of my minutes for rebuttal.

CHIEF JUDGE DIFIORE: You may, sir.

MR. KOVNER: Thank you, Your Honor.

CHIEF JUDGE DIFIORE: You're welcome.

MR. KOVNER: We believe that the resolution of this appeal turns on the language of the statute and the clear legislative history. And it is the statute and legislature's intent that the Division of Housing and Community Renewal has subverted by rewriting in effect its key provisions. Now the language - - - the statute has four relevant clear requirements. Annual income shall mean federal adjusted gross income as reported. The income shall be of all persons, except for non-family employees, who occupy the housing accommodation as their primary residence. Incomes shall be subject to verification by the Department of Taxation and Finance, not the DHCR, and there



1 shall be no disclosure of any income information.

2 JUDGE RIVERA: But, counsel, isn't the federal -
3 - - excuse me, I'm over here.

4 MR. KOVNER: Yes, sorry.

5 JUDGE RIVERA: That's all right.

6 MR. KOVNER: Your Honor.

7 JUDGE RIVERA: That's okay. Isn't the federal
8 joint statement an aggregation of income? So don't you
9 have to disaggregate the income to know the income of the
10 person who's using the apartment as their primary
11 residence?

12 MR. KOVNER: You do not, Your Honor. Joint
13 income under federal and state law that is joint income
14 reported on a joint return is indivisible. It is
15 ascribable to both parties.

16 JUDGE RIVERA: But indivisible for federal
17 purposes. I'm talking about for our state purposes, no?

18 MR. KOVNER: And - - - the - - - no, not for
19 state purposes, Your Honor. And I think it's important to
20 note that the legislature in its wisdom put into the
21 language of this statute a rather technical term for the
22 definition of income. You could define income in many
23 ways. They chose to put in federal adjusted gross income
24 as reported. That has specific meaning in federal and
25 state law, and they did it for a very good reason. It - -



1 -

2 JUDGE FEINMAN: But even - - -

3 MR. KOVNER: I'm sorry.

4 JUDGE FEINMAN: - - - for the purpose of the
5 federal tax law, if somebody moves out of the household
6 within the twelve months proceeding you can actually amend
7 your return, right, and disaggregate it.

8 MR. KOVNER: It's possible.

9 JUDGE FEINMAN: I think that's U.S.C. 6015.

10 MR. KOVNER: It's certainly possible to amend
11 one's return, and there is legislation on who is a primary
12 resident and who is not. There are a number of - - - and
13 as to that issue, not the tax question, the Department of
14 Community - - - Housing and Community Renewal has expertise
15 and does resolve it. It's not an issue in this case
16 because all the parties agree there was but one primary
17 resident in the relevant date which was 2005, and that was
18 Ms. Friedman.

19 JUDGE STEIN: What if these - - - what is this
20 couple separated and she lived in one apartment that was
21 regulated, rent regulated, and he lived in another
22 apartment? So how - - - so they would both have to include
23 - - - and they filed joint returns, but they - - - they
24 clearly had separate primary residences. So they would
25 each have to claim the aggregate for purpose of luxury rent



1 de-regulation?

2 MR. KOVNER: Assuming both are in regulated
3 apartments I think the answer is yes.

4 JUDGE STEIN: Well, so how does that comport with
5 the intent of the - - - of the legislature?

6 MR. KOVNER: The - - - the reason the legislature
7 showed - - - chose federal adjusted gross income as
8 reported, which is the amount she reported, Ms. Friedman,
9 is that it - - - it was the simplest way to administer this
10 system, ease of administration. DTF could go, get the name
11 and the apartment, just look at the tax return, look at the
12 AGI, and report back whether it was above or below the
13 threshold.

14 JUDGE WILSON: So if here - - - if here instead
15 they had filed separately, married filing separately, we
16 wouldn't be here?

17 MR. KOVNER: Absolutely right, Your Honor.
18 That's - - - that's the point, and that's a decision that
19 Ms. Friedman made with whatever accounting or other advice
20 available to her to file jointly. Many people do and many
21 people don't.

22 JUDGE FEINMAN: Well, but your tax accountant
23 isn't necessarily, you know, figuring out also and by the
24 way this is going to, you know, bring you over the income
25 threshold for rent stabilization.



1 MR. KOVNER: The answer is, Your Honor, there are
2 numerous cases we've cited in these briefs in which the
3 courts have said it's the federal adjusted gross income as
4 reported and that's it. They don't look beyond that
5 because that's what the legislature - - -

6 JUDGE FAHEY: The cases say that but the case - -
7 -

8 JUDGE FEINMAN: - - - doesn't talk about the
9 occupants? I'm sorry.

10 JUDGE FAHEY: No, you go ahead, Judge. You go
11 ahead.

12 JUDGE FEINMAN: I was just - - -

13 JUDGE GARCIA: I'll go. Why do you think they -
14 - - why do you think they use federal adjusted gross income
15 as reported on New York State income tax return? I mean
16 that's a strange phrase, right. They could have used
17 federal adjusted gross income. Why did they use - - -

18 MR. KOVNER: You know - - -

19 JUDGE GARCIA: It seems to mean something
20 different to me.

21 MR. KOVNER: Because there are - - - there are -
22 - - there are many ways you could categorize or define
23 income and there are lots of - - - it was the simplest and
24 easiest - - -

25 JUDGE GARCIA: Why not just use federal adjusted



1 gross income?

2 MR. KOVNER: That's what they did do.

3 JUDGE GARCIA: No, it says federal adjusted gross
4 income as reported on - - -

5 MR. KOVNER: As reported?

6 JUDGE GARCIA: Why?

7 MR. KOVNER: I think the "as reported" phrase is
8 important, should not be ignored because that was reported
9 to the agency that would determine it, the Department of
10 Taxation and Finance.

11 JUDGE RIVERA: It's a way you ensure you're
12 looking at limited documents, right? And you're only
13 looking at the State documents because that's what you're
14 trying to figure out. But I want to get back to the
15 federal tax because I'm - - - I'm a little confused by your
16 argument, and you'll correct me if I'm - - - and it would
17 be no surprise if I'm misunderstanding the federal tax law.
18 But I thought the federal tax law that - - - that you were
19 relying on is referring to joint liability but recognizes
20 that it's income that's aggregated for purposes of filling
21 out the form. The joint part of it is the tax liability.

22 MR. KOVNER: It's not simply the liability, Your
23 Honor. It's - - - the treasury regulations state
24 unequivocally although there are two taxpayers on a joint
25 return there is only one taxable income. And that was a



1 choice that was made for whatever reason to go that route
2 and not go the separate - - -

3 JUDGE RIVERA: Yes, but that's what I'm saying
4 when you say taxable income isn't that, saying that the
5 liability for federal taxes is based on an aggregation that
6 comes up with a number that's considered the taxable
7 income?

8 MR. KOVNER: A tax - a joint income is not
9 divisible as a matter of law for any purpose. One cannot
10 apportion it. It is - - -

11 JUDGE FAHEY: You know what - - - you know what I
12 wonder? It seems to me that DHCR, the way I understand
13 this, demanded the tax - - - the supporting tax information
14 from the Friedmans after initially making an error in their
15 earlier decision. Is - - - is that correct? That's the
16 way you understand the record?

17 MR. KOVNER: It is, and of course in doing so
18 they violated the statute and their own rules.

19 JUDGE FAHEY: All right. Let's - - - so the
20 question would be then who can object to the Friedmans
21 supplying tax information to DHCR? It seems that only the
22 Friedmans should be able to object to that. I don't
23 understand the basis of your objection since it's their tax
24 information.

25 MR. KOVNER: Well, I - - - I think we have the



1 standing to argue, as we do, that their conduct - - -

2 JUDGE FAHEY: Well, but let - - - let's talk
3 about - - -

4 MR. KOVNER: - - - violated the statute.

5 JUDGE FAHEY: Since we - - - in this case, to
6 some degree we're - - - we're required to look at the
7 legislative history and the purposes and intent of this
8 behind that. So I - - - want to step a little bit behind
9 that. I'm not arguing your standing here. I understand
10 that. Let's assume you have standing. But the purpose is
11 and intent would, of course, be to protect and to limit
12 government's intrusion into a private person's tax
13 information. It would seem to me that the Friedmans would
14 have that right not Brookford.

15 MR. KOVNER: Actually, Judge Fahey [Fuh' Hee], I
16 do want to correct your version - - -

17 JUDGE FAHEY: Fahey [Fay' Hee]. Fahey.

18 MR. KOVNER: Fahey. They were - - - they were
19 asked by DHCR to provide all this information, the W-2s,
20 the 1099s, the tax transcript. They sort of made it worse
21 [inaudible] - - - and they computed it themselves even
22 though they - - - they've acknowledged they're not - - -
23 they don't have the expertise to do it.

24 JUDGE FAHEY: I accept that. I accept that.

25 MR. KOVNER: And - - - and the Friedmans



1 complied, but that very process is the very process the
2 legislature chose to avoid.

3 JUDGE FAHEY: No, but do you understand - - - do
4 you understand my point? What I'm wondering is - their tax
5 reforms information, they give them over to DHCR. They
6 don't object to giving that information. On - - - on what
7 basis could that possibly harm you for them to give fuller
8 information?

9 MR. KOVNER: It - - - because it invited - - - or
10 more than invited, they asked the - - - the relevant agency
11 asked them to participate jointly in a violation of the
12 statute to do something that they weren't asked to do, they
13 had no jurisdiction. It was an extra-legal ultra vires
14 assumption of authority to pursue their own judgment that
15 they could apportion it because that was - - - for whatever
16 reason they thought was better as opposed to if they
17 thought there was some sort of gap in the statute going to
18 the legislature and asking them to address it.

19 JUDGE FAHEY: I see thank you.

20 MR. KOVNER: I see my red light is on, and I want
21 to keep my three minutes.

22 CHIEF JUDGE DIFIORE: It is, sir.

23 MR. KOVNER: Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Counsel.

25 MS. JOSEPH: May it please the court, my name is



1 Sandra Joseph, and this is Anita Shia, counsel for DHCR.

2 CHIEF JUDGE DIFIORE: Counsel, are there any
3 scenarios under which joint income would be divisible?

4 MS. JOSEPH: Yes, in New - - - under New York
5 State tax law, even though the parties filed a joint tax
6 return, New York State tax law has various scenarios where
7 let's say if you file a joint tax return and one of the
8 parties is a non-resident then they'll file a separate
9 return. Your - - -

10 CHIEF JUDGE DIFIORE: What about child support
11 determinations?

12 MS. JOSEPH: Yes, under Tax Law 171, which was
13 reenacted at the same time that (b) was for high
14 regulation, actually it was the same measure. What Tax Law
15 171 says and what the rent control statute says is that
16 it's using this - - - it says "for these purposes." It's
17 not saying it is the federal tax law. It's saying we're -
18 - - this means or we're going to use this measure in order
19 to determine income. And to answer another question why
20 they're using federal tax law as reported on the New York
21 State income tax, this is kind of interesting because
22 federal tax law - - - federal income on a New York State
23 tax return can be higher than the New York State income.
24 Because let's say even if you file single and you have out-
25 of-state income, that's included in your federal income tax



1 return and it's not included in your New York State income.
2 The statute sought that it's to - - - it's only the
3 occupant on the day the ICF is served or who's using the
4 premises as their primary residence.

5 There's nothing in the legislative intent that
6 said, well, if you file a federal tax return jointly you
7 will, therefore, have to report that income. It's only the
8 income. It's not the liability. The owner is trying - - -
9 or the appellate is trying to import the liability into the
10 rent control statute. And there's - - - in this case, you
11 know, the tenant - - - the tenant in this case wouldn't
12 have known that she shouldn't file a federal joint tax
13 return as her husband was just going into the nursing home
14 and there he subsequently died. He clearly wasn't in the
15 apartment at the time that the ICF was served.

16 JUDGE FAHEY: So what's the basis for DHCR to ask
17 for this information or to demand it?

18 MS. JOSEPH: Well, actually the - - - DHCR really
19 didn't violate the statute. It said - - -

20 JUDGE FAHEY: Okay. Then tell me what the basis
21 is.

22 MS. JOSEPH: The basis is is that to be quite
23 honest they wanted to verify. DTF came back with a result
24 that the tenant wasn't over income based on the percentages
25 that were - - -



1 JUDGE FAHEY: So in other words, you're saying it
2 wasn't expressly prohibited for them to ask for it.

3 MS. JOSEPH: Exactly. The - - - it's - - - do
4 you want the exact section? It's - - -

5 JUDGE FAHEY: No, no, I trust you.

6 MS. JOSEPH: Okay. Thank you.

7 JUDGE FAHEY: I trust you.

8 CHIEF JUDGE DIFIORE: Counsel, mindful of the
9 important privacy concerns that are at stake, how do you
10 apportion in a way that is transparent enough to allow a
11 landlord to have a meaningful challenge?

12 MS. JOSEPH: Unfor - - - unfortunately, just like
13 on a tax return, it's as reported. You know, the tenant
14 reported her percentages which has been on the ICF form for
15 almost twenty-five years. There has been Section 7 that
16 says tell us what percentage, and this form was designed by
17 DTF. It wasn't designed by DHCR. And it says tell us what
18 your percentages are. Just like on a tax return, it's all
19 self-reporting. It's not, you know - - -

20 JUDGE STEIN: So - - - so you're saying if they -
21 - - if they fraudulently reported AGI on the federal tax
22 return then the owner has no basis to challenge that
23 either?

24 MS. JOSEPH: Exactly. Exactly. And I mean that
25 the - - - on the - - - in Section 7 on the ICF form they do



1 affirm that these are the correct percentages. The only
2 thing DHCR sought to do because this was the first time
3 DHCR was faced with this situation, they wanted to verify
4 DTF's findings. They wanted to verify the tenant's
5 percentages, and under the statute where we could ask for
6 the information we did ask for an IRS transcript. While
7 DHCR will concede it has no expertise, the transcript that
8 we received from the IRS picked the things off the joint
9 tax return that was ascribed to the - - -

10 JUDGE RIVERA: So can I - - -

11 MS. JOSEPH: - - - tenant.

12 JUDGE RIVERA: - - - ask - - - and you'll correct
13 if I'm - - - the premise is flawed. So the husband is
14 there part of the year?

15 MS. JOSEPH: No, he wasn't there at all.

16 JUDGE RIVERA: At all?

17 MS. JOSEPH: At all. He was in the nursing home.

18 JUDGE GARCIA: Is there any gross limit on income
19 at all - - - I mean the certain adjusted gross income just
20 doesn't apply at all?

21 MS. JOSEPH: In - - - in what scenario?

22 JUDGE GARCIA: So if you have five million
23 dollars in adjusted gross income total but one spouse earns
24 40,000 dollars of that.

25 MS. JOSEPH: There is - - - there is no limit.



1 It's almost like the case of Glenbriar v. Lipsman where - -
2 - where the tenant had no income and the husband trying to
3 evade New York State tax laws moved to Florida and claimed
4 a homestead rebate. It's - - - it's the same situation.
5 You can have one that earns all the income and the other
6 one that earns nothing.

7 JUDGE GARCIA: And you could get this benefit
8 then?

9 MS. JOSEPH: You - - - if - - -

10 JUDGE GARCIA: So if it was the spouse of Mark
11 Zuckerberg or something and - - - just for an example.

12 MS. JOSEPH: Exactly, and he moved Florida and -
13 - -

14 JUDGE GARCIA: And he was living in Silicon
15 Valley and this - - - or someone like that and the spouse
16 is living in New York and have 50,000 dollars in income
17 that's what you would count?

18 MS. JOSEPH: Exactly. That's what the - - -

19 JUDGE GARCIA: But doesn't that seem like there's
20 something wrong with that calculation?

21 MS. JOSEPH: That's what - - - that's what the
22 legislature - - -

23 JUDGE GARCIA: If you have, like, two billion
24 dollars and - - - you know, like why would you qualify for
25 this?



1 MS. JOSEPH: That's what the legislature saw fit
2 in this statute and also in Tax Las 171-b.

3 JUDGE RIVERA: Okay. Can I just clarify the
4 dates of - - - now I'm very confused. So what period is
5 the ICF covering?

6 MS. JOSEPH: I can't answer that off the top of
7 my head. I - - - I'd have to look. It - - - the - - -
8 it's - the ICF is the date - - - the operative date for
9 that is the date that it's served. He was not in the
10 apartment.

11 JUDGE RIVERA: Because he had left the prior
12 year?

13 MS. JOSEPH: Yes.

14 JUDGE RIVERA: Okay. And then the tax form that
15 you're looking at is for what - - - for tax - - - what tax
16 year?

17 MS. JOSEPH: I believe it was for the prior year.

18 JUDGE FEINMAN: It was '04 and '05 I believe.

19 MS. JOSEPH: Yeah, I - - - I think he - - -

20 JUDGE RIVERA: So - - - I'm sorry.

21 MS. JOSEPH: I'm not a hundred percent sure.

22 JUDGE RIVERA: Okay. So you - - -

23 MS. JOSEPH: Maybe the tenant's counsel can
24 answer that for you.

25 JUDGE RIVERA: Okay.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. SOKOLSKI: Good afternoon, Your Honors. May
3 it please the court, my name is Robert Sokolski from
4 Sokolski and Zekaria. We represent the respondent,
5 Margaret Schuette Friedman.

6 JUDGE RIVERA: Can you clarify this issue about -
7 - -

8 MR. SOKOLSKI: Yes.

9 JUDGE RIVERA: - - - the ICF and the tax years?

10 MR. SOKOLSKI: The - - - the - - - first of all,
11 the tax years, it was - - - it was an ICF that was served
12 on April 27, 2006. The - - - the backwards looking is two
13 years, so it'd be 2004 and 2005 that would be the years in
14 question. And just in the beginning of 2005, March 21st,
15 2005, Si Friedman moved out permanently - - - permanently
16 from the apartment. There are affidavits that we submitted
17 to DHCR that confirmed that his move-out was always
18 considered to be permanent.

19 JUDGE STEIN: But what if he moved out on
20 December 31st, 2005, no difference?

21 MR. SOKOLSKI: No, it wouldn't make any
22 difference because - - - because the date that DHCR looks
23 at to see whose income should be included is the date that
24 the - - - that the landlord choose to serve the ICF upon a
25 tenant, which didn't happen for another year until April



1 27th, 2006. In fact, by the time they had served the ICF,
2 Si Friedman had moved from the nursing home into hospice
3 where he died that following November.

4 JUDGE RIVERA: So, I'm sorry. So what year does
5 he pass away, 2005? 2006?

6 MR. SOKOLSKI: 2006, November 2006.

7 JUDGE RIVERA: And he moved into hospice March -
8 - -

9 MR. SOKOLSKI: He moved into - - - into hospice
10 on March 1st, 2006. So it was before even the ICF was
11 served. Not only was he in nursing but he was moved out to
12 hospice. There are a couple of phrases that - - - that -
13 there are - - - there are a couple of things that concern
14 me, and I - - - and I know my time is brief so I might
15 speak a little bit fast. The tenant was not directed to -
16 - - to provide anything but the ICF form and the copy of
17 her tax label on the state form which is what DHCR does.
18 I, with my client, voluntarily - - - voluntarily provided
19 backup information in order for DHCR to review how we did
20 the - - - the proportions of income, the apportionment, and
21 to say, okay, well, you did it right, okay. In fact, we
22 were off by two percent only because there was some
23 interest that my client - - -

24 JUDGE FAHEY: So what you're saying is DHCR
25 didn't demand it, that you provided the information?



1 MR. SOKOLSKI: Absolutely, voluntarily. In fact,
2 all my papers state that from the very beginning
3 voluntarily so I took a - - - I took red confidential
4 stamp, I said don't give it to the landlord because he's
5 not entitled to it, but it's like an in camera review. And
6 you want to review it, review it. We actually were - - -
7 attributed more income to my client than necessary because
8 she couldn't find two small interest statements. So she
9 wound up with thirty-four percent instead of thirty-two
10 percent apportionment.

11 So - - - so I don't think we're properly here on
12 this question because there - - - they have not - - - DHCR
13 has not done anything but act in the statute. This was a
14 voluntary action. This is not a question of whether or not
15 DHCR can demand things. And by the way, they can. They
16 can. Because the - - - the statute - - - the de-
17 regulations statute state that if DHCR can't figure out - -
18 - if they don't get an answer or if they can't figure it
19 out they can ask for more - - - for more information.
20 There is nothing secret about a tenant's income, Your
21 Honors, unfortunately. If you ask any tenant that has
22 NYCHA house, Mitchell-Lama housing, an HDFC co-op, or
23 Section 8, they have to - - - every year they have to
24 verify their income. They have to supply - - -

25 JUDGE STEIN: So is the purpose then is to keep



1 the owner from having access to this information? Is that
2 the purpose of - - - of the ruling of limiting what - - -
3 what can be required?

4 MR. SOKOLSKI: Yes, yes. Because - - - because
5 the information - - - well, yes and no. The information on
6 a tax form itself - - - because it has the form, right, we
7 have 6- - - - 697 of the tax - - - tax - - - of the tax law
8 is very strict in what someone provides to the taxing
9 authority, and we want that to be candid so we protect it.
10 Okay. So we're very stingy on what happens but just on
11 that form. When you ask about someone's income, tenants
12 certify their income all the time for low-income housing.
13 They do that every single year. They have to tell the
14 landlord who's managing the property what their income - -
15 - there's nothing secret about this. And the - - - the law
16 states that it is the adjusted federal gross income and - -
17 - and I know I heard the phrase, this is my second concern,
18 "as reported." It's not as reported. As reported on your
19 New York State tax form, and that's a signal. That's a
20 signal that the legislature did not intend to import the
21 whole body of federal tax law into New York State Housing
22 Law. I see my time is up, so unless Your Honors have any
23 questions - - -

24 CHIEF JUDGE DIFIORE: Thank you, sir.

25 MR. SOKOLSKI: - - - I thank you very much for



1 your time.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. KOVNER: Yes, just very briefly. First, the
4 most important point is the statute expressly prohibits the
5 administrative agencies from asking for this information.
6 The statute says: "Shall not require disclosure of any
7 income information other than whether the aforementioned
8 threshold has been exceeded." So neither DTF nor DHCR
9 could - - -

10 JUDGE FAHEY: So let me ask you this. Is the
11 question then whether or not they - - - they asked for it
12 or whether or not they can see it? Let's assume they
13 didn't ask for it, that counsel is correct and it was
14 voluntarily turned over. Did - - - are you saying they
15 can't see this information?

16 MR. KOVNER: Yes, I - - - yes, I am, Your Honor.

17 JUDGE FAHEY: I see.

18 MR. KOVNER: And that was what the legislature
19 had in mind to make this a simple check to protect tenant
20 privacy. Just look at the federal AGI as reported on the
21 tax return. Is it above the threshold or no?

22 JUDGE FAHEY: I see.

23 MR. KOVNER: A couple of other points just very
24 briefly - - -

25 JUDGE RIVERA: Even if not seeing it might result



1 in something that undermines the statutory intent?

2 MR. KOVNER: The - - -

3 JUDGE RIVERA: Which is to only count the income
4 of those who were using the - - - the apartment as their
5 primary residence?

6 MR. KOVNER: The answer is there are a whole
7 series of cases in the - - - in the briefs, Your Honor, in
8 which the courts have said the statute require - - - makes
9 the federal AGI as reported determinative. They're not
10 going to look beyond it even though there may be some other
11 income anyway some - - - at some place, some other wealth,
12 corporate income, whatever.

13 JUDGE RIVERA: Yes, but that would inure to the
14 landlord's benefit, right, because it might increase the
15 income. But if she wants to show that the actual income
16 falls within what the statute permits - - -

17 MR. KOVNER: The answer - - - the statute - - -

18 JUDGE RIVERA: - - - wouldn't it undermine the
19 goals, the larger goals?

20 MR. KOVNER: It does, Your Honor, because it
21 undermines that there should never be an audit, that no one
22 should be asked or people's privacy should be respected as
23 to this detailed information. Just very briefly, you could
24 either, as to some of the points from my adversary, you
25 could either file a joint return or a separate return but



1 not both.

2 JUDGE GARCIA: And what's the tax policy in New
3 York State that gives you the different treatment for
4 filing jointly than filing separately and is that
5 inconsistent with separating the income - - -

6 MR. KOVNER: It's not - - - it's not
7 inconsistent. In New York State it's joint and indivisible
8 across the board. It - - - that's the nature. As - - -

9 JUDGE GARCIA: No, but I think I'm not being
10 clear. So you get different rates and different
11 applications of tax laws filing jointly than you do from
12 filing individually if you're a married couple, correct?

13 MR. KOVNER: Yes, you do. And in fact - - -

14 JUDGE GARCIA: But can I just finish?

15 MR. KOVNER: Yes, by all means. Sure.

16 JUDGE GARCIA: What's the policy behind that
17 giving you those rates for filing jointly as a married
18 couple, and is that in any way inconsistent with splitting
19 the income out for these purposes?

20 MR. KOVNER: You get a lower rate if you file
21 jointly. The government, both federal and state, wants to
22 encourage you to file jointly. You get other benefits.
23 This tenant chose to take those benefits and not give them
24 up - - - I don't know how large they would be, not give
25 them up by filing separately. And I think my red light is



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

on, and I think I'm going to stop unless there are further questions. Thank you very much, Your Honor.

CHIEF JUDGE DIFIORE: Thank you, counsel.

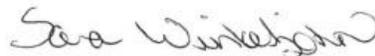
(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 Matter of Brookford, LLC v. New York State Division of Housing and Community Renewal, No. 69 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: May 08, 2018

