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COURT OF APPEALS
STATE OF NEW YORK

159 MP CORP., et al.,

Appellants,

-against-

REDBRIDGE BEDFORD LLC,

Respondent.

No. 26

20 Eagle Street
Albany, New York
March 20, 2019

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 26, 159 MP Corp. v.
3 Redbridge Bedford, LLC.

4 MR. EHRLICH: May it please the court. Good
5 afternoon, Your Honors. I'd like to reserve two minutes.

6 CHIEF JUDGE DIFIORE: Two minutes, sir, you may
7 have that.

8 MR. EHRLICH: And I'd like to say what a
9 privilege it is again to appear before this body.

10 Obviously this case comes to this court in a very
11 unusual way. It's a one-in-five chance that when you have
12 a decision below against you that all four justices decide
13 to grant leave to appeal to the Court of Appeals. It
14 happens in less than twenty percent of the cases, in fact.
15 And we think - - - I'm with Meryl Wenig, who was on the
16 brief and argued the case below. We believe that the court
17 below missed the point.

18 JUDGE STEIN: Well, let me ask you this, why - -
19 - first of all, could the parties have negotiated an
20 agreement that didn't have a cure period at all?

21 MR. EHRLICH: I would say no, under Yellowstone.
22 I would say they had - - - they had - - - if they - - -

23 JUDGE STEIN: Well, the legislature has written -
24 - -

25 MR. EHRLICH: They're waiving - - -



1 JUDGE STEIN: - - - has written a cure period in
2 for residential leases, right?

3 MR. EHRLICH: Correct.

4 JUDGE STEIN: They haven't done that for - - -
5 for - - -

6 MR. EHRLICH: Only in New York City - - -

7 JUDGE STEIN: - - - commercial leases.

8 MR. EHRLICH: - - - for commercials. Only in New
9 York City; it's the only place where they have written such
10 a thing in. Now, this - - - this is obviously - - -

11 JUDGE STEIN: So that means that in the vast
12 majority of places there's no requirement of - - - of a
13 cure period, right?

14 MR. EHRLICH: Well, there's a requirement that
15 you cure, but there's no requirement that there be a stay
16 in this - - - in this - - - in a commercial - - -

17 JUDGE STEIN: And by the same token, the
18 legislature has, in a whole variety of contexts, in the - -
19 - in the landlord-tenant realm, indicated when parties
20 cannot waive - - - when tenants, in particular - - -

21 MR. EHRLICH: Oh, tenants.

22 JUDGE STEIN: - - - can't waive certain rights,
23 correct?

24 MR. EHRLICH: Correct.

25 JUDGE STEIN: Okay. One more question in this



1 line of questioning which is: so why do we allow parties,
2 in general, to waive judicial review completely in favor of
3 arbitration, right?

4 MR. EHRLICH: Well, that's not here.

5 JUDGE STEIN: Well, I know it's not here, but I'm
6 asking you. You're making a public policy argument.
7 You're saying that they have to have this right to seek a
8 declaratory judgment in court, otherwise it's against
9 public policy.

10 I'm saying that if we have allowed parties to
11 forego all - - - and I'm not saying that we should allow
12 that here, but - - - because I think our case law says that
13 there has to be some access to the courts in this - - - in
14 this context. But - - - but if - - - if we - - - if we
15 allow that in other contexts, how - - - how can we say that
16 it is against public policy ever to allow a landlord and a
17 tenant to agree to waive that right?

18 MR. EHRLICH: Because you, yourself, Your Honor,
19 Judge Stein, you just said it, hit the nail on the head.
20 If this had been sent to AAA arbitration and that clause
21 was in this contract, we would not be here today.

22 JUDGE FEINMAN: Because the point being that you
23 have another forum in which to adjudicate the respective
24 responsibility.

25 MR. EHRLICH: Absolutely correct.



1 JUDGE STEIN: But you had that forum here. You
2 have a summary proceeding which is the forum that was
3 explicitly chosen. You have the right to sue for a breach
4 of contract. You have the right to sue under tort. Well,
5 how - - -

6 JUDGE FEINMAN: Well, the tenant can't commence a
7 summary proceeding - - -

8 MR. EHRLICH: Right.

9 JUDGE FEINMAN: - - - correct?

10 MR. EHRLICH: He cannot commence a summary
11 proceeding at all.

12 JUDGE STEIN: I understand that, but there is a
13 forum for which the tenant can present when - - - when
14 asked to leave the premises, can say, well, wait a minute,
15 I haven't done anything wrong.

16 MR. EHRLICH: But they can't - - -

17 JUDGE STEIN: Or - - -

18 MR. EHRLICH: There really isn't one; that's the
19 point here.

20 JUDGE RIVERA: Maybe it would be helpful - - -

21 CHIEF JUDGE DIFIORE: Well, if the tenant is
22 served with a notice to cure, right - - -

23 MR. EHRLICH: Um-hum.

24 CHIEF JUDGE DIFIORE: - - - and he cures the
25 default, is there anything in the lease that prevents him



1 from suing for breach of contract and collecting damages?

2 MR. EHRLICH: Yes, Your Honor.

3 CHIEF JUDGE DIFIORE: What would that be?

4 MR. EHRLICH: That would be, I believe, clause 67
5 - - - I believe clause 67(F) of this - - - of this
6 contract. This contract - - -

7 MS. WENIG: (D) - - - (D).

8 MR. EHRLICH: (D)? Rather - - - excuse me, 67(D)
9 of this contract prevents us from going against the - - -
10 going against the landlord. This - - - this lease is one
11 of the few leases I can ever say that completely avoids
12 judicial review.

13 JUDGE RIVERA: Counsel, let's try it a different
14 way because I think the dissent tried to do this and maybe
15 - - - maybe you can help us here.

16 MR. EHRLICH: We agree with this.

17 JUDGE RIVERA: Maybe you can help us here. What
18 - - - what is it that would not happen if we upheld - - -
19 all right, what - - - what is it that the tenant cannot do
20 if we upheld this blanket prohibition - - -

21 MR. EHRLICH: Everything.

22 JUDGE RIVERA: - - - on - - -

23 MR. EHRLICH: Everything.

24 JUDGE RIVERA: I - - - I appreciate that. Walk
25 through that, because I think that's the tension.



1 MR. EHRLICH: Let's start with what landlord and
2 tenant court, commercial part, can do. They can't help us
3 stay. They can't - - -

4 JUDGE FAHEY: When you say "they can't", you mean
5 they don't have the equitable powers.

6 MR. EHRLICH: Correct, they don't - - -

7 JUDGE FAHEY: And you've abandoned those
8 equitable powers by the nature of the contract.

9 MR. EHRLICH: Absolutely correct, Your Honor.

10 JUDGE FAHEY: Okay.

11 MR. EHRLICH: And - - -

12 JUDGE RIVERA: So you have to cure or risk the
13 summary proceeding when you're in a defensive posture.

14 MR. EHRLICH: Correct, and we have - - -

15 JUDGE RIVERA: What - - - what do you lose?
16 That's the question. What does the tenant lose in that way
17 - - -

18 MR. EHRLICH: We - - -

19 JUDGE RIVERA: - - - of handling the tenant's
20 concerns?

21 MR. EHRLICH: Because we have no - - - because if
22 we can't have our remedy in - - - in housing court - - - in
23 landlord - - -

24 JUDGE RIVERA: Yeah.

25 MR. EHRLICH: - - - excuse me, landlord-tenant



1 court - - -

2 JUDGE RIVERA: Yeah.

3 MR. EHRLICH: I'm using an old term - - - we - -
4 - we have a - - - we have a situation where we can't bring
5 on a declaratory judgement in Supreme.

6 JUDGE FAHEY: Right.

7 MR. EHRLICH: And the civil court can't give us
8 the relief we need.

9 JUDGE STEIN: But wouldn't one of two things
10 happen? Either the landlord brings you into housing court
11 and then you can litigate your rights, or the landlord
12 doesn't, in which case you remain in possession of the
13 property and carry on your business. So I don't understand
14 - - -

15 MR. EHRLICH: Your Honor - - -

16 JUDGE STEIN: - - - what you've lost.

17 MR. EHRLICH: - - - in the first proceeding - - -
18 this is one of several, by the way - - - in the first
19 proceeding the landlord said he wouldn't enforce clause
20 67(H), and now we have a proceeding to enforce 67(H).

21 JUDGE FAHEY: Let me ask you a question about
22 your public policy argument. As I understand it, the
23 Yellowstone - - - the case that established a Yellowstone
24 injunction was in - - - give me your attention for a second
25 - - - was in 1968, right?



1 MR. EHRLICH: Correct.

2 JUDGE FAHEY: So it's the fiftieth anniversary.
3 And it's been the common law of the State of New York for
4 the past fifty years that you can get an injunction to cure
5 a breach. Is that correct?

6 MR. EHRLICH: Correct.

7 JUDGE FAHEY: All right. So how long have you
8 been practicing real estate law?

9 MR. EHRLICH: Not very long, Your Honor, five,
10 six years.

11 JUDGE FAHEY: Okay. Well, longer than I have;
12 I'll tell you that because you know - - - you seem to know
13 a lot more about than I do.

14 MR. EHRLICH: Everybody - - -

15 JUDGE FAHEY: Yeah.

16 MR. EHRLICH: Everybody would recognize me on a
17 different topic.

18 JUDGE FAHEY: What will be the effect - - - what
19 is your opinion on what will be the effect of - - - of this
20 court's decision if this court says that the freedom of
21 contract - - - or some - - - if this court says that this
22 provision stands and that it's not subject to any public
23 policy constraint?

24 MR. EHRLICH: Expansion.

25 JUDGE FAHEY: What do you mean by "expansion"?



1 MR. EHRLICH: Expansion; it's going to expand
2 into mom-and-pop stores. It's going to expand - - -

3 JUDGE FAHEY: Let me ask this. Is it - - -

4 MR. EHRLICH: - - - and eventually there'll be
5 pressure on the legislature - - -

6 JUDGE FAHEY: No, no, stay with me. Stay with me
7 on this. Is there any practicing lawyer that would not
8 include this provision if you're representing the landlord?

9 MR. EHRLICH: I've seen other contracts that do
10 not include this provision - - -

11 JUDGE FAHEY: All right. From this point forward
12 - - -

13 MR. EHRLICH: - - - on commercial - - -

14 JUDGE FAHEY: From this point forward, would
15 there be any lawyers that do that?

16 MR. EHRLICH: I would - - - this court finds that
17 - - - that you can avail yourself of this clause, ignoring
18 Article 1 of the state constitution, and 4 and 14 of the
19 U.S. constitution, and void all due process rights - - -

20 JUDGE FAHEY: Let's just stay on Yellowstone, all
21 right?

22 MR. EHRLICH: Okay.

23 JUDGE FAHEY: Let's not - - -

24 MR. EHRLICH: If you want to stay there, fine.
25 But the public policy argument is very simple.



1 JUDGE FAHEY: Um-hum.

2 MR. EHRLICH: If you allow this to happen, it
3 will increase, it'll become standard practice in New York,
4 and this - - - that's why this decision has such a
5 monumental impact.

6 JUDGE FEINMAN: I think the point that Judge
7 Fahey is trying to draw out of you is whether or not, if
8 you uphold this, it essentially guts - - -

9 MR. EHRLICH: Yellowstone.

10 JUDGE FEINMAN: - - - the Yellowstone remedy - -
11 -

12 MR. EHRLICH: Yes.

13 JUDGE FEINMAN: - - - and eliminates it.

14 MR. EHRLICH: Well, yes, it eliminates it as a
15 remedy.

16 JUDGE GARCIA: Counsel, if I could ask - - -

17 JUDGE FEINMAN: And - - -

18 JUDGE GARCIA: I'm sorry.

19 JUDGE FEINMAN: And from a slightly different
20 approach on public policy, in a hypothetical situation
21 where you have a tax escalation clause - - - let's take it
22 out of this particular case - - - and the parties don't
23 agree, and then you have this clause, right, in the
24 contract, is there a way for the tenant to promote the
25 fulfilment of the contract by both sides without first



1 breaching?

2 MR. EHRLICH: I don't know how. I don't know how
3 you can do it.

4 JUDGE FEINMAN: So there would be no other remedy
5 other than you're forcing the tenant into a breach.

6 MR. EHRLICH: Correct.

7 JUDGE GARCIA: Counsel, when I think of public
8 policy where we say, oh, you can't contract to do this,
9 obviously the thing that comes to mind for me is statute of
10 limitations, right? And in those cases we've said there's
11 a societal interest, and the repose of the human affairs,
12 and we use rhetoric to that - - - of that kind.

13 What analogous public policy interest has the
14 court found in a situation like this? I mean, here, you
15 know, there may be two commercial parties that think this
16 is a great deal for us, ten years I want it, and we say,
17 you know what, that's - - - society has an interest here
18 too and we're going to put a stop to that.

19 Here it seems to me you're arguing this is a bad
20 deal for certain tenants, particularly smaller commercial
21 tenants. It seems to me that isn't the type of public
22 policy or issue we've looked to in undoing commercial
23 contracts.

24 MR. EHRLICH: We're not undoing the contract in
25 its entirety, number one - - - excuse me, Your Honor - - -



1 and secondly, an escalator clause for insurance, the
2 insurance bill is what it is. In this case there was one
3 violation that we moved in on the others.

4 JUDGE GARCIA: That's a bad scenario here, we can
5 say. Let's assume you're right and this - - - these facts,
6 that's a bad scenario. But we don't make a public policy
7 determination. I mean, this is such an important issue
8 that, as you point out in your brief, you don't have - - -
9 you can raise this for the first time in the Appellate
10 Division; it's such an important issue. Limited times you
11 can do that. So what is the overriding societal interest
12 in undoing this type of agreement between contracting
13 commercial parties - - -

14 MR. EHRLICH: The overriding - - -

15 JUDGE GARCIA: - - - as a general matter?

16 MR. EHRLICH: As a general matter, it's evading
17 review of the courts entirely. You're taking yourself - -
18 -

19 JUDGE GARCIA: So can you give me an analogy?

20 MR. EHRLICH: - - - the Court of Appeals - - -

21 JUDGE STEIN: Not entirely, just that the tenant
22 can't be the first one - - -

23 JUDGE GARCIA: Right.

24 JUDGE STEIN: - - - to go into housing court.

25 There's still an avenue.



1 MR. EHRLICH: We still can't counterclaim.
2 That's in the contract. We have no right to counterclaim.
3 So even if we were able to get into housing court, we
4 couldn't do anything.

5 JUDGE STEIN: So is it possible that - - - that
6 this - - - I'm - - - I'm having a little bit of difficulty
7 distinguishing between your argument and - - - and a - - -
8 and a unconscionability argument. And I - - - and I do
9 think there are two different - - - that they're two
10 different things. I think that - - - that, arguably - - -
11 that one could make an argument, maybe in this case, maybe
12 not in this case, maybe just in the mom-and-pop case, I
13 don't - - - you know, the bodega, whatever, but that this
14 particular contract is unconscionable, okay? And we have a
15 long line of cases that do that, but - - - but that's
16 different from saying that, as a matter of public policy,
17 there can never be a situation in which two sophisticated,
18 knowledgeable, equally - - - you know, equal bargaining
19 power parties could ever agree to this.

20 MR. EHRLICH: Well, number one, in commercial
21 leases, I don't think there are equal bargaining parties in
22 most of the cases because if you want the space, this is
23 your space. In this particular case, the tenant took the
24 risk of an emerging neighborhood. He took the risk.

25 JUDGE STEIN: But see, you're talking about this



1 particular case again, and that's my - - -

2 MR. EHRLICH: Right.

3 JUDGE STEIN: - - - point, that maybe - - - maybe
4 you have an argument, I don't know that I agree with it,
5 that in this particular case it's an unconscionable
6 agreement because of all these factors. But - - - but that
7 still doesn't say to me - - -

8 MR. EHRLICH: It still should - - -

9 JUDGE STEIN: - - - that it - - -

10 MR. EHRLICH: - - - be against public policy for
11 - - - to be - - - to give us no remedy, no arbitration
12 clause, nothing that the court can review, and that's the
13 crux of the case. This case, under this contract, avoids
14 court review in every instance. We cannot counterclaim, we
15 can't bring declaratory judgment, we can't get relief from
16 the courts that we can go to.

17 JUDGE STEIN: But if they - - - if they try to
18 evict you because they say you've breached the lease, and
19 you demonstrate that you haven't breached the lease, there
20 is judicial review of that, and if - - - if you're right,
21 then they can't evict you.

22 MR. EHRLICH: Well, if they start - - -

23 JUDGE STEIN: So that's not an action - - -

24 MR. EHRLICH: - - - they've restored that action.

25 JUDGE STEIN: That's not an action.



1 MR. EHRLICH: Well, how am I going to do it
2 without putting forward a counterclaim? My opportunity to
3 get - - -

4 JUDGE STEIN: No.

5 MR. EHRLICH: - - - "cute" and put it in - - -

6 JUDGE STEIN: Your defense is I haven't breached
7 the lease. That's - - -

8 MR. EHRLICH: Am I going to have to get cute to
9 avoid the forty-five-dollar motion and - - - and put it in
10 as an affirmative defense?

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 Counsel?

13 MR. LUPKIN: Good afternoon. May it please the
14 court. My name is Jonathan Lupkin, and I represent the
15 respondent here.

16 This case, in our assessment, is fairly
17 straightforward. It goes - - -

18 JUDGE RIVERA: But isn't the problem, though, in
19 part, with this - - - this blanket waiver, that it puts the
20 tenant in the position of having to cure, even though they
21 think they have no responsibility to do so, or I don't know
22 what, if they don't think there is actually anything to
23 cure or breach.

24 MR. LUPKIN: Well, that's - - -

25 JUDGE RIVERA: How is that in furtherance of



1 public policy to force a - - - a party to have to make that
2 kind of choice?

3 MR. LUPKIN: First of all, it presupposes, Your
4 Honor, that there is an obligation to give a cure period.
5 And there are at least two cases that we cited in our
6 brief, the Queens case - - - and I'll get you the name of
7 the other one in a moment - - - the - - - bear with me for
8 just a second - - - the Victory Taxi Garage case. In both
9 of those cases, those were commercial leases in which there
10 was no cure period for certain breaches.

11 And so if you accept the premise that a cure
12 period is not required, it doesn't take that much of a
13 stretch to assume that you don't need to get a stay for the
14 cure period. I don't know whether that answers your
15 question, Your Honor.

16 JUDGE RIVERA: It doesn't because they've got the
17 cure period here, so I'd really like you to kind of get to
18 that question.

19 MR. LUPKIN: Of course.

20 JUDGE RIVERA: You've got the cure period. The -
21 - - the point of that Yellowstone injunction, and the way
22 the system has worked until now is that they go in and they
23 seek injunctive relief, we're at status quo so that a court
24 can decide their rights. And if the landlord is correct,
25 they've got an opportunity to cure or they're going to have



1 to leave if they don't.

2 MR. LUPKIN: I don't necessarily agree with that
3 for the following reason. First of all, they have the
4 right to adjudicate the propriety of the notice to cure and
5 the breaches in the landlord-tenant court. That's what's
6 specifically contemplated not only by the leases here but
7 also by the RPAPL in providing for summary - - -

8 JUDGE RIVERA: How would they do that?

9 MR. LUPKIN: How would what?

10 JUDGE RIVERA: Walk me through how they do that.

11 MR. LUPKIN: Oh, sure. There would a notice to
12 cure served. They would either cure or not cure.

13 JUDGE RIVERA: Right.

14 MR. LUPKIN: And then the landlord would then
15 have to bring on a summary proceeding in saying you are in
16 - - -

17 JUDGE RIVERA: And that was my point. That was
18 my point. They - - - they are going to have to choose
19 whether or not to breach because they may not believe they
20 have to cure anything.

21 MR. LUPKIN: Well, then that's - - -

22 JUDGE RIVERA: And then they're in a defensive
23 posture as opposed to seeking a court explicitly clarifying
24 what their rights are.

25 MR. LUPKIN: But they're - - - I mean, they're



1 only in breach once the landlord-tenant court concludes
2 they're in breach. If I'm the landlord and I say to you
3 you are in breach - - -

4 JUDGE RIVERA: Yes, but they're in limbo, right?
5 They're in limbo. If you don't start the summary judgment
6 proceeding, they're in limbo, correct?

7 MR. LUPKIN: They - - - there's an uncertainty,
8 yes.

9 JUDGE RIVERA: And if you do, then they're in a
10 defensive posture; they don't have all of the defenses they
11 would otherwise have. So - - -

12 MR. LUPKIN: Well, they do have all of the other
13 defenses. The only thing they don't have is the right to
14 avail themselves of the affirmative procedural mechanism
15 that is a declaratory judgement.

16 JUDGE FEINMAN: That's the point. The way you've
17 structured this is that the tenant can only operate from a
18 defensive posture. And so going back to the tax escalation
19 hypothetical, they either pay all the tax and give in, or
20 they breach by not paying the tax and - - -

21 MR. LUPKIN: With respect, Judge, I don't agree
22 with that. In the scenario you've just posited with the
23 tax escalation clause, they could do, as one typically does
24 in federal court, if there's a challenge to a tax, they pay
25 the tax and then they challenge it later. There's



1 absolutely nothing in this clause 67(H) that prevents an
2 after-the-fact adjudication as to whether or not the
3 payment of those taxes were appropriate or not appropriate.

4 JUDGE GARCIA: Counsel, have you ever seen a
5 clause like this in another contract? Is this the first
6 one you've ever seen?

7 MR. LUPKIN: No, I've seen them in a couple of
8 other contracts, but I've not seen them typically.

9 JUDGE GARCIA: Because I keep hearing that up
10 till now - - - up till now everyone could go into court.
11 But it may well be that up till now no one's tried to do
12 this because they made a commercial agreement not to,
13 right?

14 MR. LUPKIN: Well, that's also true. In my - - -
15 in my view, respectfully, what this does is it changes the
16 - - -

17 JUDGE RIVERA: Because one might read the
18 existing law not to permit it.

19 MR. LUPKIN: I looked at the cases, and I have
20 not seen any case law cited, in either the opening brief or
21 in the reply brief, that would stand for the proposition
22 that an entitlement to a discretionary declaratory
23 judgement violates - - - that the absence of a right to a
24 declaratory judgement - - -

25 JUDGE FAHEY: It seems that we're dealing with



1 cases that we don't know exist. We're speculating, really,
2 if they do or not in this discussion.

3 What I'm curious about is I wanted your take on
4 the same question I asked opposing counsel which is on the
5 Yellowstone injunction question itself, as I said before,
6 the case that established it has been in effect for fifty
7 years in New York. It's - - - it's intricately woven into
8 the commercial practice, particularly in the City of New
9 York.

10 If we rule in your favor, wouldn't that
11 represent, number one, an overturning of the case that
12 established the Yellowstone injunction from all new
13 contracts forward, and secondly, a radical departure from
14 our own jurisprudence?

15 MR. LUPKIN: Let me address the first point
16 first.

17 JUDGE FAHEY: There's two parts, and the reason
18 the second part's important, and I just wanted to get it on
19 the record, is because of course there's a different
20 standard than a declaratory judgement standard that applies
21 to a Yellowstone injunction. So we're dealing with
22 something slightly different here than a DJ. Go ahead.

23 MR. LUPKIN: Yes, I understand that. First of
24 all, it would not be overturning Yellowstone for the - - -

25 JUDGE FAHEY: Really?



1 MR. LUPKIN: - - - following reason.

2 JUDGE FAHEY: You would - - - wouldn't you - - -
3 wouldn't you, as a - - - a commercial litigator, be - - -
4 be committing malpractice if - - - if you drew up a
5 contract, and if we upheld this provision and didn't
6 include this permission - - - this provision?

7 MR. LUPKIN: I think it would depend on the
8 circumstances of the bargain.

9 JUDGE FAHEY: I see.

10 MR. LUPKIN: So - - -

11 JUDGE FAHEY: Okay. Go ahead.

12 MR. LUPKIN: - - - to go a little bit further
13 than that, if I may.

14 JUDGE FAHEY: Yeah.

15 MR. LUPKIN: what I began to say is that this
16 really changes what the playing field looked like.
17 Fundamentally, the tenant will have whatever leverage the
18 tenant has to urge whatever it is that the tenant wants to
19 urge. And the landlord will have the similar leverage to
20 do or not do as he sees fit. The only thing that will
21 change is the board on which they're playing the chess
22 game. It will change the dynamic. It might mean that from
23 the tenant's standpoint - - -

24 JUDGE FAHEY: By that I assume you mean the
25 powers of the court that they're before, in front of a



1 different court.

2 MR. LUPKIN: Yes, but to go back to - - - to the
3 concept of the game, the chess game that we're talking
4 about here, if this - - - if a landlord insists upon this
5 clause then the tenant is certainly within his rights to
6 insist upon a much greater concession.

7 So for example, I could imagine a scenario where
8 a tenant says, okay, you want a waiver of Yellowstone
9 injunctions, I want a year-and-a-half of free rent. I
10 don't know that anyone on the court would say that that's
11 untoward, improper, or otherwise.

12 And furthermore, with respect to the - - - the
13 importance of this concept, the legislature - - - Judge
14 Stein, you pointed this out - - - the legislature
15 specifically contemplated the importance, in the context of
16 residential leases by, in effect, tacking on a statutory
17 cure period.

18 JUDGE STEIN: So you would agree that a small
19 commercial business owner might have a very different
20 degree of leverage than a big sophisticated, you know,
21 corporation, whatever. So does that mean that in - - - in
22 determining whether one of these provisions would be
23 acceptable would depend on the circumstances of each case?
24 Is that - - - is that what you're saying?

25 MR. LUPKIN: What I'm saying is that in this part



1 - - - we're here on this particular case.

2 JUDGE STEIN: No, I know, but we need to think
3 about whatever we decide here, what the impact is going to
4 be on many, many, many other cases. So - - -

5 MR. LUPKIN: I don't think that the answer would
6 be any different with respect to any number of other
7 clauses that might appear in a commercial lease. If
8 there's a - - -

9 JUDGE FEINMAN: No, I guess - - - maybe I'm
10 misunderstanding the question, but the question that I
11 have, and I think it's the same, is let's say it's not a
12 big corporation, it's, you know, Joe Smith wants to open a
13 hair salon and - - - and, you know, signs a commercial
14 lease that has this clause with a - - - a big, you know,
15 corporate management company or - - - or a real - - - real
16 estate corporation.

17 MR. LUPKIN: Well - - - I'm sorry; go ahead.

18 JUDGE FEINMAN: Is it still enforceable?

19 MR. LUPKIN: I think that the answer to that is
20 yes because if the answer is no then every provision of
21 every commercial lease would be scrutinized. And the
22 statute is very clear that there are only certain
23 enumerated statutory rights that may not be given up. A
24 Yellowstone injunction is not one of them except in the
25 context of a residential lease - - -



1 JUDGE FAHEY: So really it's - - -

2 MR. LUPKIN: - - - and there the legislature
3 sought to impose one.

4 JUDGE FAHEY: It's the source of the public
5 policy argument. Is that what you're saying? In other
6 words, if it was a constitutional source or a statutory
7 source for the public policy argument, then that's on
8 stronger ground, in your mind, than some other source?

9 MR. LUPKIN: I do believe that that's correct,
10 Your Honor.

11 JUDGE FAHEY: So that's a fair argument. I don't
12 think that's an unfair argument. In my mind, though, I say
13 to myself why isn't the common law a sufficient source of -
14 - - of a public policy argument, particularly something as
15 well established as this over a long period of time.

16 MR. LUPKIN: All that would change is that the
17 terms of the lease would change. Maybe some leases would
18 have this provision in it and maybe others would not. It
19 depends on how the parties bargain. But - - - but I - - -

20 JUDGE RIVERA: But isn't - - -

21 MR. LUPKIN: What?

22 JUDGE RIVERA: - - - part of the public policy
23 argument, at least as I understood it from the dissent, the
24 potential to destabilize these contracts because there's a
25 lack of certainty? And again - - -



1 MR. LUPKIN: Well, let me - - -

2 JUDGE RIVERA: - - - tenants are put in the
3 position of having to breach. And isn't that part of the
4 public policy that we have to take into consideration?

5 MR. LUPKIN: As I understood the appellant's
6 argument, the question was being held in an uncertain state
7 of limbo. And my response to that would be as follows.
8 Under no circumstances, even with this clause, 67(H), would
9 a - - - a breach be sitting out there indefinitely. At the
10 outer boundaries, it would be metered by the six-year
11 statute of limitations for breach of contract. But in resp
12 - - -

13 JUDGE RIVERA: That's a long time.

14 MR. LUPKIN: But - - -

15 JUDGE RIVERA: - - - to run a shop that you can't
16 get loans, you're afraid to order produce or product
17 because of having bills accumulate and you being stuck with
18 those contracts.

19 MR. LUPKIN: True enough, but the reality is that
20 there is a way to negotiate around that uncertainty. And
21 one could engraft onto this clause a requirement that any
22 breach that is identified in a notice to cure would have to
23 be adjudicated in the landlord-tenant court within one
24 year. There's certainly no prohibition on shortening the
25 statute of limitations. There is a prohibition on



1 elongating it. And I think that the circumstances of this
2 case illustrate, in a very clear fashion, what is permitted
3 to happen if the parties don't want it to happen, and that
4 is to allow a tenancy to continue for 1,500 days when it
5 was clear in the lease, as expressed by both parties, that
6 the resolution of these disputes was supposed to be made in
7 a landlord-tenant court.

8 Unless the court has any other questions, I will
9 rest on my papers, and I thank you very much.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Counsel?

12 MR. EHRLICH: May it please the court. Briefly,
13 to finish, this bill - - - this - - - not - - - excuse me -
14 - - this contract does change the playing field
15 dramatically. And Judge - - - Judge Rivera is a hundred
16 percent correct, with these actions going on, you can't get
17 credit, you can't get - - - you can't buy material, you
18 can't buy produce; you can't do almost anything. You're
19 out of business with these type of actions. Summary
20 proceedings can't revive a lease, grant an injunction, cure
21 - - - toll a cure, avoid technical breaches, direct the
22 landlord to complete alterations that they promised to work
23 on, grant discovery of issues. You have no discovery.

24 JUDGE STEIN: If tenants decided that they're - -
25 - you know, they're not going to agree to these provisions



1 unless - - - you know, unless there's some consideration -
2 - - some valuable consideration coming back the other way,
3 or there's some limitation on it or whatever, then the - -
4 - the owners, they won't be able to find anybody to - - -
5 to fill their properties, will they?

6 MR. EHRLICH: That's not true, especially in this
7 case.

8 JUDGE STEIN: Well, I mean, we're talking about
9 this horrific parade of horrors that's going to happen -
10 - -

11 MR. EHRLICH: Well, that's - - -

12 JUDGE STEIN: - - - if - - - and what I'm
13 suggesting is is that it's not completely one-sided. Some
14 - - -

15 MR. EHRLICH: Well - - -

16 JUDGE STEIN: Right? You know, so - - -

17 MR. EHRLICH: Judge Stein, nothing is completely
18 one-sided except for this contract which is completely
19 one-sided, in my opinion. And I'm going to press the court
20 that the breach is based on the landlord's failure to do
21 what he did, then my client is out of business. And we
22 have nowhere to go, literally, because, again, we can't
23 revive it, we can't get an injunction, we can't avoid a
24 technical breach, we can't direct the landlord to fix the
25 things that he's contracted to do because we can't get into



1 court to do it.

2 And the most important thing, if there's really
3 going to be litigation over a lease, don't we want to have
4 discovery of the issues and - - - and adjudicate these - -
5 - adjudicate the issues? As I said before, if there was a
6 AAA provision in this lease that sent us to arbitration, we
7 would not be standing here today.

8 JUDGE STEIN: I have one more question. Why
9 would it be in - - - in the owner's interest to serve a
10 notice to cure, right, and then sit on it for five years,
11 six years, a year, whatever? Isn't - - - isn't the - - -
12 the landlord signaling that they want you to do something
13 or get out? So - - - so this limbo, I don't under - - - I
14 mean, it seems to me that the limbo - - - that the worst
15 limbo is what you're in right now, which was - - - is
16 caused by all these stays and litigation and everything,
17 which is exactly what the lease was designed to avoid so -
18 - -

19 MR. EHRLICH: Except - - -

20 JUDGE STEIN: - - - so why would a landlord do
21 that? Why - - - why - - -

22 MR. EHRLICH: Well, in the case - - -

23 JUDGE STEIN: Why would a landlord - - -

24 MR. EHRLICH: In this particular matter, the one
25 - - - the one - - - I guess the nice way to put - - - one -



1 - - one order, the City approved it and it should have been
2 - - - it was - - - it was repaired almost immediately right
3 after the Yellowstone was brought. And right now, as far
4 as we know, we're in no technical breach of anything, and
5 we want to keep our lease the way it is - - -

6 JUDGE STEIN: And you've been in the - - -

7 MR. EHRLICH: - - - and stay.

8 JUDGE STEIN: You've been in the premises for
9 this entire time, right.

10 MR. EHRLICH: We don't want to be in the
11 premises.

12 JUDGE STEIN: So I just - - - I don't understand
13 why - - -

14 MR. EHRLICH: Well, there's - - - there's the
15 unspoken fact here that this is in Williamsburg, New York.
16 That's where this is situated. This - - - the place - - -

17 JUDGE STEIN: But my point is that the landlord,
18 if you're suggesting that - - - that he wants to get in a
19 more lucrative lease, why would the landlord sit on it and
20 - - -

21 MR. EHRLICH: Well, I'm not - - -

22 JUDGE STEIN: - - - leave the tenant in limbo?

23 MR. EHRLICH: We're not saying the landlord is
24 sitting on it.

25 JUDGE STEIN: Okay.



1 MR. EHRLICH: We have seven actions going. This
2 is just the first of those.

3 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
4 you.

5 MR. EHRLICH: Thank you.

6 CHIEF JUDGE DIFIORE: Thank you.

7 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of 159 MP Corp., et al. v. Redbridge Bedford LLC, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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