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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FRANKLIN STREET REALTY
CORP., et al.

Appellants,

-against-

No. 100

NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, et al.,

Respondents.

20 Eagle Street
Albany, New York
November 19, 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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 100, Matter of
3 Franklin Street Realty Corp. v. New York City Environmental
4 Control Board.

5 Thank you.

6 Good afternoon, counsel.

7 MS. GARROWAY: Good afternoon, Your Honors. May
8 it please the court. My name is Lindsay Garroway. I'm
9 here on behalf of four appellants, Franklin Street
10 Associates, J.P. Associates, 41-03 31st Avenue, and 23-06
11 Jackson Avenue. I respectfully request two minutes for
12 rebuttal.

13 CHIEF JUDGE DIFIORE: You may.

14 MS. GARROWAY: Thank you. Your Honors, in
15 defining "outdoor advertising company", New York City
16 council never envisioned fining a small business owner like
17 John Ciafone, in the amount of 380,000 dollars for the - -
18 -

19 JUDGE RIVERA: Where do we find support for that
20 in the text?

21 MS. GARROWAY: Actually - - -

22 JUDGE RIVERA: What language do I need to look at
23 to come to that conclusion?

24 MS. GARROWAY: I would hearken back to the
25 legislative history, Your Honor.



1 JUDGE RIVERA: No, the text. I'm not going to
2 the history until I get past the text, unless you're going
3 to argue the text is ambiguous.

4 MS. GARROWAY: Understood. I think the statutory
5 interpretation is actually our strongest argument. The
6 Administrative Code - - - New York City Administrative
7 Code, Sections 28-502.1 define outdoor advertising company
8 and outdoor advertising business.

9 And the crux of our case is that Mr. Ciafone's
10 activities, through these property holding companies, do
11 not constitute the, quote/unquote, "business of selling,
12 leasing, marketing, managing, or otherwise either directly
13 or indirectly making space on signs situated on buildings"
14 - - -

15 JUDGE STEIN: Why not "or otherwise"? That's
16 pretty broad, right?

17 MS. GARROWAY: It is very broad. And - - -

18 JUDGE STEIN: And if we limit it to those other
19 things, then aren't we ignoring something that the
20 legislature intended to put in there?

21 MS. GARROWAY: We concede that the case law
22 interpreting this regulation says that the bar is very low
23 to be considered an outdoor advertising company. All the
24 City really needs to show - - - or there's a rebuttable
25 presumption created by the fact that if you have a sign on



1 your building you are assumed to be an OAC unless you can
2 prove certain things. And we're asking for a very narrow
3 exception here. Mr. Ciafone falls into this Nativo - - -

4 JUDGE RIVERA: But I guess that's - - - now we're
5 getting to my question. It strikes me what you're really
6 asking for is that Nativo be read differently from the way
7 the board reads Nativo.

8 MS. GARROWAY: Exactly.

9 JUDGE RIVERA: And what would be the legal basis
10 for doing that? It's their exception to what I see
11 provides no exception. And you're not challenging the
12 exception because you want to ride the coattails of the
13 exception.

14 MS. GARROWAY: Right. The - - -

15 JUDGE RIVERA: So tell me why the board acted
16 irrationally in - - - in interpreting Nativo as narrowly as
17 it had, given that it's an exception that they have created
18 for language that I don't see contains any exception?

19 MS. GARROWAY: It's not really an exception; I
20 actually agree with you.

21 JUDGE RIVERA: Okay.

22 MS. GARROWAY: We're - - - it's called the Nativo
23 exception by the court below, and we repeat that in our
24 papers, but you're right: we're actually just saying that
25 we fall totally outside of what the statute defines, that



1 in its plain language we don't meet those - - - that
2 definition.

3 But respectfully, to the ECB appeals board - - -

4 JUDGE RIVERA: Well, how not? I mean, these are
5 two separate corporate entities; they're not the same.

6 MS. GARROWAY: They are not the same, but the
7 activities that they are engaged in fall short of any of
8 the examples, even - - - even the cases that are cited to
9 by the ECB appeals board, and there are only a few of them,
10 the facts are radically different than our case. In all of
11 those examples there is - - -

12 JUDGE FAHEY: Well, isn't it really whether or
13 not there's a rational basis, as a public policy matter, to
14 distinguish sole ownership? You have sole ownership by an
15 individual. You have sole ownership by a - - - a
16 corporation, partner - - - well, not a partnership but a
17 corporation. But what would be the rationalization, if
18 sole ownership is a criteria for someone who's not engaged
19 in the regular course of business in conducting an outdoor
20 advertising company, then why - - - what's the public
21 policy basis to distinguish between them in the law? Isn't
22 that what you're saying, that it's essentially irrational
23 for that reason? There's no - - - there's no principled
24 basis to make that distinction.

25 MS. GARROWAY: Yes, exactly. It lacks



1 rationality and also serves no purpose - - -

2 JUDGE STEIN: Well, what about just the
3 enforceability, because it seems to me that, if you look at
4 the history of all of this, the very purpose of these
5 regulations or this Code was to make - - - to make it
6 easier to enforce the sign regulations. So if - - - as I
7 understand it, and as it's been argued, if the Board wants
8 to go find out who owns a piece of property, they can go to
9 public records and it tells them, right? And if it's an
10 individual then that's pretty clear.

11 Now, if - - - we're going to say that the way
12 they interpret the regulation requires them to apply Nativio
13 - - - Nativio when the owner of record is a corporation,
14 then what do they have to do to figure out whether it's the
15 same person or it's not the same - - - I mean, this isn't a
16 question of - - - you know, would you agree that it would
17 be an easier question of Ciafone, P.C. owned the building
18 and also was the subject of the signs?

19 MS. GARROWAY: I don't agree with that,
20 respectfully, nor - - -

21 JUDGE STEIN: Why - - -

22 MS. GARROWAY: - - - could Ciafone, P.C. - - -

23 JUDGE STEIN: Why not?

24 MS. GARROWAY: Because if the city's goal is
25 transparency - - - and that would be a rational objective.



1 If they were saying, well, if we could see who the
2 individual owner was and we can see who owns the business
3 or the - - - the company that's being promoted by - - - by
4 the sign, that would be some sort of rational connection.
5 But they're not even saying that. If you look - - -

6 JUDGE FAHEY: But you didn't put anything in the
7 record at all saying that Ciafone was the sole owner of the
8 corporation, did you?

9 MS. GARROWAY: Judge, I see that Corp. counsel
10 challenges that factual issue in their papers. But
11 respectfully, it was not challenged at the hearing at ECB -
12 - -

13 JUDGE FAHEY: But I'm asking if you put anything
14 in.

15 MS. GARROWAY: I did not because we feel it's
16 unpreserved. We feel that the - - -

17 JUDGE RIVERA: But isn't it your burden?

18 MS. GARROWAY: I think - - -

19 JUDGE RIVERA: Isn't it your burden to show he's
20 the sole owner?

21 MS. GARROWAY: We believe that because the
22 hearing judge accepted that fact - - - the hearing judge
23 took that - - - his testimony and - - - and the
24 documentation that he did submit. He said that was
25 sufficient and accepted that fact as true, and it was not



1 questioned. It doesn't even appear as an issue in the - -
2 - in the ECB - - -

3 JUDGE FAHEY: So you're saying the hearing court
4 accepted it as true that he was a sole owner if the
5 corporation.

6 MS. GARROWAY: That's right.

7 JUDGE FAHEY: I see.

8 MS. GARROWAY: That's right. It's not preserved
9 to be challenged, although - - -

10 JUDGE RIVERA: And the board didn't find
11 otherwise?

12 MS. GARROWAY: The board did not mention that
13 issue at all, meaning it wasn't preserved. It's too late
14 to be raising it at the Appellate Division level.

15 JUDGE RIVERA: Well, the analysis for the Board,
16 it's not relevant to them in many ways.

17 MS. GARROWAY: I'll say something else about that
18 point. Even if you are unsatisfied with the issue that he
19 - - - that the proof that he's the sole owner, it's very
20 similar to the ECB appeal's case Eileen Halvatzis where the
21 husband and wife co-owned the property and the - - - Eileen
22 Halvatzis was the respondent named on the violations. They
23 co-owned the property together, but the sign promoted the
24 husband's real estate business. And - - -

25 JUDGE GARCIA: But they were co-owners, right?



1 This is a little bit different. And that fact, or not
2 fact, is in the Appellate Division decision, isn't it, that
3 the spouse was the principal of one of these companies?
4 Where did they get that from?

5 MS. GARROWAY: I think because Corp. counsel
6 raised it in their papers and tried to make an issue of it
7 later, they addressed it. But we maintain our position
8 that it's not preserved, and that's a - - - a factual - - -
9 the issue is moot.

10 JUDGE FAHEY: One of the things I struggle with
11 in this case is that I mentioned to you before that the - -
12 - the weakness in the majority opinion below argument is -
13 - - is the rational basis analysis, that there's a
14 principled distinction between two types of sole ownership.
15 But it seems the weakness in the dissent's argument is that
16 the corporation is not merely a forum. There are specific
17 tax - - - tax benefits and liability benefits that someone
18 gets by the creation of distinct corporate entity. And I'm
19 concerned that if we say that this is simply a forum
20 distinction that we will somehow be denigrating or
21 diminishing, in this circumstance, the use of - - - of a
22 corporate entity as a separate legal person.

23 MS. GARROWAY: I see my time has elapsed. May I
24 just answer?

25 CHIEF JUDGE DIFIORE: Yes.



1 MS. GARROWAY: Very briefly, I don't think that
2 finding this very narrow exception for my client would not
3 alter the way the city enforces or - - -

4 JUDGE FAHEY: Castles are made of sand all the
5 time in the legal business. You know this.

6 MS. GARROWAY: The fact that in this instance the
7 administrative code is what we're looking to, we're not
8 asking you to change the law on corporate structures, only
9 to say that the administrative code is broad enough to
10 allow this sort of piercing, is our request.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MS. GARROWAY: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MS. GRAVES-POLLER: May it please the court.
15 Barbara Graves-Poller for respondents.

16 CHIEF JUDGE DIFIORE: Counsel, is there a
17 meaningful difference between Nativo and this case?

18 MS. GRAVES-POLLER: Absolutely. These - - -
19 these proceedings are only superficially similar to what
20 happened in the Nativo case. For one thing, Mr. Ciafone is
21 no Joseph Nativo. He does not own any property at issue in
22 this proceeding - - - in these proceedings. Mr. Ciafone
23 also doesn't owe New York City one dollar in connection
24 with any of the violations. And in the Nativo case, Mr.
25 Nativo actually paid several thousand dollars out of his



1 own pocket because it was his property.

2 But I think Your Honor's question - - - the most
3 important answer to your question is that the entire
4 enforcement system is one based on premises-based
5 liability. DOB employs any number of inspectors who go out
6 to a physical location, and in the case of the outdoor
7 advertising laws, they look at a number of things at that
8 site. They look at the decals. If a sign is up, is this a
9 sign for an accessory use, something that's on premises?
10 Is there a decal for a licensed sign hanger? All of the
11 things that were noted in the violations. And that
12 inspector, reasonably and rationally and properly assumes
13 that if you own property, you're responsible for the
14 conditions at your property.

15 Now, what petitioners are asking for is a total
16 rewrite of that system and actually a rewrite of the
17 administrative code which contains absolutely no Native
18 exception, and even if it did, it wouldn't apply to
19 petitioners.

20 JUDGE GARCIA: This is a basic question. This is
21 a statute, right, not a regulation?

22 MS. GRAVES-POLLER: Well, there's - - - what
23 we're talking about now is absolutely the administrative
24 code. The regulation simply restates the language - - -

25 JUDGE GARCIA: Restates. So there can't be an



1 exception carved out by the agency to what's in the Code,
2 right? I mean, last I looked, the agency couldn't make an
3 exception to a statute.

4 MS. GRAVES-POLLER: Correct.

5 JUDGE GARCIA: So it seems to me, *Nativo* is an
6 application of the term, right? It's the agency's
7 interpretation. And one question we have is is that, you
8 know, we look at the statute, do we agree that that's a
9 reasonable reading of "others" or the terminology in the
10 statute.

11 I think the other argument really with *Nativo* is
12 you are applying the statute in this way, and you've been
13 going along applying it in *Nativo* and the other cases that
14 are cited in the papers. And is that rational? Is it
15 rational to say here yes, here no? And that, I think, is
16 something of a more interesting issue.

17 MS. GRAVES-POLLER: So again, we are not asking
18 for the court to defer to ECB's expertise and enforcement
19 or even to defer to the same facts that were discussed in
20 *Nativo*.

21 JUDGE GARCIA: Right, but has it been - - - have
22 you been applying the statute irrationally by saying to
23 *Nativo* you're not, and saying here and in other cases you
24 are.

25 MS. GRAVES-POLLER: Absolutely not because again,



1 Nativo wasn't simply about the fact that Mr. Nativo owned
2 the property, which Mr. Ciafone doesn't - - -

3 JUDGE FAHEY: But within the statute then you're
4 saying the use of the corporate forum is a creation of an
5 "other"; therefore, it's - - - it's not covered, clearly,
6 unequivocally. And you have no obligation to check and see
7 if they're the same person?

8 MS. GRAVES-POLLER: Correct, but also, I would -
9 - -

10 JUDGE FAHEY: See, I wonder about that lack of an
11 obligation to check and see if you don't have the same
12 person because let's say it was a chronic absentee
13 landlord, you would look - - - if you're an inspector, city
14 inspector, you look behind the forum to find out if it's
15 the same person and track him down and see if there's a
16 network of slum landlords, for instance.

17 It's done all the time. You have a situation
18 where the liability goes from 800 dollars for a person to
19 10,000 dollars per violation. I'm assuming that the
20 violations then, if they're imposed, are a lien against the
21 property.

22 MS. GRAVES-POLLER: Correct.

23 JUDGE FAHEY: And so he doesn't pay, he loses the
24 building.

25 MS. GRAVES-POLLER: So - - -



1 JUDGE FAHEY: Is that correct?

2 MS. GRAVES-POLLER: Presumably. I don't know
3 what the assets of petitioners are. But it - - - it sounds
4 like Your Honor's question is actually pointing to other
5 language in the Code that we - - -

6 JUDGE FAHEY: Well, there's the "others"
7 question. I started out there, but I really - - - I'm
8 wondering about how is it a burden for the agency to find
9 out who actually owns the property? It seems to me that's
10 something the agency does all the time, and that looking
11 behind that forum to support - - - to enforce a whole broad
12 range of building code violations is commonly done by
13 municipalities throughout the state.

14 And I know this because the first job I had at
15 college was an inspector for the absentee control unit in
16 the city of Buffalo, and that's what I did; I looked up who
17 owned what property and what the web was. And it's very
18 common. This was forty years ago.

19 MS. GRAVES-POLLER: So - - -

20 JUDGE FAHEY: It doesn't seem unusual. The
21 city's usually way more sophisticated than we ever were in
22 these areas.

23 MS. GRAVES-POLLER: So I'm not familiar with - -
24 -

25 JUDGE FAHEY: So my question is - - -



1 MS. GRAVES-POLLER: - - - those laws in Buffalo,
2 but - - -

3 JUDGE FAHEY: - - - in terms of enforcement, the
4 enforcement burden; that's what I'm trying to focus you in
5 on.

6 MS. GRAVES-POLLER: Right, so the city did find
7 out who owned these properties.

8 JUDGE FAHEY: Um-hum.

9 MS. GRAVES-POLLER: And the owners of the
10 properties were petitioners.

11 Now, what I was going to point Your Honor to was
12 the language it talks about the regular conduct of its
13 business.

14 JUDGE WILSON: And I wanted to ask about that
15 because there's an argument made at page 8 of Mr. Ciafone's
16 brief, and it's also made in the Appellate Division, to the
17 effect that you failed to present any evidence as to the
18 engage - - - as to his engagement or his company's
19 engagement in the business of selling, leasing, marketing,
20 et cetera.

21 That seems, to me, to be a different argument
22 that was not at all made in the administrative proceedings.
23 It's made for the first time when you get to - - - to the
24 Appellate Division. And that it's a case where you - - - a
25 circumstance where you really want to apply our



1 preservation doctrine because you weren't given the chance
2 to put in that kind of evidence and to explain what you
3 would mean by "regular conduct" of - - - of a business.

4 And to the point that Judge Fahey was asking
5 about, in terms of the 800 dollars versus 10,000 dollars,
6 that might be the language that is intended to, sort of,
7 draw this back from the individuals and distinguish them
8 from, say, Gannett Outdoor. But none of that, I think, has
9 been raised properly in this case.

10 MS. GRAVES-POLLER: So the issue of what it means
11 to be - - - what regular conduct of its business means is
12 not something that - - - that was addressed at the
13 administrative hearing. But there certainly is evidence in
14 the administrative hearing record to show that these signs
15 were placed on the buildings in the regular course of
16 petitioner's business as to be - - -

17 JUDGE FAHEY: But I guess the point is, though,
18 can you even argue that - - - because I didn't think the
19 issue was preserved. I was interested in the question
20 myself, and then when I researched it, it didn't seem to be
21 preserved at all, the regular-course-of-business argument.

22 MS. GRAVES-POLLER: I just want to make sure that
23 I'm understanding how Your Honors are understanding
24 "regular course of business" because, from ECB's
25 perspective, regular course of business means that these



1 signs were placed on the - - - on the buildings with the -
2 - - in the regular course of owning and operating the
3 buildings. It doesn't mean that the regular course of
4 petitioner's business is advertising. But one can conceive
5 a - - -

6 JUDGE WILSON: But that's not my - - - my
7 question is that issue one that was raised in the
8 administrative proceeding because I don't see it raised in
9 the administrative proceeding.

10 MS. GRAVES-POLLER: That discussion was not had
11 in the administrative proceeding. What petitioners focused
12 on was their unsuccessful arguments that these were
13 accessory signs and then the arguments based on Chapter 15
14 of the BCL.

15 But I just, again, want to complete the answer to
16 Your Honors, and that is that one can imagine a scenario in
17 which, without a landowner's or a property owner's consent,
18 some sign appears on a building. Or one can also imagine
19 that, through an act of vandalism or something, the
20 conditions on the building changed.

21 But what is in the administrative record here is
22 very clear testimony by Mr. Ciafone that he was acting on
23 petitioner's behalf when he placed these very prominent
24 signs, or had them placed on the buildings. And so from
25 ECB's perspective, that amounts to petitioners placing



1 these ads on in the regular course of their ownership and
2 operation of their buildings. And this is not some sort of
3 anomaly or something done without their consent.

4 JUDGE RIVERA: And what if the evidence that once
5 he's informed that this is a violation the - - - the signs
6 don't go down?

7 MS. GRAVES-POLLER: I'm sorry?

8 JUDGE RIVERA: He doesn't remove the signs once
9 he's informed of the violation. How does that inform the
10 analysis you're proposing?

11 MS. GRAVES-POLLER: Well, again, I think it just
12 goes to the fact that petitioners wanted these signs on
13 their buildings and they left them there. On the question
14 of fines that Your Honor also raised, petitioners could
15 have mitigated the - - - the fines that they're facing by,
16 I believe, fifty percent, had they reduced - - - had they
17 removed the signs - - -

18 JUDGE FEINMAN: Well, but we have no authority to
19 sort of visit whether the fine shocks the conscience or
20 anything like that, and I mean, this is really just a
21 matter of whether these are these Class 1 violations or
22 not.

23 MS. GRAVES-POLLER: Correct. And I'm just only
24 raising the issue that it shows that petitioners wanted and
25 intended for these signs to remain on the buildings for an



1 extended period of time.

2 JUDGE STEIN: I'm not sure - - -

3 JUDGE FEINMAN: Let me ask you this - - - I'm
4 sorry.

5 JUDGE STEIN: Go ahead.

6 JUDGE FEINMAN: How does the fact that there's
7 this whole provision for affiliates figure into this? And
8 - - - and is it possible that you could have two
9 corporations, you know, they're essentially affiliates, or
10 perhaps an individual and a corporation are affiliates,
11 such that it would take you out of this Class 1 violation -
12 - -

13 MS. GRAVES-POLLER: So - - -

14 JUDGE FEINMAN: - - - here.

15 MS. GRAVES-POLLER: - - - certainly affiliates
16 would - - - the possibility of registering as affiliates
17 would be available to petitioners. They didn't avail
18 themselves of that opportunity, but it doesn't take them
19 out of the definition of being an OAC. What it means is
20 that they go online - - - this is an online registration
21 system. And they would register a lead OAC, and then its
22 affiliated OACs. They would all be jointly and severally
23 liable, but it would be a more streamlined registration
24 process. But then they would renew every two years.

25 So I agree that if petitioners had followed the



1 law, they could likely, if they met the definition of
2 affiliates that's clear in DOB's rules, they could possibly
3 register as affiliates, which would just streamline the
4 process but not mean that they were no longer outdoor
5 advertising companies.

6 CHIEF JUDGE DIFIORE: Judge Stein?

7 JUDGE STEIN: I'm not sure you answered, I think,
8 a question that's really at the crux of this, and if you
9 did, I apologize; I didn't hear it.

10 The question is: why it is not irrational to
11 distinguish between the circumstances here and the
12 circumstances in Nativo?

13 MS. GRAVES-POLLER: It is not irrational because,
14 first, petitioners are the owners of the properties, not
15 the individual, Mr. Nativo, as he was in that case. And
16 petitioners do not allege that they have any ownership
17 interest in the advertised entity. So for those two
18 reasons, Nativo is - - - simply is not applicable.

19 JUDGE GARCIA: And I believe in Nativo it was the
20 owner who brought in the proof that they were in fact the
21 sole owner of the property.

22 MS. GRAVES-POLLER: Absolutely. And that's not
23 even an allegation here, let alone coming up with proof.

24 I see my light is on. Thank you, Your Honors.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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Counsel?

MS. GARROWAY: Thank you. Just two quick clarification points. The enforcement issue that was raised, the judgment against the building would absolutely be enforceable against Mr. Ciafone personally. It would be a lien on the building. The marshal's office would likely obtain it. They would go after him personally.

Number two, the preservation or the burden-shifting issue, we believe that ECB's rules operate as such that as soon as Mr. Ciafone, at the hearing, denied that he was acting as an OAC, the burden then shifted to DOB to present any proof that he was engaged in some sort of activity that met the definition of the rule.

I'll also point to 48 R.C.N.Y. 3-54(a), the City must prove, by a preponderance of the credible evidence, that Mr. Ciafone and his property ownership corporations committed the violations charged. And we think both of those points are in our favor. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(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 Matter of Franklin Street Realty Corp., et al. v. NYC Environmental Control Board, et al., No. 100 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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