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COURT OF APPEALS
STATE OF NEW YORK

JOEL RADEN and ODETTE RADEN,

Appellants,

-against-

W7879, LLC., et al.

No. 2

Respondents,

20 Eagle Street
Albany, New York
January 7, 2020

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 today's
2 calendar is appeal number 2, Raden v. W7879, LLC.

3 (Pause)

4 CHIEF JUDGE DIFIORE: Good afternoon, sir. You
5 may now place your appearance on the record and inform the
6 court as to whether or not you'd like rebuttal time.

7 MR. MILLER: Thank you, Judge. My name is Seth
8 Miller from Collins, Dobkin & Miller. I represent the
9 appellant. And I would like one minute for rebuttal.

10 CHIEF JUDGE DIFIORE: One minute, sir?

11 MR. MILLER: Yes.

12 CHIEF JUDGE DIFIORE: You have it.

13 MR. MILLER: May it please the court. It was
14 illegal in 1995 for the Raden's apartment to have been
15 deregulated, and it was illegal at that time to charge them
16 a market rent. They've paid illegal overcharges for
17 twenty-five years. And this case is about how much
18 illegality they and the public are required to accept and
19 whether that illegality is required, by law, to project
20 indefinitely into the future.

21 I have four points to make. Number one, the
22 HSTPA applies. Number two, on this record, the 1994
23 registration is the reliable registration that - - - that
24 is referred to in the HSTPA, within the meaning of that
25 statute, and that the record here is sufficient to reach



1 that issue, decide it, and instruct the - - - the - - -

2 JUDGE GARCIA: Counsel, I have a question.

3 MR. MILLER: Yes.

4 JUDGE GARCIA: If the - - - we've heard - - - I
5 think Judge Fahey was asking a lot about the changes that
6 can be interpreted as more favorable to landlords - - - in
7 '97, I think, those were passed?

8 MR. MILLER: yes.

9 JUDGE GARCIA: Let's say the '97 amendments were
10 never passed, and obviously then the '19 amendments, the
11 new law, was not passed, and your scenario happened, under
12 the pre-'97 law now, what - - - what would happen? How
13 would you calculate damages?

14 MR. MILLER: I think the result would be the
15 same. Bear in mind that this is a case where a landlord
16 deregulated an apartment for many years and never
17 registered - - -

18 JUDGE GARCIA: So I guess my specific question
19 is: Would you look at any reliable information to set a
20 base date rent and go back to '94 in 2019 - - -

21 MR. MILLER: Yes.

22 JUDGE GARCIA: - - - if none of those intervening
23 changes had happened?

24 MR. MILLER: Prior to the amendments that were
25 just passed, the - - - the statute 26-516(a) said - - - and



1 - - - and I'm quoting as best I can from memory - - - that
2 the - - - the base rent is the rent reflected on a
3 registration statement on file - - -

4 JUDGE GARCIA: No, but I'm saying if '97 - - -

5 MR. MILLER: - - - four years prior to the most
6 recent - - -

7 JUDGE GARCIA: - - - also had never happened. If
8 the '97 change - - -

9 MR. MILLER: No, no, this was the '94 - - - the
10 '84 statute.

11 JUDGE GARCIA: Okay.

12 MR. MILLER: The '84 statute said the words "four
13 years". But those four years were reckoned in a very
14 particular way that's now been restored and - - - and two
15 years have been added.

16 JUDGE GARCIA: Okay.

17 MR. MILLER: If - - - if a landlord consistently
18 registered, year after year, then you're going back
19 basically six years plus however - - - whatever portion of
20 a year it takes to register. But if a landlord doesn't
21 register, under the old law, you go back to the previous
22 registration, and then four years back before that. So
23 somebody who never registered could have their rent
24 determined from decades ago. That's - - - that was the '84
25 statute.



1 JUDGE GARCIA: So the only - - -

2 MR. MILLER: And that statute, that statutory
3 language was not amended in 1997. What happened in 1997 is
4 that that positive declaration of how you affirmatively
5 find what the rent is remained the same, but the
6 legislature enacted what my colleague called an evidentiary
7 rule, saying we can't look at records more than four years
8 old.

9 And frankly, Judge, those two provisions of that
10 same statute contradicted one another, which led to endless
11 litigation which has reached this court because you had a
12 command that remained in the statute, unamended, that said
13 you must look at a registration more than four years old if
14 there's been a failure to register. And you had another
15 command in the same statute saying you can't look at it.

16 This court resolved it as best it could in the
17 Thornton case by saying, you know what, landlords, if we
18 can't look at that prior registration - - - as Judge Tom
19 had said in the Appellate Division, in his dissent, if we
20 can't look at that prior registration, there's no reliable
21 registration, and we're just going to use a default - - -

22 JUDGE GARCIA: Can I - - - I understand that.
23 Can I ask you? Again, looking at my hypothetical, where
24 none of these intervening changes took place - - -

25 MR. MILLER: Right.



1 JUDGE GARCIA: - - - and you had in 19 - - -
2 whatever it is, '95 or '92, illegal change, right? And
3 then you never increase the rent, like, there's never an
4 increase above what you would increase it, but that initial
5 one is bad. So let's say you go from 1,000 to 2,000, and
6 it should have only gone up to 1,200. But after that, you
7 increase it only the percentages - - - and this under the
8 old law, pre-'97 - - - you increase it only the percentages
9 you're allowed to. Under the old law, could you still
10 bring the suit, even though you'd had no increase in the
11 four years before that would have qualified as above the -
12 - -

13 MR. MILLER: Judge, with all due respect, that
14 hypothetical lacks the critical fact of whether it was
15 registered.

16 JUDGE GARCIA: Okay. Let's say he registered it.

17 MR. MILLER: If those increases were registered
18 and there are more than four years' worth, the answer would
19 be no. If those increases were, under prior law, not
20 registered, the answer would be yes. So under the old law,
21 if a landlord takes a - - - an illegal rent increase and
22 registers it - - -

23 JUDGE GARCIA: Right.

24 MR. MILLER: - - - and then four years elapses,
25 and nobody challenges that, and a landlord files a fifth



1 registration, it's exempt. That was how the old four-year
2 rule - - - the original four-year rule worked. That is how
3 I think a lot of people thought the '97 law would work
4 until the landlord bar and the courts started to look at it
5 as excluding registration documents.

6 JUDGE GARCIA: What about how this law works,
7 though?

8 MR. MILLER: That's not how this law - - - this
9 law works very much like the - - - the '84 law originally
10 worked.

11 JUDGE GARCIA: But in this one you could file a
12 registration statement, not do anything, and then five
13 years later you can bring a claim, which I think you're
14 telling me you couldn't in the other one. As long as you
15 filed a registration statement, even if it's bad, and then
16 five years go by, under the current law, you can bring a
17 claim and get your five years of increases, right? Under
18 the old law, could you do that?

19 MR. MILLER: I believe the - - - the biggest
20 difference is between this law and the '84 law is the
21 addition of the two years - - -

22 JUDGE GARCIA: Right.

23 MR. MILLER: - - - and the clear statement that
24 even the - - - what would be - - - I'm going to say there's
25 a presumption; nobody's really interpreted the statute, but



1 this is how I would interpret it. The presumptive
2 registration, that's the base registration, that one six
3 years prior to the most recent registration, that
4 presumptive registration can be impeached under this law.
5 But I would say still that there's a presumption that a - -
6 - a facially-valid registration is valid.

7 JUDGE GARCIA: Because it strikes me as the
8 difference with this statute of limitations and the
9 evidentiary rule is there's just no repose ever.

10 MR. MILLER: Well, I believe there is. I do
11 believe there is. In fact, I - - - I think that if you
12 look at it from the point of view, not of the many cases
13 that are heavily contested that reach this court where
14 landlords are accused of all kinds of fraud, if you look at
15 it from the point of view of the law-abiding landlord, who
16 constantly registers, who takes only legal rent increases,
17 who - - - for whom most rent increases can be calculated
18 mathematically based on the guidelines, and - - - and based
19 on MCI orders that are public records, where occasionally
20 there may be an improvements increase, but that can be
21 validated, those registrations are going to be
22 unimpeachable. They're going to be - - -

23 JUDGE GARCIA: Why?

24 MR. MILLER: - - - reliable.

25 JUDGE GARCIA: What if that landlord made a



1 mistake and they file one and it gets by, and now, twenty
2 years later, under the new rule, you come in and you say,
3 look, I could show there was a mistake, so this rent should
4 have been X six years ago. And now I can - - -

5 MR. MILLER: right.

6 JUDGE GARCIA: - - - recover for six years.

7 MR. MILLER: I - - -

8 JUDGE GARCIA: So why is that never being able to
9 repose? Even for a well-intentioned landlord, who's trying
10 to follow laws, but he increases it more than - - -

11 MR. MILLER: I agree.

12 JUDGE GARCIA: - - - that landlord should have?

13 MR. MILLER: Well, this is economic regulation.
14 So I - - - I agree with you that when you're dealing with a
15 no-fault statute - - -

16 JUDGE GARCIA: Even economic regulation must have
17 some end to it.

18 MR. MILLER: No, of course it does.

19 JUDGE GARCIA: Like, you can't be open-ended in
20 the consequences for your action, and it seems to me - - -

21 MR. MILLER: No, but you're - - -

22 JUDGE GARCIA: - - - there just is no repose.

23 MR. MILLER: But you're talking about a mistake.
24 You're talking about something that - - - that is
25 recognizably wrong even though it's not somebody's fault.



1 JUDGE GARCIA: Right.

2 MR. MILLER: Right? If it's - - - if it's a
3 wrong rent, it can't project into the future, if it can be
4 demonstrated to be wrong. But what - - - when there is
5 repose is when you can't demonstrate an ancient
6 registration to be wrong.

7 JUDGE GARCIA: So if you hadn't - - -

8 MR. MILLER: When it's clearly right - - -

9 JUDGE GARCIA: - - - committed a tort, you
10 wouldn't have a statute of limitations problem. You know,
11 it's - - - you've done something that's wrong, you've made
12 a mistake; isn't there a certain amount of time in the law
13 that goes by where you can think, okay, you know, that's
14 not going to have consequences? Isn't this more like a
15 claims-revival statute, an ongoing claims-revival statute?

16 MR. MILLER: Well, yes, but what this court has
17 said about claims-revival statutes, in the World Trade
18 Center litigation, 30 N.Y.3d 377 - - - I believe it was
19 your opinion, Judge Feinman - - - is that the - - - the
20 standard of review is slightly more than pure
21 reasonableness, which I think this statute passes.

22 JUDGE STEIN: But doesn't it have to - - -
23 doesn't the language have to be a lot clearer than the
24 language of this statute to be a claim-revival statute? I
25 mean, we just - - - we just recently saw the - - - the sex



1 victims act, right?

2 MR. MILLER: Right.

3 JUDGE STEIN: Child Victims Act - - - I'm sorry.
4 And - - - and it says that the statute of limitations, the
5 period is being revived for a discrete limited period of
6 time, I think which is also a part of the test of
7 reasonableness, whereas here, as Judge Garcia has just
8 demonstrated, there is no period of time. It's - - - it's
9 indefinite. So - - -

10 MR. MILLER: No, it creates a presumption. The
11 presumption is that the six-year - - - that a landlord who
12 constantly registers, that registration six years ago is
13 going to be valid unless it's impeached. And it's not so
14 easy to impeach a registration. I've litigated with
15 landlords for thirty years.

16 JUDGE STEIN: But prior to this, in order to go
17 back beyond the four years to look at this, there was a
18 burden, was there not, on the tenant, to make a colorable
19 claim of fraud or a pre-existing rent reduction order?

20 MR. MILLER: I think that - - -

21 JUDGE STEIN: That's how the law was interpreted
22 prior to that, right?

23 MR. MILLER: That was what was at issue in this
24 appeal prior to the passage of the HSTPA. And what we
25 contended - - -



1 JUDGE STEIN: Well, I understand, but that's what
2 we have to compare it to in - - -

3 MR. MILLER: Right.

4 JUDGE STEIN: - - - in determining whether it's
5 properly - - -

6 MR. MILLER: I think the pre-existing - - -

7 JUDGE STEIN: - - - retroactive.

8 MR. MILLER: Judge Stein - - -

9 JUDGE STEIN: Right?

10 MR. MILLER: - - - I think that the pre-existing
11 law before the HSTPA was that an unregistered market rent
12 cannot be a base rent.

13 JUDGE STEIN: Well, that's how you read the law,
14 but that's not how the courts interpreted the law.

15 MR. MILLER: The First Department did not
16 interpret it that way, but I think that that's a fair
17 reading of Thornton, and that's a fair reading of many of
18 the First Department cases that resulted in the conflict
19 that got us here in this case.

20 JUDGE WILSON: Let me just go back to the statute
21 of limitations question for a minute, and maybe you can
22 straighten me out if I've mixed this up. My understanding
23 is that there had been a split within the First Department
24 as to whether this was really a statute of limitations or a
25 limitation on the period of damages, and that we resolved



1 that in Conason and said it was not a true statute of
2 limitations but rather a limitation on the period of
3 damages. Is that wrong?

4 MR. MILLER: I don't think that's - - - that's
5 wrong, but I do think that the - - - the four-year rule
6 under the '97 law, and the four-year evidentiary rule,
7 under the '84 statute, was as the - - - the Solicitor
8 General said, an evidentiary rule and a statute of
9 limitations.

10 You have 213-a saying no more than six years of
11 damages, but you also have an evidentiary rule that says
12 that, even though we had this statute saying the rent is
13 the rent in a registration statement filed four years prior
14 to the most recent statement, which is probably an old
15 registration, you can't look back more than four years.

16 Some courts, until Thornton, said, you know,
17 well, that just - - - we reconcile those two things by
18 saying that only registered rents can - - - can be looked
19 at. You can't look at anything else. This court found,
20 basically, a middle ground saying if - - - if - - - if that
21 rule of evidence is applied, then you don't look at old
22 records, you don't look at the registration records, but
23 you apply a default formula when a rent is not reliable.

24 The phrase "reliable rent registration" comes
25 from this court. I believe that the legislature has - - -



1 has attempted in the HSTPA to modify the original '84
2 language to accommodate what this court was trying to do in
3 the Thornton case when it said that if a rent registration
4 is not reliable it cannot be used.

5 JUDGE FAHEY: So let me ask you this. I see your
6 time's up. What would we - - - what would you be asking us
7 to do? You wouldn't be asking us to do the calculations.
8 What - - - what are you asking us to do?

9 MR. MILLER: A couple of things.

10 JUDGE FAHEY: Um-hum.

11 MR. MILLER: Our treble-damages argument really
12 now is no different than it was before. We want - - -

13 JUDGE FAHEY: Well, the burden has shifted if the
14 new statute applies. All right.

15 MR. MILLER: No, the burden is the same. It's -
16 - - it's always - - -

17 JUDGE FAHEY: Okay. Talk to me about the
18 evidentiary question.

19 MR. MILLER: On the evidentiary question, take
20 the '94 registration that's in the record and find that
21 that is the - - - the last reliable registration within the
22 meaning of the HSTPA. What you do is you - - - you say Mr.
23 Raden filed his - - - his lawsuit in September of 2010. If
24 you go back to - - -

25 JUDGE WILSON: Well, but you said that - - -



1 MR. MILLER: - - - the most recent registration
2 before that - - -

3 JUDGE WILSON: But you said that was a
4 presumption that could be overcome, right? No?

5 MR. MILLER: I - - - yeah, but we're not trying
6 to impeach the '94 registration.

7 JUDGE WILSON: No, I understand that. No, I - -
8 -

9 MR. MILLER: And the '95 registration is - - -
10 there's a - - -

11 JUDGE WILSON: I understand that, but you're
12 asking us to hold, as a matter of law, that that is the
13 valid regi - - - reliable registration when earlier I think
14 you said it could be impeached. Why doesn't that require
15 us to send it back to determine whether it could be
16 impeached or not?

17 MR. MILLER: We've had a full-blown trial. We've
18 had a complete full-blown trial. There's no more evidence
19 to be introduced. Those registrations are what they are.
20 The Gordons took over a decontrolled apartment. They were
21 the first rent-stabilized tenants. Nobody is disputing
22 that their initial rent was registered. It's ninety days
23 not six years - - -

24 JUDGE STEIN: But was the question of the
25 reliability of that, was that litigated? Was that - - -



1 was that an issue before HSTPA? In this case. In this
2 case.

3 MR. MILLER: In - - - in this case, yes, our
4 position was that you have to go back to the Gordons' rent.
5 So yes, we affirm it and we took the position that you've
6 got to go back to the Gordons' last rent. That was our
7 position that, under the '84 statute, that was - - - that
8 was never - - - the portion that was never amended in '97,
9 that - - - that you go back to - - - to the last
10 registration, because if there's no - - - if there's no
11 registration, you use the default formula.

12 JUDGE FAHEY: So you only win if the new
13 evidentiary rule goes into effect - - -

14 MR. MILLER: No.

15 JUDGE FAHEY: - - - by this court? No?

16 MR. MILLER: I don't think so, no.

17 JUDGE FAHEY: Okay.

18 MR. MILLER: Our initial brief asked - - - asked
19 this court to apply the default formula because there was
20 no - - - there was fraud. We - - -

21 JUDGE FAHEY: Right.

22 MR. MILLER: - - - proved fraud - - -

23 JUDGE FAHEY: Right.

24 MR. MILLER: - - - and there was no registration.

25 JUDGE FAHEY: Right, the default formula, I



1 understand it to mean Thornton; is that what we're talking
2 about?

3 MR. MILLER: The Thornton default formula.

4 JUDGE FAHEY: Okay.

5 JUDGE GARCIA: Would you be entitled - - -

6 CHIEF JUDGE DIFIORE: Thank you, Mr. Miller.

7 JUDGE GARCIA: I'm sorry. Would you be entitled
8 to six years if we send it back and apply the new statute?

9 MR. MILLER: Yes. Yes, we would be.

10 CHIEF JUDGE DIFIORE: Thank you, Mr. Miller.

11 MR. MILLER: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel?

13 MR. WINIARSKY: May it please the court. Nativ
14 Winiarsky from the law firm of Kucker Marino Winiarsky &
15 Bittens.

16 I'd like to say from the outset I join with the
17 other members of the landlord bar who are arguing against
18 the retroactivity of the HSTPA, and I'd like to address the
19 questions as to whether there's repose, because absolutely
20 there is no repose.

21 But there is a singular distinction to this case,
22 and the singular distinction to this case, that separates
23 us from all the four other cases being argued today, is
24 that there was a judgment, final judgment rendered in our
25 case, that there was not only a judgment, but that monetary



1 judgment was fully satisfied, and that was fully satisfied
2 under CPLR 5011, which means there was a final
3 determination of all claims. And when there is a final
4 determination of all claims, that action is terminated and
5 therefore no longer pending, irrespective of whether
6 appeals have been exhausted or the time for the appeals
7 have run.

8 And I think if this court wanted to issue a
9 bright-line rule as to the applicability of the HSTPA, I
10 think it certainly should not apply to any claims in which
11 there was a full judgment rendered and a final
12 determination of all claims.

13 And indeed, in every single lower court case that
14 has since dealt with the HSTPA, and specifically addressed
15 that issue, the courts have held it does not apply to
16 claims in which a final judgment was rendered and therefore
17 is no longer pending. I'm referring - - -

18 JUDGE STEIN: What if a final judgment was
19 rendered dismissing the claim and - - - and now there's a
20 question about whether that was proper?

21 MR. WINIARSKY: Right, so - - -

22 JUDGE STEIN: Do you think the legislature
23 intended for it not to apply to those claims?

24 MR. WINIARSKY: Right, so I know, for example, in
25 the Collazo appeal, it was dismissed with the - - - and



1 it's probably going to the DHCR. So there's a question as
2 to whether that claim is still pending. I'm not speaking
3 as to that instance. I'm speaking as to instance that are
4 - - - that is similar to this appeal where there is nothing
5 pending, and everything was gone.

6 JUDGE STEIN: So - - -

7 JUDGE RIVERA: So how is the case here?

8 MR. WINIARSKY: Excuse me?

9 JUDGE RIVERA: How is the case here?

10 MR. WINIARSKY: Oh, on appeal.

11 JUDGE RIVERA: Just refresh my recollection - - -

12 MR. WINIARSKY: What - - -

13 JUDGE RIVERA: - - - of the procedural history
14 that got you here.

15 MR. WINIARSKY: Well, there was a final judgment
16 rendered for an overcharge.

17 JUDGE RIVERA: Yeah.

18 MR. WINIARSKY: That overcharge was paid.

19 JUDGE RIVERA: Okay.

20 MR. WINIARSKY: There was a satisfaction of
21 judgment that was rendered.

22 JUDGE RIVERA: Um-hum.

23 MR. WINIARSKY: And they appealed that - - - and
24 they appealed that judgment. And then the - - - and after
25 the Appellate Division came out in our favor, then the



1 HSTPA came out. And there's a distinction between - - -
2 for example, we spoke before about - - -

3 JUDGE RIVERA: So how is their appeal not pending
4 if they appealed judgment?

5 MR. WINIARSKY: Because the case law is pretty
6 specific - - -

7 JUDGE RIVERA: Um-hum.

8 MR. WINIARSKY: - - - that when a judgment is
9 rendered, that terminates the action, irrespective of the
10 appeal. And I cited, for example, In re Bailey; it's a
11 Court of Appeals case. I cited Slewett v. (sic) Farber,
12 which specifically said that "The finality of determination
13 is not affected either by the pendency of an appeal or by
14 the" - - - or by the "fact that a time of appeal has not
15 yet run." And I should also - - -

16 JUDGE WILSON: Are you basing your argument at
17 all on the statutory language "claim", "pending claim", as
18 opposed to, say, proceedings or actions or something like
19 that?

20 MR. WINIARSKY: I'm basing it on the word
21 "pending" and how that's been interpreted by the courts.
22 And the courts have interpret - - - have interpreted that
23 language as it's only pending if there was never a judgment
24 rendered which terminates the action. And I should add - -
25 -

1 JUDGE WILSON: So if it said "pending appeal",
2 you'd be making the same argument?

3 MR. WINIARSKY: No.

4 JUDGE WILSON: Okay. So claim - - -

5 MR. WINIARSKY: For example - - -

6 JUDGE WILSON: So "claim" matters to you?

7 MR. WINIARSKY: Yes, and I'll give you an
8 important distinction. In 1997, when the law was amended,
9 the - - - the legislature said all actions or proceedings
10 pending in any court, which is very significantly different
11 than what it says here. In fact, when the legislature
12 amended the 1997 statute, it specifically referred to that
13 statute, so you can presume they were aware of it. But yet
14 they didn't use that language, "action or proceeding
15 pending in any court", which would include an appellate
16 claim.

17 And so by the very fact that they limited
18 themselves and said to only pending cases, I think that's
19 the reason why the courts below have ruled that you can't
20 give it retroactive effect when there is a dismissal on the
21 merits or when the action is no longer pending.

22 So - - - and I think, assuming then that the
23 HSTPA is not applicable, then it brings us back to the
24 question of how the old law was applicable, and I think the
25 Appellate Division got it completely right, basing itself



1 on the prescriptive effect of CPLR 213-a and 26-516(a) (ii),
2 which is that you cannot examine rents going back more than
3 four years unless there was a fraud, as the cases said in
4 Thornton, Grimm, Boyd, Conason, and thereafter.

5 And I should mention that even dissent in
6 Thornton said that applying the rule as the court has now -
7 - - has now interpreted it means that the statute of
8 limitations only applies in cases where there was a
9 mistake. And that's in fact correct. So the majority and
10 dissent agreed on that.

11 And I don't think anyone is questioning that the
12 DHCR made a mistake. It wasn't willful, it wasn't fraud;
13 it was a mistake, and that does not entitle you to go back
14 more than four years. I know before there were - - - there
15 were arguments about policy; what is the policy
16 considerations. Well, at that time, before the enactment
17 of the law, the policy considerations were such that there
18 was repose. And you could not go back more than four
19 years. It was a preclusion of an examination. That policy
20 has changed.

21 And - - - and to go back to Your Honor's question
22 as to whether there's repose today, I don't believe there
23 is a repose, because if you look at the statute, it
24 specifically says not only can you go back more than six
25 years, but you can actually find the last reliable rent.



1 And the question then becomes what is reliable. Again, for
2 my purposes, inasmuch as there's a final judgment, I don't
3 think I have to go there, because I think the HSTPA is not
4 applicable because of the fact that there is a judgment.

5 But to the extent we are concerned as to the
6 retroactive effect of the HSTPA, I don't see how you can
7 get away from the fact that - - - there was a question
8 asked to my adversary: Well, what rent would you be
9 applying? And his answer was 1994. And the reason you're
10 applying the 1994 rent is because that would be the last
11 registered rent.

12 Well, think about the equity on that. The
13 landlord was told for all these years that he didn't have
14 to register the units. There was no obligation. In fact,
15 when you file for high - - - high rent vacancy decontrol,
16 you file exit - - - you file exit registrations which means
17 you can't file these registrations even if you wanted to.
18 And now the landlord is going to be punished by saying,
19 well, you never filed your - - - you never filed the
20 registration six years ago. And therefore the courts now
21 are going to revert the rent back to what it was in the '94
22 year. And I think that is a demonstration of the rever - -
23 -

24 JUDGE RIVERA: There are no increases?

25 MR. WINIARSKY: Excuse me?



1 JUDGE RIVERA: There are no increases?

2 MR. WINIARSKY: Well, if you were to take my - -
3 -

4 JUDGE RIVERA: You're saying that's your base
5 rent and you're moving forward with all of the appropriate
6 lawful increases.

7 MR. WINIARSKY: I don't know how - - -

8 JUDGE RIVERA: So it's not true that you're going
9 to 1994 rent.

10 MR. WINIARSKY: You take a '94 with all - - -

11 JUDGE FAHEY: You wouldn't get a '94 rent. What
12 you'd get - - - the way I understand the case law is just
13 the way the judge says. What you get is that - - - then
14 you'd get the - - - I guess the rent stabilization
15 percentage increases over the years, right?

16 MR. WINIARSKY: I would argue that, but my
17 adversary has argued in his brief - - -

18 JUDGE FAHEY: Well, my understanding of the law
19 is the same as yours in - - -

20 MR. WINIARSKY: Right.

21 JUDGE FAHEY: - - - that particular - - -

22 MR. WINIARSKY: And so irrespective of the fact
23 that it wasn't registered - - -

24 JUDGE RIVERA: The landlord would get exactly
25 what the landlord should have gotten, throughout all that



1 time, under the correct application of the law. The
2 landlord is not losing out anything because they're getting
3 exactly what the law provided for.

4 MR. WINIARSKY: Well, the thing that we also need
5 to consider in whether he's losing or not is also
6 improvements made to the premises and - - -

7 JUDGE FAHEY: Well, no, what you don't get is you
8 don't get the market rate rent. That's what you don't get
9 for the - - -

10 JUDGE STEIN: What about the obligation to
11 maintain the records to establish what the rent should have
12 been and - - -

13 MR. WINIARSKY: And - - - and - - -

14 JUDGE STEIN: - - - what their appropriate
15 increases should have been since that time? How - - - how
16 does HSTPA affect that?

17 MR. WINIARSKY: Right, and this case, for
18 example, is - - - is indicative of the problem you face
19 when you have that because, in 1994, there was a prior
20 tenant, and '95 was a new tenant. And we were alleging
21 that there were certain improvements made. But to expect
22 that the landlords would keep these records, going back
23 twenty, twenty-five years, when 26-516(g) of the RSL was
24 telling landlords you have no obligation to hold records in
25 excess of four years, and then the law - - - then the laws



1 change and says, well, you should have held them for six
2 years. So - - -

3 JUDGE RIVERA: Or more.

4 JUDGE WILSON: Was there a point you could have
5 deregulated the apartment under luxury decontrol, or do you
6 know that? Is that in the record?

7 MR. WINIARSKY: Oh, they were entitled to
8 deregulate under luxury decontrol. They were only able to
9 deregulate this particular - - - in this particular
10 apartment because the rent was over 2,000 - - - 2,000
11 dollars in - - - in 1995.

12 JUDGE WILSON: But there's also an income or
13 vacancy test, right?

14 MR. WINIARSKY: Yes.

15 JUDGE WILSON: So I'm asking about, sort of, once
16 it was clear that you - - - once Roberts made the law
17 clear, was there some point, either before or after that,
18 where you could lawfully have deregulated this apartment?

19 MR. WINIARSKY: No.

20 JUDGE GARCIA: But to follow up on that, when the
21 benefits stopped, the tax benefits, right? Forget Roberts,
22 but if we had just kept going, and you hadn't deregulated
23 in a luxury deregulation, and the tax abatements end, could
24 you deregulate after that?

25 MR. WINIARSKY: No.



1 JUDGE GARCIA: You couldn't, under the - - -

2 MR. WINIARSKY: Not under the interpretation
3 provided by cases subsequent to Roberts.

4 JUDGE GARCIA: No, no, but that's the First
5 Department's interpretation, right?

6 MR. WINIARSKY: Right, yes.

7 JUDGE GARCIA: So the First Department has said,
8 because of Roberts and all of the interpretation and the
9 layers that have gone on in that, that if you're a tenant
10 and you're one of these tenants, and you have a lease and
11 you stay there, you're entitled to stay there and have that
12 apartment regulated despite the fact that the abatements
13 end.

14 MR. WINIARSKY: Correct.

15 JUDGE GARCIA: The Appellate Division said that.

16 MR. WINIARSKY: Correct.

17 JUDGE GARCIA: But that's, as kind of I
18 understand it, the fallout of Roberts, right?

19 MR. WINIARSKY: Yes.

20 JUDGE GARCIA: Under - - - you know, let's say
21 none of this had happened, and no one had gotten luxury
22 deregulated, if the abatements end, under the old rule,
23 could you decontrol?

24 MR. WINIARSKY: Provided you gave the - - - the
25 relevant riders and the appropriate riders informing the



1 tenants of the tax implications.

2 JUDGE WILSON: I think what we're both trying to
3 ask: Is there some reason that this particular apartment
4 was under rent stabilization other than the J-51?

5 MR. WINIARSKY: Yes.

6 JUDGE WILSON: And what was that?

7 MR. WINIARSKY: The reason was because it was
8 originally a rent-stabilized apartment, and then the rent
9 increased to 2,000 - - - over 2,000, and based upon that,
10 it was deregulated, and that's how it fell into the Roberts
11 rule.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel?

14 MR. MILLER: Okay. Just to correct the record
15 somewhat, there were no improvements between the Gordons
16 and the Radens. Raden did not pay an improvements
17 increase, the landlord didn't claim that in the - - - and
18 it's not in - - - in the record.

19 JUDGE GARCIA: But can you also clear up just
20 this last point? Now, if you're a tenant and you get this
21 relief under Roberts and under these interpretations of
22 this new law, you're entitled to stay in that apartment as
23 a rent-stabilized apartment until you leave, until you
24 decide to leave, right?

25 MR. MILLER: Right, that's the statutory language



1 of 26-504(c).

2 JUDGE WILSON: Well, hold on. Hold on.

3 JUDGE GARCIA: Forget the statute cite, but under
4 the prior rule - - - forget - - - if Roberts hadn't
5 happened, they had kept these things rent stabilized and
6 they hadn't luxury decontrolled them, when the abatements
7 end, can you end the rent stabilization rent, as the
8 landlord?

9 MR. MILLER: If a tenant is stabilized because of
10 J-51 benefits - - -

11 JUDGE GARCIA: Right.

12 MR. MILLER: - - - then the only way the landlord
13 gets a deregulated unit - - -

14 JUDGE GARCIA: Right.

15 MR. MILLER: - - - which is what - - - what
16 happens at the end of benefits, is either every lease,
17 including the initial lease, has a rights - - -

18 JUDGE GARCIA: Riders.

19 MR. MILLER: - - - rider - - -

20 JUDGE GARCIA: Right.

21 MR. MILLER: - - - that says - - -

22 JUDGE GARCIA: Understood.

23 MR. MILLER: - - - that says you're getting an
24 abatement, and you have a deadline - - -

25 JUDGE GARCIA: Understood.



1 MR. MILLER: - - - and at the end of the
2 deadline, you're deregulated.

3 JUDGE GARCIA: Right.

4 MR. MILLER: If every lease doesn't say that - -
5 -

6 JUDGE GARCIA: But let's assume it said that - -
7 -

8 MR. MILLER: - - - you're there until you vacate.

9 JUDGE GARCIA: - - - and they followed the rules,
10 so my point really goes to the landlords are just getting
11 what they were entitled to. Because, it seems to me, under
12 this new rule, the landlords have to keep these apartments
13 rent stabilized under whatever formula we say, at least
14 according to the Appellate Division, longer than they would
15 have under the J-51 program originally.

16 MR. MILLER: I'm sorry, Judge. I - - -

17 JUDGE GARCIA: And I may have that wrong.

18 MR. MILLER: I wish I was following you better
19 about that.

20 JUDGE GARCIA: No, no, I'm sure it's the way I'm
21 articulating it.

22 MR. MILLER: I think - - -

23 JUDGE GARCIA: So let me - - -

24 MR. MILLER: I think the status issue comes out
25 the same under whatever iteration of this statute you're



1 talking about. This would not have been a deregulated - -
2 -

3 JUDGE GARCIA: But just talking about J-51 for
4 now.

5 MR. MILLER: Under J-51, which - - -

6 JUDGE GARCIA: Assuming you have all of the
7 riders and the warnings.

8 MR. MILLER: Yeah, this statute made no changes
9 to 26-504.

10 JUDGE GARCIA: No, but the Appellate Division has
11 made a change - - - it seems to me, and I may be wrong - -
12 - to what J-51 required, even under the Roberts
13 interpretation, per se, which was, as long as you're
14 getting tax abatements, the apartment can't be luxury
15 decontrolled, right?

16 MR. MILLER: Yeah, that doesn't - - -

17 JUDGE GARCIA: Roughly.

18 MR. MILLER: - - - come out of the Appellate
19 Division. What that comes out of is statutory language in
20 26-504(c) that says if you don't get a rider in each lease,
21 then you're there until you leave.

22 JUDGE GARCIA: So it's the fact that they didn't
23 put riders in - - -

24 MR. MILLER: That's right.

25 JUDGE GARCIA: - - - because they were under the



1 impression they didn't - - - they could decontrol it, that
2 now they get held to: You didn't have the right rider in
3 there, so this tenant stays under - - - under rent
4 stabilization until they decide to leave.

5 MR. MILLER: I agree with most of that, but I
6 don't think that they were under that impression. That was
7 an issue at trial in this case, and they never proved that
8 they - - - in fact, the only witness testifying on the
9 issue of what they knew and when they knew it and why they
10 deregulated this apartment was their current lawyer, Mr.
11 Winiarsky's partner, Jim Marino, who testified: I don't
12 remember giving any advice to the landlord about whether
13 this unit could be deregulated. The burden was on the
14 landlord to prove a lack of willfulness. They did not meet
15 that burden. That's why we should get treble damages.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. MILLER: There was no exit registration in
18 this case.

19 And just to touch on the rent records issue.
20 Even though there's no issue of rent records here, all of
21 the records are complete in this case, but there have been
22 several questions about it.

23 I would like to quote 26-516(g) because that
24 statute was not amended in 1997. That statute reads the
25 same way it read in 1994, and that statute, contrary to



1 what people seem to be advocating for in this court, never
2 said that a landlord can throw out all but the last four
3 years of rent records. What that statute says is that,
4 provided that the landlord registers, they can throw out
5 all of the records preceding the registration four years
6 ago.

7 JUDGE WILSON: It doesn't even say that; it says
8 they can't be ordered to maintain records for more than the
9 four years.

10 MR. MILLER: But it's predicated - - -

11 JUDGE WILSON: It doesn't say anything about - -
12 -

13 MR. MILLER: - - - on registration.

14 JUDGE WILSON: It doesn't say anything about what
15 they have to keep.

16 MR. MILLER: Exactly.

17 JUDGE WILSON: Okay.

18 MR. MILLER: I agree.

19 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
20 you.

21 MR. MILLER: Thank you, Judge.

22 (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 Joel Raden and Odette Raden v. W7879, LLC., No. 2, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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