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COURT OF APPEALS

STATE OF NEW YORK

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JAMES TAYLOR AND TAMARA JENKINS,

Respondents,

-against-

NO. 3

72A REALTY ASSOCIATES, LP AND JANET  
ZINBERG,

Appellants.  
-----

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: Okay, the next appeal on  
2 this afternoon's calendar is appeal number 3, Taylor v. 72A  
3 Realty Associates.

4 One moment, Counsel.

5 Good afternoon, Counsel.

6 MR. ZINBERG: Good afternoon, Your Honor. May it  
7 please the court, my name is Joel Zinberg, and I represent  
8 the defendant-appellant, 72A Realty Associates. And I  
9 respectfully reserve one-and-a-half minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: You may.

11 MR. ZINBERG: This court - - - there's no  
12 question that the legislature can change its mind, it can  
13 decide that they think the rents prior to four years are  
14 incorrect, and they - - - they don't want those rents  
15 counted; they want that to be corrected.

16 The question, then - - - the narrower question  
17 that we're dealing with today is can they apply that change  
18 consistent with due process in this narrow set of cases  
19 where all the land - - - these J-51 cases, where all the  
20 owners did - - - and nothing wrong - - - other than rely on  
21 the relevant administrative agency's guidance that was in  
22 place, unchanged, unchallenged, for over a decade?

23 If we - - -

24 JUDGE WILSON: So you're - - - you're here on a  
25 certified question, correct?



1 MR. ZINBERG: Excuse me?

2 JUDGE WILSON: You're here on a certified  
3 question, yes?

4 MR. ZINBERG: No, we're - - - we're here on the  
5 broad - - - the question is was it correctly decided.

6 JUDGE WILSON: The appellant - - -

7 JUDGE FEINMAN: I think what Judge Wilson is  
8 getting at is that the way you got here is that the  
9 Appellate Division certified a question as to the propriety  
10 of its order.

11 JUDGE WILSON: You have a non-final - - - it's a  
12 non-final appeal, right?

13 MR. ZINBERG: That is correct.

14 JUDGE WILSON: And the Appellate Division  
15 certified a question to us, otherwise we wouldn't have  
16 jurisdiction to hear your appeal; is that right?

17 MR. ZINBERG: Right.

18 JUDGE WILSON: Okay. Are you familiar with the  
19 McMaster case from this court from 1925?

20 MR. ZINBERG: No, Your Honor - - - Your Honor - -  
21 - this court sent out a letter requesting - - -

22 JUDGE WILSON: I understand.

23 MR. ZINBERG: - - - that the parties in all of  
24 the cases deal with the question of whether the HSTPA  
25 should be applied, so - - -



1 JUDGE WILSON: Okay.

2 MR. ZINBERG: - - - it was my understanding that  
3 the court was soliciting this - - -

4 JUDGE WILSON: Are you familiar with the McMaster  
5 case?

6 MR. ZINBERG: No, Your Honor.

7 JUDGE WILSON: Okay, then I'll ask someone else.

8 MR. ZINBERG: Okay. Okay.

9 If we're going to apply this court's decision in  
10 James Square Associates, where they set out a three-factor  
11 test to see whether due process - - - commensurate with due  
12 process you could apply a new statute retroactively, you  
13 cannot apply the HSTPA to this - - -

14 JUDGE GARCIA: But why should we do that in a  
15 non-tax case?

16 MR. ZINBERG: Because the tax cases are generally  
17 where the - - - this court and the U.S. Supreme Court have  
18 said it's a more flexible application to retroactive cases,  
19 because you're trying - - -

20 JUDGE GARCIA: I understand why you would want us  
21 to apply it, but is - - -

22 MR. ZINBERG: No, I understand, Your Honor. But  
23 - - - but it - - - it's those particular cases where this  
24 court and the U.S. Supreme Court have said we're going to  
25 be more flexible in trying.



1           So if you can't meet the test in a tax case - - -  
2           the James Square case - - - you can't meet it anywhere.  
3           And I think the most important part - - - the third factor  
4           in James Square - - - is, is there a public purpose for  
5           retroactive application? And I think if you look at the  
6           legislative record which we have - - - and the bill jacket  
7           just came out yesterday; we've scoured it - - - you cannot  
8           find any expression of a particular reason why this - - -  
9           why the - - - the HSTPA, this one particular part of the  
10          HSTPA dealing with overcharges, should be applied to  
11          pending cases.

12                    It's very much like what this court said in James  
13          Square: "The State fails to set forth" - - -

14                    JUDGE FEINMAN: Well, do they actually have to  
15          articulate it in the statute or in legislative history, or  
16          is it up to the court to figure out if there's any  
17          conceivable, rational basis for applying it retroactively?

18                    MR. ZINBERG: Well, they have to do it, Your  
19          Honor, because for example, as Judge Fahey pointed out, in  
20          1997, there were amendments. But the difference is, in  
21          1997, this court cite - - - there were legislative  
22          memoranda that dealt with the reasons they were amending  
23          the statute. And those - - - I refer to those in - - - in  
24          my brief, at pages 5 and 6. There was legislative  
25          memoranda, there was - - -



1 JUDGE FAHEY: Usually, though, in our - - -  
2 usually in our analysis, we go to legislative history after  
3 we read the law and say that we need to look beyond it. If  
4 the law is sufficient in and of itself, on its face, we may  
5 not need to do that.

6 And I think you're back to two things: whether  
7 the James Square factors would even apply, whether this is  
8 actually a taking, or whether we're deal - - - because it  
9 seems to me that the more controversial issue is not the  
10 four- or the six-year question, but really the question of  
11 what the - - - what's been called the evidentiary rule is,  
12 and whether it applies.

13 And that, to me, seems to be an analysis that's  
14 entirely outside of the James Square analysis. It's - - -  
15 so I - - - that's the difficulty I'm having with your  
16 argument.

17 So this evidentiary rule, I don't see what - - -  
18 I - - - did they have a rational basis to do it? Was it  
19 proper? Okay. That's a fair argument. But whether or not  
20 it involves - - - and even if it involves sub - - -  
21 substantive due process, that's a fair argument. But the  
22 James Square factors don't apply in that context to an  
23 evidentiary, statutory rule.

24 MR. ZINBERG: The HSTP - - -

25 JUDGE FAHEY: That would be how I would view it



1 from the other side.

2 MR. ZINBERG: Yeah, but Your Honor, the HSTPA is  
3 not merely an evidentiary rule. It changes the - - -

4 JUDGE FAHEY: I understand - - -

5 MR. ZINBERG: - - - substance of - - -

6 JUDGE FAHEY: - - - and of itself it's not - - -

7 MR. ZINBERG: - - - it changes the substance of  
8 the - - -

9 JUDGE FAHEY: No, no, no. We're talking about  
10 213-a. and you get right down to the core of 213-a, it's  
11 two things. It's the expanding the statute of limitations  
12 from four to six years, number one; and number two, it's  
13 saying that you can use evidence beyond the four years.

14 MR. ZINBERG: It's - - - but it's also changing -  
15 - - it's changing the length of time you can collect  
16 penalties for - - -

17 JUDGE FAHEY: Um-hum.

18 MR. ZINBERG: - - - the treble damages. It's  
19 changing the discretionary attorneys' fees to a mandatory  
20 attorneys' fees.

21 JUDGE FAHEY: Right. But focus in for me on the  
22 evidentiary question, okay?

23 MR. ZINBERG: The going be - - - from - - - going  
24 back from four - - -

25 JUDGE FAHEY: You can go beyond the four years.



1 MR. ZINBERG: Well, the point is - - - I still  
2 think it applies - - - there's no question you can change  
3 that - - -

4 JUDGE FAHEY: But tell me how that's a violation  
5 of your substantive due process rights, because - - -

6 JUDGE STEIN: Aren't you saying that - - -

7 JUDGE FAHEY: - - - that's - - - that's the way I  
8 - - -

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

10 JUDGE FAHEY: - - - under - - - I'm sorry, Judge.

11 JUDGE STEIN: Sorry.

12 MR. ZINBERG: Be - - - because the - - - this  
13 case has been pending for six, seven years already.

14 JUDGE FAHEY: Um-hum.

15 MR. ZINBERG: And that fact goes back to 2013  
16 when this - - - when the defendant became aware that the  
17 tenants in this case, because of the decision in Lucas, had  
18 to be considered rent-stabilized tenants, it said we need  
19 to figure out if there's an overcharge. It looked back  
20 four years; said no overcharge. It gave them a lease.

21 Same thing in 2014, when the case started. It  
22 determined no overcharge; no need to adjust the rent.

23 Now, because of this evidentiary change, the  
24 owner is looking at seven additional years of overcharges  
25 that are going to be add - - - we're going to have the





1 addition of nine percent statutory interest, which I know  
2 the court can't change, but the reality is, it's four times  
3 the market rate.

4 It could have avoided litigation back in 2013,  
5 had it had any kind of inkling the - - - any kind of  
6 forewarning, which is one of the James Square factors, that  
7 something was going to happen.

8 But now it couldn't - - - it couldn't avoid that.  
9 And now it's stuck with litigation and mandatory attorneys'  
10 fees, which is yet another reason that retroactive  
11 penalties - - -

12 JUDGE FEINMAN: So I just - - - you know, there's  
13 several of these cases, obviously, and I may have my facts  
14 mixed up. Is this the one where you went ahead and  
15 calculated what you thought might or might not be owed and  
16 sent a check - - -

17 MR. ZINBERG: No, Your Honor.

18 JUDGE FEINMAN: That's a different one. Okay.

19 MR. ZINBERG: This - - - this is a case - - -  
20 this is a case - - - and it's never been disputed - - -  
21 where if you used the four-year rule as existed in 2013,  
22 and as existed in 2014, there were no overcharges,  
23 therefore there's no treble damages, no attorneys' fees.

24 What happens is if you apply the HSTPA, it  
25 suddenly goes from a case with no overcharges to a case



1 with overcharges, mandatory attorneys' fees, expanded and  
2 more severe liability for treble damages, and that too is -  
3 - - I saw it in multiple cases.

4 JUDGE RIVERA: And that - - - that's an attempt  
5 to correct an error to get to the lawful base rent - -  
6 - base date rent, and moving forward. Why doesn't that  
7 serve a public purpose?

8 Let's assume for one moment that we're agreeing  
9 with you on the applicable test.

10 MR. ZINBERG: Um-hum.

11 JUDGE RIVERA: I - - - I'm very hard-pressed to  
12 understand why there's no public purpose served - - -

13 MR. ZINBERG: I think what you - - -

14 JUDGE RIVERA: - - - by retro - - - retroactive  
15 application.

16 MR. ZINBERG: - - - I think what you're asking,  
17 Your Honor, is why should we apply a rent that we think is  
18 - - - was incorrect, because after all, after Roberts, we  
19 know they shouldn't have deregulated those apartments. Now  
20 you charge market-rate rents.

21 But the point is, there was also a four-year rule  
22 that was set out in the law. And that - - -

23 JUDGE RIVERA: No. No, no, no. I'm going back  
24 to your test. Your test is one that you claim the third  
25 factor about the public purpose is not met because there's



1 no public purpose in retroactive application.

2 So my question to you is: why isn't the  
3 corrective effort to ensure you have a lawful rent moving  
4 forward, in service of a public purpose?

5 MR. ZINBERG: Well, Your Honor, that has not been  
6 articulated, first of all, by the legislature. Second of  
7 all, there's nothing in applica - - - that's true for  
8 prospective, what you just enunciated. But there's nothing  
9 - - -

10 JUDGE RIVERA: But why isn't it true for retro,  
11 is what I'm asking you?

12 MR. ZINBERG: Because we have applied a different  
13 standard for retroactive than we do pro - - - prospective.

14 JUDGE RIVERA: Okay.

15 MR. ZINBERG: The fact that something might work  
16 for prospective does not mean it applies, consistent with  
17 due process, for retroactive. The - - -

18 JUDGE RIVERA: You mean, the legislator wanting -  
19 - - the legislature wanting to ensure that the regulated  
20 rents are correct and lawful, in accordance with the law,  
21 from the base - - - a lawful base date rent moving forward,  
22 doesn't serve a public purpose?

23 MR. ZINBERG: Your Honor, I don't know what - - -  
24 what their purpose is.

25 JUDGE WILSON: Well, would you - - -



1 JUDGE RIVERA: Let - - - let's assume for one  
2 moment it's the one I have articulated.

3 MR. ZINBERG: Right.

4 JUDGE RIVERA: Why doesn't that serve a public  
5 pur - - - I'm working with the standard you are advocating.

6 MR. ZINBERG: I'm working - - - because - - -  
7 because three basic reasons. Because the law as it existed  
8 going back many years - - -

9 JUDGE RIVERA: Yes.

10 MR. ZINBERG: - - - unchanged, and at the time -  
11 - - 2000, when the deregulation occurred; 2013, 2014, 2017,  
12 when this case was decided by the Appellate Division, was  
13 the four-year rule. And this was a rule that the defendant  
14 and others relied upon, to its detriment - - - as I just  
15 tried to sketch out - - - and - - -

16 JUDGE FAHEY: So what you refer - - -

17 MR. ZINBERG: - - - it - - - and it was - - - it  
18 was a - - - it was a rule that the legislature set out as  
19 compromise. I think it - - - going - - - Judge Rivera  
20 said, it was - - - the idea was to give repose. There was  
21 a point in time - - -

22 JUDGE FAHEY: Judge Garcia. But - - -

23 JUDGE RIVERA: Yeah, I didn't say that.

24 JUDGE FAHEY: - - - but - - -

25 MR. ZINBERG: I'm sorry.



1 JUDGE FAHEY: - - - let me just take a step back  
2 for a second. You're arguing, at its core, substantive due  
3 process, right?

4 MR. ZINBERG: Yes.

5 JUDGE FAHEY: Okay. So let - - - let's go back  
6 to the Supreme Court cases - - - United States Supreme  
7 Court. They've stated that the constitutional impediments  
8 to retroactive civil legislation are now modest, quoting  
9 from Landgraf - - - it was in the 90s, I forget when.  
10 Absent a violation of a specific constitutional provision,  
11 the potential unfairness of retroactive civil legislation  
12 is not a sufficient reason for a court to fail to give a  
13 statute its intended scope.

14 And the way I understand your argument is, it's  
15 not fair.

16 MR. ZINBERG: No, Your Honor.

17 JUDGE FAHEY: I - - - no, let me just finish.

18 The fairness argument can go both way. And I  
19 think that you can make a - - - a decent argument on that,  
20 and we can make a decent argument against it. That's the  
21 problem with these concepts. They - - - they tend to be a  
22 little slippery.

23 But what the United States Supreme Court, as I  
24 understand, as I read those - - - the - - - the cases that  
25 have come out there, is that specifically - - - if there's



1 a specific statutory con - - - or there's a specific  
2 constitutional violation of a pro - - - a particular  
3 provision, then you can consider it. Otherwise the  
4 legislature can do what they feel policy requires.

5 MR. ZINBERG: Your Honor, as set out by this  
6 court in American Economy, I think citing - - -

7 JUDGE FAHEY: Which I wrote, so I'm familiar with  
8 it, but - - -

9 MR. ZINBERG: - - - citing Landgraf - - -

10 JUDGE FAHEY: Right.

11 MR. ZINBERG: - - - it said there has to be a  
12 rational relationship between the policy - - -

13 JUDGE FAHEY: Well, as Judge - - - as Judge  
14 Rivera's made clear, there's certainly a rational  
15 relationship. It's irrational if you're on the taking end,  
16 and it's rational if you're on the receiving end. That's  
17 how I'd characterize this particular rationality argument.

18 MR. ZINBERG: But - - - but they have not set out  
19 any argument. And in fact, this - - - they have not set  
20 out what they were trying to accomplish, number one.  
21 Number two - - -

22 JUDGE FAHEY: Forgetting what they haven't set  
23 out - - -

24 MR. ZINBERG: - - - it will not - - - it will not  
25 - - -



1 JUDGE FAHEY: - - - tell me - - - forgetting what  
2 they haven't set out, tell me why you say it's irrational.

3 MR. ZINBERG: I'm saying - - - it's not a  
4 question of rational or irrational. I'm saying this will  
5 not keep any of the tenants in this case - - - these cases  
6 from being evicted. It won't increase the stock of  
7 affordable housing. It won't meet with the goals of the  
8 rent stabilization law that this court set out in Santiago-  
9 Monteverde, which was to preserve housing for low- and  
10 working-class people. It will not do that. These are all  
11 wealthy individuals. The - - - the defendant in this - - -  
12 excuse me - - - the plaintiffs in this case are Oscar-  
13 winning directors - - -

14 JUDGE WILSON: Is there anything in the record  
15 about their income or assets?

16 MR. ZINBERG: No, there's nothing in the - - -  
17 other than that statement was made and never denied, Your  
18 Honor. And - - - and - - -

19 JUDGE WILSON: Which statement; that they - - -  
20 that they won an Oscar?

21 MR. ZINBERG: That they - - - they won Oscars.  
22 And I think they've demon - - -

23 JUDGE WILSON: So how much can you sell and Oscar  
24 for on the open market?

25 MR. ZINBERG: No, Your Honor, I think - - - I



1 think the court can take judicial notice that Oscar-winning  
2 screenwriters can command large fees.

3 CHIEF JUDGE DIFIORE: Counsel, getting back to  
4 Judge Fahey's question to you about is this more than just  
5 an - - - it's unfair to the owners argument; is this an  
6 argument about expanding liability to the owner, based on  
7 conduct that was previously permitted? Is that where - - -

8 MR. ZINBERG: It's a - - - as I was trying to  
9 express before, Your Honor, it's ex - - - it's subjecting  
10 retroactively this owner to penalties that did not exist  
11 before. And there are a number of cases that say that that  
12 is not consistent with - - - with due process.

13 And I outlined what those penalties are:  
14 mandatory attorneys' fees. It's changing this case from  
15 one where there were no overcharges to one where there are  
16 overcharges. And - - - and for that reason alone, it - - -  
17 it should be scrutinized in this particular case. That's a  
18 distinction between this case and the other cases.

19 JUDGE STEIN: Are - - - are you also arguing  
20 that when - - - when we look at this we have to look at the  
21 look-back rule in particular in relation to these other  
22 aspects of the statute? We don't look at it in isolation?

23 MR. ZINBERG: Correct. Correct.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 Counsel?





1 MR. SOKOLSKI: Good afternoon, Your Honors. I'm  
2 Robert Sokolski. I'm here with my wife and partner, Daphna  
3 Zekaria. Sokolski & Zekaria, we represent the plaintiffs  
4 and respon - - - plaintiffs in the action below, and  
5 respondents on appeal.

6 If I could get to Your Honor's point about the  
7 public purpose first, if you don't mind? There's - - -  
8 there's a public purpose in this. In - - - in order to go  
9 back retroactively and - - - and - - - I'm - - - I'm very  
10 reserved with using the word, even "retroactive".

11 The tenants are still paying the price of the  
12 landlord's unlawful conduct today. This isn't something  
13 where - - - where you - - - you - - - you have a mistake  
14 and - - - and there's no impact coming into today. It all  
15 comes into - - - into today, because whatever overcharges  
16 the landlord charged in the past get added in and  
17 compounded every time that the lease is renewed.

18 So I - - - I don't - - - I don't necessarily even  
19 look at this as a retroactive situation. This is  
20 prospective. The tenant today is still paying that. So -  
21 - - so yeah, that's why I don't really perform much of a -  
22 - - of a retroactivity analysis on it. And that's why I  
23 say it supports the public interest, because - - - because  
24 Your - - - Your Honor's question about that was correct.  
25 It restores what the rent would be.



1           If I overcharge somebody my hourly fee by mistake  
2           for three years and that was brought to my attention, what  
3           would I do about it? I'd go back the three years, I'd  
4           figure out how much I overcharged for every hour, or  
5           however I billed, and I would reimburse someone; because  
6           that's the fair thing to do. Isn't it?

7           This - - - these cases - - - Justice - - -

8           JUDGE STEIN: But isn't the question whether  
9           every lawyer in - - - in that situation would be legally  
10          required to do that, when they were under a mistake about -  
11          - -

12          MR. SOKOLSKI: You'd - - - yeah, you'd - - -

13          JUDGE STEIN: - - - when they were under a  
14          mistake about what the agreement had been, say, for  
15          example, as to what the - - - the hourly rate was?

16          MR. SOKOLSKI: Right.

17          JUDGE STEIN: So oh, gee, I thought we had under  
18          - - - I - - - my understanding was this - - - maybe it's  
19          before retainer agreements in writing or whatever. And the  
20          tenant comes and says, no, no, no, your understanding was  
21          wrong, and here, I have - - - I have a recording of you  
22          telling me it was that.

23          MR. SOKOLSKI: Yeah.

24          JUDGE STEIN: Okay. So - - -

25          MR. SOKOLSKI: There would absolutely be a legal



1 requirement, right, because you have an agreement. You  
2 have a - - - a set amount of hourly fee, and - - - and  
3 you've overbilled on that. And they can certainly come  
4 after you for breach of contract, and - - - and - - - or -  
5 - - and for the overpayment. And they can get it back - -  
6 - back.

7 The - - - the same way that it happened here,  
8 right? Some of the - - -

9 JUDGE WILSON: So some of the - - -

10 JUDGE RIVERA: Well, it's different, to this  
11 extent, because this is a highly regulated area. There are  
12 always changes.

13 MR. SOKOLSKI: There's always changes.

14 JUDGE RIVERA: Yes.

15 MR. SOKOLSKI: One - - - one change that has - -  
16 -

17 JUDGE RIVERA: Right?

18 MR. SOKOLSKI: I'm sorry.

19 JUDGE RIVERA: No, no, go ahead. Go ahead.

20 MR. SOKOLSKI: One change that - - - that - - -  
21 that has never ever been made since the registration  
22 requirements were started in 1984, is that if you fail to  
23 register the apartment, and it's rent-stabilized, you don't  
24 get a rent increase, period.

25 JUDGE FEINMAN: But - - -



1 MR. SOKOLSKI: You don't get one.

2 JUDGE FEINMAN: - - - how is it fair to say,  
3 okay, you filed these registrations as long as the  
4 apartment was required to do so, because, you know, it's  
5 rent-stabilized - - - putting aside J-51, putting aside  
6 those problems - - - and then at some point, it becomes  
7 decontrolled - - - whether it hits the 2,000 limit, whether  
8 it's a non-primary residence, what - - - I don't know, you  
9 know, it becomes decontrolled.

10 And then to say - - - you know, so now the  
11 landlord is no longer required to file the registrations,  
12 but then a couple more years go by, and somebody who comes  
13 into the apartment says you know what, it never should have  
14 been decontrolled, for whatever reason, and I'm going to go  
15 back to that very first rent registration.

16 MR. SOKOLSKI: Right, right. And - - -

17 JUDGE FEINMAN: And that's the problem that I'm  
18 having.

19 MR. SOKOLSKI: Right. And well, okay - - -

20 JUDGE FEINMAN: How is - - -

21 MR. SOKOLSKI: There's - - - let me - - - let me  
22 try and explain it two ways. First of all, the only thing  
23 that you're doing is restoring the proper legal rent to the  
24 apartment.

25 JUDGE FEINMAN: Um-hum.



1 MR. SOKOLSKI: If you go - - - no matter how far  
2 you go back. If you go back until you hit a reliable  
3 registration, the only thing that you're doing is to  
4 restore the lawful rent - - -

5 JUDGE STEIN: Well, no, it's not.

6 MR. SOKOLSKI: - - - to the apartment.

7 JUDGE STEIN: Because you're imposing - - -  
8 potentially, you're imposing treble damages, attorneys'  
9 fees - - -

10 MR. SOKOLSKI: That's - - -

11 JUDGE STEIN: - - - and - - - and a whole lot of  
12 other things, based on records that may not exist because  
13 you didn't think you were required to register and you  
14 didn't think you were required to keep those records.

15 MR. SOKOLSKI: And that's - - -

16 JUDGE FEINMAN: And the agency told you didn't  
17 have to.

18 JUDGE STEIN: Right.

19 MR. SOKOLSKI: And - - - and I'm sorry. So  
20 that's point two. Okay? That's - - - that's - - - I gave  
21 you half the point. Point two is, on a proper showing - -  
22 - that wasn't made here. Because - - - and - - - and I  
23 want to point that out. I mean, we are - - - we are  
24 patently non-final. We have a denial of a summary judgment  
25 motion, a - - - a granting of the - - - of the - - - of the



1 tenants' cross-motion, just for a finding of stabilization,  
2 however - - - which - - - which the defendants fought.

3 I mean, we're not just talking about - - - about  
4 straightening out the rent here. This landlord fought  
5 stabilization tooth-and-nail, even after Roberts. This is  
6 not - - -

7 JUDGE FEINMAN: So this is the one where there  
8 was a delay of about two years or so - - -

9 MR. SOKOLSKI: Well, even - - - even - - - even  
10 if - - -

11 JUDGE FEINMAN: - - - of the registration?

12 MR. SOKOLSKI: Yeah, but even - - - even for  
13 Roberts; Roberts came out in 2009. In this case, I mean,  
14 the - - - the court's own fact pattern also recalls that,  
15 that the landlord didn't give a stabilized lease until  
16 2013.

17 JUDGE WILSON: And their explanation, I guess, is  
18 that they had litigation with Lucas, and they were waiting  
19 to see how that came out before deciding what they had to  
20 do.

21 MR. SOKOLSKI: Absolutely. And you know what?  
22 And if you make a bet on the - - - on - - - on the law, and  
23 you lose, you pay the price. That's what happens.

24 JUDGE GARCIA: Counsel, can we go back to  
25 something you were saying earlier which seemed to be - - -



1 MR. SOKOLSKI: I want to - - -

2 JUDGE GARCIA: - - - an analogy - - -

3 MR. SOKOLSKI: I - - -

4 JUDGE GARCIA: - - - an analogy to ongoing  
5 damages. Right? There was this problem that happened a  
6 long time ago, and it continues to have an effect today,  
7 and like breach of contract, the damages that result from  
8 that breach continue.

9 But that goes back to this - - - the problem I'm  
10 having with this is you breach a contract, you have a  
11 certain amount of time to bring that claim. Six years,  
12 let's say. Here you don't have any time limit to bring the  
13 claim.

14 So I know I have one of these claims now, but I  
15 don't think it's a good tax year for me. So let's say I  
16 wait, because I know it's ongoing damages, and then I bring  
17 it when it's convenient for me, and I get six years - - - I  
18 get the six years of my choosing, effect.

19 Isn't that different than a type of ongoing analy  
20 - - - damages analysis for a contract claim?

21 MR. SOKOLSKI: No, because - - -

22 JUDGE GARCIA: Because a contract claim I have  
23 six years.

24 MR. SOKOLSKI: No, no, because in - - - in nearly  
25 all of these cases - - - and - - - and by the way, I just -



1 - - I just wanted to point out too - - - and I know Your  
2 Honor knows this, but - - - but the damages are limited to  
3 six years. This isn't unlimited damages. What you're  
4 talking about is how far can you go back in order to - - -

5 JUDGE GARCIA: But you can bring that six-year -  
6 - -

7 MR. SOKOLSKI: - - - determine what the legal  
8 rent should be.

9 JUDGE GARCIA: - - - case whenever you want.  
10 Like there's no limit on when you can bring it. Under your  
11 theory, look, I've got six - - -

12 MR. SOKOLSKI: Right, because it's - - -

13 JUDGE GARCIA: - - - years of damages.

14 MR. SOKOLSKI: - - - because it's an ongoing  
15 violation. The - - - in - - - in all of these cases - - -  
16 you're going to see this case too. This record - - - this  
17 record, they - - - they went off the tracks in like 2002.  
18 When they dis - - - when - - - when they got sued, they  
19 back-filed four years of registrations - - - only four  
20 years of them. And this is a 2014 index number. They went  
21 from 2010 to 2014 and filed back. They didn't correct  
22 anything.

23 JUDGE WILSON: Well, didn't they try to file the  
24 prior period and your clients objected? No?

25 MR. SOKOLSKI: I don't think that that's - - -





1 JUDGE WILSON: That may be a different case I'm  
2 thinking about.

3 MR. SOKOLSKI: - - - I don't think that that's -  
4 - - that that's - - -

5 JUDGE WILSON: Okay.

6 MR. SOKOLSKI: - - - in - - - in the record, at  
7 all.

8 But getting back to Your Honor's point, what do  
9 we have? On a proper showing - - - and I'm denying that  
10 that happened here for that reason - - - but in a proper  
11 showing, that's what treble damages are about. Right?

12 If they show that they honestly relied upon  
13 DHCR's advice, and deregulated a unit - - - by the way,  
14 while every City regulation - - - that they got the J-51  
15 tax benefits under - - - all of them say those units remain  
16 stabilized for at least as long as the benefit period.

17 JUDGE FEINMAN: Right.

18 MR. SOKOLSKI: Okay? So I - - - I find some of  
19 this - - - some of this a little dubious. I think that  
20 they took the rosy interpretation because it made them more  
21 money. And they took that chance, Your Honor. But they  
22 lost. They were wrong. They violated the law.

23 Now they're looking to violate more laws, because  
24 they're saying, well, gee, well, we didn't register because  
25 we didn't think we had to. Right?



1                   So you know, there's - - - there - - - I think -  
2                   - - I think that on a proper showing, I think that they can  
3                   be denied treble damages, because they're showing that it's  
4                   not willful, and that's how the law works. All they are -  
5                   - - all they are doing is to restore the - - - the rent to  
6                   what it would have been - - -

7                   JUDGE WILSON: Well - - - well, let me ask this.

8                   MR. SOKOLSKI: - - - had they not - - - had they  
9                   not violated the law.

10                  JUDGE WILSON: Let me ask this. What is the  
11                  purpose of treble damages, generally?

12                  MR. SOKOLSKI: The purpose of treble damages,  
13                  generally.

14                  JUDGE WILSON: Generally.

15                  MR. SOKOLSKI: Is a penalty. It's - - -

16                  JUDGE WILSON: So - - -

17                  MR. SOKOLSKI: - - - well, it's penalty and  
18                  deterrence.

19                  JUDGE WILSON: Is there any claim inducing  
20                  function?

21                  MR. SOKOLSKI: Sorry?

22                  JUDGE WILSON: Is there any claim inducing  
23                  function of treble damages?

24                  MR. SOKOLSKI: There might be. I - - - I don't -  
25                  - - I - - - I would posit that attorneys' fees - - -



1 JUDGE WILSON: So - - - so - - -

2 MR. SOKOLSKI: - - - are much - - -

3 JUDGE WILSON: - - - let me ask you - - -

4 MR. SOKOLSKI: - - - claim inducing than treble  
5 damages.

6 JUDGE WILSON: Okay. So let me ask - - - let's  
7 stick with treble damages for a second. Given that the  
8 actions here have already happened, and - - - and let's  
9 just assume that the change in the legislation changes, in  
10 a way that is adverse to your clients - - - sorry - - -  
11 adverse to his clients, the treble damage provisions, how  
12 does that serve the - - - either the deterrence or the - -  
13 - I'm not sure it's any different - - - the deterrence or  
14 the penalty purpose, that is, the - - - the actions have  
15 already taken place. So why retroactively increasing the -  
16 - - trebling the damages or changing the basis on which you  
17 can get treble damages, why does that serve those purposes?

18 MR. SOKOLSKI: Well, be - - - be - - - for  
19 deterrence.

20 JUDGE WILSON: Deterring somebody else, you mean?

21 MR. SOKOLSKI: Deterring someone else from  
22 following the law.

23 JUDGE WILSON: So why - - - that's fine. So why  
24 is there a difference in deterring somebody else between  
25 prospective and retrospective application of the treble



1 damages in the new statute?

2 MR. SOKOLSKI: I'm not sure I understand the  
3 question.

4 JUDGE WILSON: Okay, we'll move to something  
5 else.

6 MR. SOKOLSKI: Okay.

7 JUDGE RIVERA: Well, if I may try?

8 MR. SOKOLSKI: Yes.

9 JUDGE RIVERA: I think the point is if you've  
10 already committed the act, you're not going to be deterred,  
11 because you've already done that, so why - - -

12 MR. SOKOLSKI: It's - - -

13 JUDGE RIVERA: - - - why not - - -

14 MR. SOKOLSKI: - - - it's to - - -

15 JUDGE RIVERA: - - - why - - - excuse me. So  
16 wouldn't - - -

17 MR. SOKOLSKI: Oh, for the specific person.

18 JUDGE RIVERA: - - - wouldn't that mean that  
19 treble damages retroactively, of course, should be viewed  
20 differently than treble damages prospectively - - -

21 MR. SOKOLSKI: Well - - -

22 JUDGE RIVERA: - - - if all you're focused on is  
23 on deterrence.

24 MR. SOKOLSKI: But it's - - - it's - - - it's - -  
25 - it is - - - it's general deterrence. It's also



1 individual deterrence, because you might have a landlord  
2 that's got sixty units or a hundred units, okay?

3 The landlord in this case didn't come up and say,  
4 oh, Mr. Taylor, you're stabilized, even when Lucas was  
5 being litigated. They didn't come up to Mr. Taylor and say  
6 you're stabilized, when Roberts was determined.

7 And just - - - I see my time is up. If I could  
8 just make - - - make one point?

9 CHIEF JUDGE DIFIORE: You may. One point.

10 MR. SOKOLSKI: Thank you. The point three of my  
11 brief that I talk about the rent freeze, is - - - is  
12 absolutely where we are now, because what the legislation  
13 is doing is saying you have to go back to a reliable - - -  
14 a reliable rent registration, okay, at least six years ago,  
15 could be unlimited years ago, okay, and then come forward.

16 And we see that the courts now, that are dealing  
17 with this in the lower courts - - - there was one Gold  
18 Rivka case that the - - - the amicus cited in their brief,  
19 and I also put it in my - - - in my letter of October 16th.  
20 The lower court stops and says, well, wait a second, they  
21 didn't register anyway.

22 Rent's frozen. That's how it should be. The  
23 only reason that we disagree with Justice Gische's decision  
24 and - - - and the Appellate Division in this, is because  
25 they added in increases that were not lawful rent

1 increases, because the landlord failed - - - failed to file  
2 registrations.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MR. SOKOLSKI: Thank you very much, Your Honors.

5 CHIEF JUDGE DIFIORE: Counsel?

6 MR. ZINBERG: Just to correct some misconceptions  
7 and misstatements about what the record is in this case.  
8 As Your Honor pointed out, the owner did not know until  
9 Lucas was decided if the plaintiffs here had to be  
10 considered stabilized, but as soon as Lucas was decided, it  
11 provided a stabilized lease, and then in the next available  
12 time, registered the apartment.

13 It registered the apar - - - it attempted to  
14 register the apartment for the entire period of time, and  
15 as you said, it was - - - the DHCR said for some of those  
16 years you need an administrative determination, which the  
17 plaintiffs opposed, and that was the ex - - - reason that  
18 DHCR cited for not approving the administrative  
19 determination and registering the rents.

20 Vis-a-vis Lucas, so - - - vis-a-vis Lucas, which  
21 I think Your Honor - - - I don't want to mangle your name  
22 again. So I'm not going to bother.

23 JUDGE GARCIA: I'm fine.

24 MR. ZINBERG: But you did ask the question about  
25 whether stabilization would continue at the - - - at the



1 end of a J-51 period. And there was a misstatement by - -  
2 - during the previous state - - - case. 26-504(c) creates  
3 really two classes. It said that if you were getting a - -  
4 - if you're stabilized by virtue of receiving a J-51, you  
5 had to put those notices in the lease.

6 However, if you were not - - - and this is  
7 clarified both in Gersten and in the Lucas case - - - if  
8 you are not, you did not need to put that J-51 notice - - -

9 JUDGE FEINMAN: In other words, you were  
10 stabilized anyway, regardless of the J-51.

11 MR. ZINBERG: Correct. And if you were  
12 stabilized, as in this case, because you had an older  
13 building and you were subject to the earlier laws. And  
14 that was not clear - - -

15 JUDGE GARCIA: Just so I'm clear, when - - - so  
16 you're stabilized because of both things, essentially: the  
17 older building and J-51?

18 MR. ZINBERG: Correct. Correct.

19 JUDGE GARCIA: And you didn't need the riders, in  
20 that case?

21 MR. ZINBERG: You do not need the rider. That -  
22 - - that's actually stated in Lucas. In fact, that turned  
23 around - - - in Lucas, the two lower courts said - - -

24 JUDGE GARCIA: Okay.

25 MR. ZINBERG: - - - you remain stabilized because



1 the notice wasn't there. The Lucas Appellate Division  
2 decision said no, they were wrong; relying on Gersten, you  
3 did not need the notice.

4 JUDGE GARCIA: But so under the - - -

5 MR. ZINBERG: But then it said you stay  
6 stabilized because you "improperly" - - -

7 JUDGE GARCIA: Right, so it's not - - -

8 MR. ZINBERG: - - - quote/unquote - - -

9 JUDGE GARCIA: - - - based on the filing of the  
10 notice or not, it's based on kind of a - - - because of - -  
11 -

12 MR. ZINBERG: It's based on nothing, Your Honor.  
13 It's - - -

14 JUDGE GARCIA: It's based on a perception of - -  
15 -

16 MR. ZINBERG: - - - there was no citation to a  
17 statute, a regulation, to a precedent.

18 JUDGE GARCIA: Right.

19 MR. ZINBERG: It's based on - - -

20 JUDGE GARCIA: Okay.

21 MR. ZINBERG: - - - we think it should stay.

22 Whereas, 26-5 - - - the last clause of 26-504(c) says if  
23 you fall into this second category, at the expiration of  
24 the J-51, you - - - you resume as if this section had never  
25 applied. And that's what we were discussing about Lucas in





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this case.

We said if that's the case, and if you were temporarily kept stabilized because of J-51 receipt, now that the J-51 is over - - -

JUDGE RIVERA: Are you arguing for - - -

MR. ZINBERG: - - - you should go back - - -

JUDGE RIVERA: - - - are you - - - arguing for us to consider whether or not Lucas was properly decided?

MR. ZINBERG: That - - - well, I'm arguing on that point, Your Honor, yes.

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, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of James Taylor and Tamara Jenkins v. 72A Realty Associates, LP and Janet Zinberg, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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