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COURT OF APPEALS

STATE OF NEW YORK

DANIEL COLLAZO, ET AL.,

Appellants,

-against-

NO. 5

NETHERLAND PROPERTY ASSETS LLC AND
PARKOFF OPERATING CORP.,

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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1 CHIEF JUDGE DIFIORE: The last case on this
2 afternoon's calendar is Collazo v. Netherland Property
3 Assets.

4 Good afternoon, Counsel.

5 MR. LANGUEDOC: Good afternoon. Excuse me; I
6 have a little cold. My name is Ronald Languedoc. I'm with
7 Himmelstein, McConnell, for the appellants. I'm here with
8 my colleague, Jesse Gribben.

9 I'm here to argue today that the - - -

10 CHIEF JUDGE DIFIORE: Counsel, may interrupt you
11 for a moment - - -

12 MR. LANGUEDOC: Certainly.

13 CHIEF JUDGE DIFIORE: - - - and ask you if you
14 would like to reserve some rebuttal time?

15 MR. LANGUEDOC: Oh, yes, two minutes, please.

16 CHIEF JUDGE DIFIORE: Sure.

17 MR. LANGUEDOC: The tenants' causes of action for
18 rent overcharge should not have been dismissed, based upon
19 the doctrine of primary jurisdiction, nor should their
20 cause of action for - - - under the General Business Law -
21 - -

22 JUDGE FEINMAN: So I just want to be clear,
23 though. Now that we have the HT - - - HSTPA, do we need to
24 decide at all - - - if we assume, for the purpose of this
25 question, that that is going to be retroactively applied



1 here, do we have to wrestle with whether or not, under the
2 old statute, it was concurrent jurisdiction, it was
3 properly dismissed, it was an abuse of discretion, to send
4 it to the agency?

5 MR. LANGUEDOC: Right.

6 JUDGE FEINMAN: Do we have to even deal with
7 that?

8 MR. LANGUEDOC: Right. I don't think you do,
9 Your Honor. I think the statute is clear on its face that
10 the - - - the statute codifies the previously existing
11 court accepted doctrine that tenants had concurrent
12 jurisdiction with the DHCR to pursue overcharge claims.
13 And it's now - - - the - - - it makes clear - - - it's
14 specifically in the law - - - that it's subject to the
15 tenant's choice of forum.

16 JUDGE RIVERA: So - - - so I'm a little confused,
17 then. Do you adopt what I understood the Attorney General
18 - - - the DHCR through the Attorney General's position,
19 that yes, that's true, but in certain circumstances the
20 court can, indeed, dismiss?

21 MR. LANGUEDOC: I would say - - -

22 JUDGE RIVERA: Or are you taking the position
23 that "subject to the tenant's choice" means if the tenant
24 chooses to proceed in court, the court cannot dismiss it
25 although perhaps could seek guidance from DHCR, and DHCR



1 could submit an amicus?

2 MR. LANGUEDOC: I think it's hard to - - - right,
3 I understand the court's question. And I think - - -

4 JUDGE RIVERA: Um-hum.

5 MR. LANGUEDOC: - - - it's - - - it's hard to
6 come up with a hypothetical scenario - - -

7 JUDGE RIVERA: Um-hum.

8 MR. LANGUEDOC: - - - where a court would require
9 that type of involvement.

10 JUDGE RIVERA: Um-hum.

11 MR. LANGUEDOC: There is a procedure under the
12 Rent Stabilization Law where the court can certify a
13 question to the DHCR. There are also proceedings which are
14 known as fair-market-rent appeals, which are under a
15 different provision of the Rent Stabilization Law, which
16 there have been, you know, court decisions saying that the
17 DHCR has exclusive jurisdiction over those.

18 JUDGE STEIN: Just to clarify, was that issue
19 about the right to submit a - - - a certified question or
20 refer back or anything like that - - - was that raised in
21 this case in Supreme Court or - - -

22 MR. LANGUEDOC: No.

23 JUDGE STEIN: - - - in the arguments here?

24 MR. LANGUEDOC: No, no, it was not raised. I'm
25 just - - - just - - -



1 JUDGE STEIN: So do we need to - - - do we need
2 to decide that - - -

3 MR. LANGUEDOC: No, I don't think - - -

4 JUDGE STEIN: - - - here?

5 MR. LANGUEDOC: - - - you do.

6 JUDGE STEIN: Okay.

7 MR. LANGUEDOC: I was just trying to respond to
8 Judge Rivera's question - - -

9 JUDGE STEIN: Um-hum.

10 MR. LANGUEDOC: - - - as to whether
11 hypothetically there could be cases where - - -

12 JUDGE RIVERA: Well, I don't know how we don't
13 get to it given, I thought - - - I will ask them - - - that
14 their argument was that nevertheless, they fit within these
15 exceptions. So if indeed the statute says no, it's not
16 quite the primary jurisdiction doctrine that formerly
17 applied - - -

18 MR. LANGUEDOC: Right.

19 JUDGE RIVERA: - - - then it does make a
20 difference.

21 MR. LANGUEDOC: Well, the statute now says that
22 the - - - it's concurrent jurisdiction, subject to the - -
23 -

24 JUDGE RIVERA: Yeah.

25 MR. LANGUEDOC: - - - tenant's choice of forum.



1 And nothing shall prevent the tenant from asserting a claim
2 in court. So if you put all of that together, and you can
3 come up with some basis why the court requires the input of
4 the DHCR, by all means, the court is entitled to - - - to
5 do that.

6 For example, there are times when sampling data
7 is used, although I think that that basically can be
8 obtained pursuant to a subpoena. But if not, that might be
9 a situation where the court could - - - could reach out to
10 the DHCR.

11 But I think that the - - - the - - - the current
12 law now is that the - - - the tenant has the choice of
13 forum and that has to be honored.

14 I - - - with regard to the - - -

15 JUDGE FEINMAN: How would it operate if for some
16 reason it wasn't the tenant who commenced the - - - an
17 action?

18 MR. LANGUEDOC: Okay, so if the tenant com - - -
19 if the tenant did not commence the action, but the tenant
20 counterclaimed in the action - - - that's not the case here
21 - - - but I think it would operate the same. The - - - the
22 tenant - - - tenant had a right to counterclaim, whether it
23 would be in a Housing Court proceeding or Supreme Court
24 Action. I - - - I still think that the - - - the rule
25 would - - - would be the same. I see no reason why - - -



1 why it should not be.

2 I would like to touch on the issue that I know
3 Counsel is going to address with regard to the
4 applicability of the new law to this case, because it was
5 dismissed.

6 In case the court is not aware, there was a
7 ruling by the Appellate Division in late November - - - a
8 case called Zitman, which I can't find it at the moment - -
9 - but it - - - it held that an action that had been
10 dismissed by the Supreme Court for rent overcharge, that
11 the HSTPA did apply, because the appeal was pending at the
12 time of the enactment or at the time of the enactment of
13 the HSTPA.

14 And I submit that that's exactly what should be
15 applied here. There is an appeal pending. There was an
16 appeal pending as of June 14th, 2019. There's no reason
17 why the HSTPA does not - - -

18 JUDGE RIVERA: Pending as of the effective date?

19 MR. LANGUEDOC: Correct.

20 JUDGE STEIN: Is that - - -

21 JUDGE FAHEY: Maybe you could - - -

22 JUDGE STEIN: - - - a statutory argument or a
23 constitutional argument?

24 MR. LANGUEDOC: It's a statutory argument.

25 There's been no constitutional arguments made by Counsel in



1 this case, so we did not - - -

2 JUDGE FAHEY: Maybe you could clarify that - - -

3 MR. LANGUEDOC: - - - address that either.

4 JUDGE FAHEY: - - - where you're at right now.

5 As I understood, when this action was commenced,
6 it was prior to the 2019 changes, as many of the other ones
7 are, so the juris - - - so the primary jurisdiction rules
8 that were in place here would be the New York City rules as
9 opposed to the outside-of New York City rules; is that
10 correct?

11 MR. LANGUEDOC: That is correct. Which were - -
12 - those rules were not codified. They were based upon
13 decisions of this court, as well as the Appellate Division
14 and - - - and lower courts.

15 JUDGE FAHEY: So the - - - the way I understood
16 it, then, is that DHCR should have the power to enforce the
17 Rent Stabilization Act, but there was no specific reference
18 in the RSL to the choice of forum, and that the RSL - - -
19 the Rent Stabilization Law - - - only applied to New York
20 City. So it would seem that prior to then, at the time you
21 filed, primary jurisdiction was in DHCR; is that correct?

22 MR. LANGUEDOC: No, I don't accept that, Your
23 Honor, because - - -

24 JUDGE FAHEY: Okay, tell me why not?

25 MR. LANGUEDOC: Because there was many - - -



1 there's many decades of jurisprudence whereby tenants had
2 the choice of forum and that was honored, and even Thornton
3 v. Baron, for example, other cases - - -

4 JUDGE FAHEY: Um-hum.

5 MR. LANGUEDOC: - - - that were brought to this
6 court - - - Conason - - - there - - - there are many
7 instances where the tenants were able to pursue their
8 claims in court, and it was generally only if the landlord
9 made a motion to dismiss, as was done in this case - - -

10 JUDGE FAHEY: Um-hum.

11 MR. LANGUEDOC: - - - that the court might
12 dismiss on the basis of primary jurisdiction, although I
13 would say that up until this case, that was not the norm,
14 and that this case unleashed something about two dozen or
15 more cases that came in the wake of this case, that were
16 dismissed, which was, I think, what caused the legislature
17 to act - - -

18 JUDGE FAHEY: I see.

19 MR. LANGUEDOC: - - - in - - - in the HSTPA.

20 So the answer is no, there - - - there was a - -
21 -

22 JUDGE STEIN: Do we know what DHCR's position is
23 on whether it had exclusive jurisdiction or primary
24 jurisdiction or some kind of specialized technical
25 knowledge - - -



1 MR. LANGUEDOC: We do.

2 JUDGE STEIN: - - - or anything?

3 MR. LANGUEDOC: We do, indeed. The DHCR
4 submitted an amicus brief in this case in which they argued
5 that they - - - (1) they do not have - - - they - - - the
6 doctrine of primary jurisdiction does not apply here. They
7 don't want all the cases.

8 JUDGE STEIN: Um-hum.

9 MR. LANGUEDOC: They don't have the - - -

10 JUDGE FEINMAN: They have enough to keep them
11 busy.

12 MR. LANGUEDOC: They - - - they - - - their
13 resources are too - - - too taxed - - -

14 JUDGE STEIN: Your - - -

15 MR. LANGUEDOC: - - - as it is.

16 JUDGE STEIN: - - - your adversaries say that
17 they have a - - - they have a more streamlined process, and
18 that's better for everyone. Do you - - - do you agree with
19 that?

20 MR. LANGUEDOC: They do not have a more
21 streamlined process. They have - - - the worst thing - - -
22 well, there's many things about it. But in this case, the
23 way this case originated is that thirty individuals from a
24 particular building came to our firm together - - -

25 JUDGE FEINMAN: So you can't jointly prosecute in



1 the - - -

2 MR. LANGUEDOC: Correct.

3 JUDGE FEINMAN: - - - in the DHCR. You can't - -

4 -

5 MR. LANGUEDOC: You can't point out - - -

6 JUDGE FEINMAN: - - - join your resources to hire

7 - - -

8 MR. LANGUEDOC: - - - you can't point out
9 similarities.

10 JUDGE FEINMAN: - - - a tenant's firm. And the
11 likelihood of inconsistent results is therefore increased
12 when you have thirty litigations - - -

13 MR. LANGUEDOC: Yes.

14 JUDGE FEINMAN: - - - in the DHCR. So - - - so I
15 mean, those are some of the policy reasons why the
16 legislature may have made the change that they did, to make
17 it express.

18 MR. LANGUEDOC: Yes.

19 JUDGE FEINMAN: But - - - but - - -

20 MR. LANGUEDOC: You can't depose witnesses.

21 JUDGE FEINMAN: - - - so we're clear, though, if
22 we were to apply the HSTPA, your position is we don't need
23 to wrestle with what the law was?

24 MR. LANGUEDOC: That's correct.

25 I see that my time has expired. Are there more



1 questions?

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 MR. LANGUEDOC: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MS. KOCH: Good afternoon, Your Honors. May it
6 please the court, I'm Adrienne Koch from Katsky Korins,
7 here with my colleague Mark Walfish, on behalf of the
8 respondents.

9 Let me start by talking about the statutory
10 language "subject to the tenant's choice of forum", because
11 I think that that is the basis on which my adversary claims
12 that the HSTPA completely abrogated the common-law doctrine
13 of primary jurisdiction.

14 We submit that the addition of the phrase
15 "subject to the tenant's choice of forum" after the
16 specification of concurrent jurisdiction, simply makes
17 clear that the jurisdiction is concurrent, but not
18 simultaneous, that is, you only invoke the jurisdiction of
19 one body or the other, but not both. This - - -

20 JUDGE STEIN: But - - - but what is - - - but how
21 - - - then what does it mean, "subject to the tenant's
22 choice of forum"?

23 MS. KOCH: It's - - -

24 JUDGE STEIN: So that says that the tenant does
25 have a choice, right?



1 MS. KOCH: But you - - - you - - - it - - -
2 contrast to, for example, there's concurrent jurisdiction
3 elsewhere in the - - - in the various statutory schemes.
4 For example, the family court and the criminal court have
5 concurrent jurisdiction with respect to certain offenses.
6 And the statutes there specify that there's concurrent
7 jurisdiction, but invoking the jurisdiction of the family
8 court does not divest the court of its jurisdiction. The
9 two courts have jurisdiction at the same time. And the
10 statutes provide for record-sharing and the like.

11 And so we submit that the addition here "subject
12 to the tenant's choice of forum", simply distinguishes the
13 kind of concurrent jurisdiction contemplated here from the
14 kind of concurrent jurisdiction that exists in those other
15 places.

16 And I would respectfully remind the court that
17 under this court's - - -

18 JUDGE FEINMAN: You're going to have to explain
19 what you mean by that, because I - - - I didn't follow that
20 at all, frankly.

21 MS. KOCH: Concurrent jurisdiction subject to the
22 tenant's choice of forum simply means that once the tenant
23 chooses the forum, the other forum doesn't also have
24 jurisdiction at the same time. The family court - - -

25 JUDGE FEINMAN: Well, obviously you don't want to



1 litigate in two different fora at the same time.

2 JUDGE STEIN: That's not my understanding of what
3 happens in family court either, actually.

4 JUDGE FEINMAN: Yeah.

5 JUDGE STEIN: You can't have the same claim in
6 the - - - in two different courts.

7 JUDGE FEINMAN: I mean, you choose.

8 MS. KOCH: Right, and but - - - and once you
9 choose, you're there and you're subject to all of the rules
10 that apply in that court. Which in the - - - in the court
11 - - - all the rules that apply in that forum, which in the
12 court, include - - -

13 JUDGE GARCIA: But then how would that change the
14 prior law at all?

15 MS. KOCH: I'm sorry?

16 JUDGE GARCIA: I mean, wasn't that true under the
17 prior law too? So what's the change?

18 MS. KOCH: Under the prior law, the statutory
19 language - - - and we discuss this in our brief - - - it -
20 - - it suggested that in New York City DHCR had exclusive
21 jurisdiction. And the rule that DHCR has concurrent
22 jurisdiction with the courts was a judge-made rule that's
23 codified by the 2019 statute.

24 We submit that a statute under this court's - - -
25 under this court's precedent, a statute should not be



1 interpreted to abrogate the common law, if it is subject to
2 another interpretation that doesn't do so. There isn't a
3 sufficiently clear expression of legislative intent to
4 abrogate the common-law doctrine of primary jurisdiction.
5 And in fact, there's - - -

6 JUDGE RIVERA: What - - - what kind of language
7 would have been necessary, given the language that's used:
8 "concurrent jurisdiction subject to the tenant's choice".
9 What else would the legislature have to have articulated?

10 MS. KOCH: It could have specifically said the
11 doctrine of primary jurisdiction shall not apply. And
12 there's nothing - - - not only - - -

13 JUDGE STEIN: It could have, but the question is,
14 did it have to? I mean, I - - - personally, I think your
15 reading of this language is a little bit strained the other
16 way. And assuming, for the moment - - - and I don't know
17 how any of us feels about this - - - that we think that
18 that language indicates that the tenant's choice is given a
19 preference, then how could that not act to affect the
20 doctrine of primary jurisdiction?

21 MS. KOCH: I would respectfully - - - well, two
22 things, if I may? One is, you need to look at - - - at the
23 legislative history and what the legislature expressed that
24 it was doing. There is nothing in the legislative history
25 to indicate that the legislature even considered the



1 doctrine of primary jurisdiction, nor that it even
2 considered what the impact would be on the courts if it
3 took away their discretion to dismiss cases in favor of
4 DHCR.

5 And one of the questions - - - I forget who asked
6 - - - about getting the input of DHCR - - - the statute
7 does allow for questions to be certified to DHCR and for
8 DHCR to intervene, but only outside of New York City.

9 When the legislature amended the statute in 2019,
10 it did not give courts within New York City - - -

11 JUDGE STEIN: All it had to do, then, was add the
12 same language as to New York City that it had as to outside
13 New York City. They wouldn't have - - -

14 MS. KOCH: But it - - -

15 JUDGE STEIN: - - - to come up with a whole new -
16 - -

17 MS. KOCH: But it did - - - but it didn't.

18 JUDGE STEIN: - - - rule.

19 MS. KOCH: But it didn't. And what we say is
20 that - - - that - - - that it - - - by not doing that, what
21 it left in place was the way courts within New York City
22 have to get the input of - - - of DHCR as primary
23 jurisdiction.

24 JUDGE STEIN: Well, let me ask you this. Even if
25 we apply the doctrine of primary jurisdiction, what - - -



1 how - - - how - - - the issues - - - some of the issues in
2 this case are the same - - - the very same issues that
3 we've spent the last two hours hearing arguments on in four
4 other cases. And I'm sure there are many more cases that
5 aren't before us.

6 And it seems to me that these are the very type
7 of cases involving legal issues, involving interpretations
8 of - - - of the law, that the - - - the - - - that don't
9 fall within the primary expertise or the specialized
10 expertise of an agency. And in fact, the agency here says
11 it doesn't, and it's contrary to the concurrent
12 jurisdiction that has been exercised for many, many years,
13 in these cases.

14 So even if we apply that, how would dismissal be
15 proper here?

16 MS. KOCH: If - - - if - - - if I'm understanding
17 your question correctly, and - - - and you'll stop me if
18 I'm not - - - there is a - - - first of all, concurrent
19 jurisdiction is one of the prerequisites for the primary jo
20 - - - jurisdiction doctrine to apply. So - - - so the
21 primary jurisdiction doctrine applies here precisely
22 because there's concurrent jurisdiction. And there is
23 juris - - -

24 JUDGE STEIN: But I'm saying more than that. I'm
25 saying that the courts have - - - have regularly and



1 repeatedly tackled these very questions, and there's never
2 been - - - and I think somebody - - - I think Counsel
3 stated that this is very, very unusual, actually.

4 So how can you say that this is so uniquely
5 within the agency's expertise, given these issues?

6 MS. KOCH: In the lower court, the plaintiffs
7 didn't actually argue that this case raises any legal
8 issues that hadn't previously been addressed by the courts.
9 Their brief is attached as an addendum in our brief,
10 because we had some issues with whether certain things were
11 preserved. And this is one of them. They in fact, argued
12 the opposite.

13 We submit that that should be dispositive,
14 because, remember, the question here is whether the lower
15 court correctly exercised its discretion under the doctrine
16 of primary jurisdiction. Discretion implies that there's a
17 broad range of things that could be within the realm of
18 what's proper.

19 JUDGE RIVERA: But the underlying justification
20 of primary jurisdiction is what Judge Stein is asking you
21 about, right, that - - - the need to send it to another
22 entity that has specialized - - - either has experience or
23 specialized expertise; and that's what you're drawing on.

24 MS. KOCH: Cor - - - correct. And in the lower
25 court, we listed a number of reasons - - - now, we submit



1 that under the doctrine of primary jurisdiction, as it
2 applies not just here but in various areas where there's an
3 agency, once it applies, you need a reason to keep it. And
4 that's - - - and that's what the cases cited in our briefs
5 say.

6 But we said - - -

7 JUDGE RIVERA: Okay, so how - - - how does just
8 an overcharge case require the DHCR expertise? What - - -
9 what is special about your case?

10 MS. KOCH: We gave a number of - - - of reasons
11 in the lower court as to why it would - - - dismissal was a
12 proper exercise of jurisdiction - - - of discretion here.
13 There was, in fact, a - - - a proceeding pending in DHCR
14 brought by some of these plaintiffs that - - - where DHCR
15 was going to determine some of the very factual issues that
16 the plaintiffs claimed were common to them.

17 The plaintiffs argued that the cal - - -
18 calculation of their rent required review of DHCR's own
19 records, going back eighteen to twenty years.

20 There's now an additional factor that the
21 plaintiffs complaint cites the DHCR's own regulations and
22 relies on DHCR's own regulations, which, we submit, DHCR
23 should have the first crack at revising, in light of the
24 new statute.

25 But - - - but the - - - but the most important



1 thing with respect to this, Your Honor, is that the
2 plaintiffs didn't respond at all to the discretionary
3 factors that we raised below and didn't raise any
4 discretionary factors in their own argument. They only
5 argue that the court didn't have any discretion. So - - -

6 JUDGE FEINMAN: If I may? Because your white
7 light is on - - -

8 MS. KOCH: Yes.

9 JUDGE FEINMAN: - - - and I don't want you to run
10 out of time before addressing the GBL issue. And I just
11 want to be clear what your position is.

12 Are you asserting that a tenant can never assert
13 a 349 claim, or are you saying that this particular
14 complaint - - - and I think it's in paragraph 31 - - - is
15 just too vague or insufficient to withstand a motion to
16 dismiss?

17 MS. KOCH: Two answers to that question, Your
18 Honor. The first is that we - - - we do - - - we do claim
19 G - - - GBL 349 doesn't create a separate and additional
20 right of action every time someone violates the statute and
21 doesn't announce that they're doing so. And that's what
22 this court held in the Schlessinger case that's cited in
23 our briefs, that neither the plaintiffs nor any of their
24 amici address.

25 The plaintiffs' position here would mean that



1 every rent overcharge claim is necessary - - - necessarily
2 also a GBL 349 claim. And that makes no sense. And if the
3 legislature had intended that, we submit that it - - -

4 JUDGE FEINMAN: Let's say, hypothetically, a
5 landlord thinks that they have properly deregulated this
6 building or it's not subject to rent stabilization, and
7 they send out ads over - - - whether it's the internet or
8 you know, however they advertise - - - you know, come look
9 at our - - - you know, no broker, no fees, come to our
10 rental office. You can get this market-rate apartment,
11 fabulous views, et cetera.

12 That's not going to fall under the GBL - - - and
13 it turns out that that's incorrect, all right? They should
14 have been regulated. Would that be subject to the GBL?

15 MS. KOCH: I would say - - - from what you have
16 said in your hypothetical, I would say no. And the reason
17 is because for a GBL 349 claim to exist, not only does
18 there have to have been deception, but the plaintiff has to
19 have been damaged by the deception. And there is nothing
20 in the plaintiffs' complaint, and the plaintiffs haven't
21 said anything in their briefs, to say how the - - -

22 JUDGE FEINMAN: What I'm trying to distinguish
23 here is not so much this complaint, which I - - - and I'm
24 going to ask him when he stands up on rebuttal - - - is
25 focused purely on that one sentence in - - - in paragraph



1 31. What I'm trying to get at is, are you saying that
2 categorically, there can be no 349 claims based on some
3 sort of misleading representation on - - - as to the rent-
4 stabilized status, or it's just not pled here?

5 MS. KOCH: Well, I'm - - - I'm saying - - - I'm
6 saying both. I only need to say it's not pled here, but in
7 your hypothetical, I do not see how your hypothetical
8 plaintiff is injured by deception. They got what they
9 thought was a market-rate apartment, and it turns out that
10 it's rent-stabilized.

11 If they can show some injury that a market-rate
12 apartment would have been better for them than a rent-
13 stabilized apartment, or that they entered into their lease
14 thinking they were getting a market-rate apartment, and now
15 they're embarrassed to find out they have a rent-stabilized
16 apartment - - -

17 JUDGE STEIN: But what if they later find out
18 that it should have been rent-regulated and they should
19 have paid less rent for - - - for this very apartment?

20 MS. KOCH: And then - - - and what they are
21 damaged by is the violation of the Rent Stabilization Law,
22 which provides them with a complete remedy. It has nothing
23 to do with deception.

24 It's a violation of the Rent Stabilization Law,
25 so their rent should have been lower than it was, and they



1 get damages for that. But what injures them is the
2 violation of the statute of the - - - of the other
3 statutory scheme, not deception.

4 JUDGE RIVERA: Could there violation of - - -

5 JUDGE FEINMAN: Can - - -

6 JUDGE RIVERA: - - - both?

7 JUDGE FEINMAN: I'm sorry.

8 MS. KOCH: In this hypothetical, I would say - -
9 -

10 JUDGE RIVERA: Could you violate - - - excuse me.
11 Could you violate the RSL by deception?

12 MS. KOCH: I - - - I don't want to say
13 categorically no, because - - - because there may be
14 situations where a - - - where the wrong is deception and
15 it violates both.

16 But in - - - but in Judge Feinman's hypothetical,
17 and in this case, that's not the case.

18 The other thing that I would point out - - -

19 JUDGE RIVERA: To be clear then, you're not ask -
20 - - you're note seeking a per se rule that a tenant could
21 never assert a Section 349 claim?

22 MS. KOCH: A - - - a tenant might - - - a tenant
23 might have a separate claim for damages that re - - - that
24 arise from deception, but they would have to be separate
25 from the damages that arise from violation of the RSL.



1 The - - - the other thing I would point out is
2 that in 2019, when the legislature amended, not only the
3 RSL, but also the General Business Law - - - because the
4 HSTPA has amendments to the GBL in it as well - - - they
5 did not see fit to say anything about this issue, even
6 though courts had been regularly dismissing GBL 349 claims
7 under this very context. So the legislature, by its
8 failure to act, put its imprimatur on that result.

9 I - - - I see that my time is up. The only thing
10 I want to add is that the statute's very clear in saying it
11 applies to claims pending or filed on and after the
12 effective date. It doesn't say "cases" or "actions" or
13 "proceedings", the way the 1997 amendments did, which are
14 referenced no fewer than six times in the HSTPA.

15 The plaintiffs' claims in this case were not
16 pending on the date the new statute was enacted, because
17 they had already been dismissed. If they had been pending,
18 this court wouldn't have jurisdiction.

19 JUDGE STEIN: Was there ever a determination as
20 to the - - - the - - - the substantive issues - - - the
21 substantive rights of the tenants here, ever?

22 MS. KOCH: No.

23 JUDGE STEIN: Okay. So it was set - - - it was
24 dismissed so that those issues could be determined - - -
25 the merits of those issues could be determined in another



1 forum, correct?

2 MS. KOCH: Correct, yes.

3 JUDGE STEIN: Okay. So you think that the
4 legislature wouldn't have intended to include such claims
5 in - - - in the new statute?

6 MS. KOCH: I think the legislature very clearly
7 said "claims" and not "actions" or "proceedings". And
8 under the - - - the rules about statutory interpretation,
9 the court is bound to give effect to that distinction. The
10 only way to give effect to that distinction is to treat
11 claims that have been dismissed as not pending, even though
12 the action or the proceeding is, of course, still pending.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MS. KOCH: Thank you.

15 CHIEF JUDGE DIFIORE: Mr. Languedoc?

16 MR. LANGUEDOC: Yes, thank you.

17 JUDGE STEIN: Can I - - - can I just ask - - -
18 start with that point?

19 MR. LANGUEDOC: Yes.

20 JUDGE STEIN: What, if any, significance do you
21 give to the distinction in the language?

22 MR. LANGUEDOC: Your Honor, I give no di - - - no
23 significance to that whatsoever.

24 JUDGE STEIN: Why not? Why shouldn't we?

25 MR. LANGUEDOC: Because there's no - - - there's



1 no difference in the definition in this context, between
2 claims on the one hand and actions and proceedings on the
3 other hand. There's no cases that - - - that are cited
4 anywhere that point to any difference.

5 In fact, I would argue that the term "claims" is
6 broader than the term "actions and proceedings", if you
7 look at the dictionary. It could encompass - - - the term
8 "claim" could encompass more than an action and proceeding.

9 JUDGE GARCIA: Counsel, can I ask you something -
10 - -

11 MR. LANGUEDOC: Sure.

12 JUDGE GARCIA: - - - I think the reverse of what
13 I think Judge Feinman asked you before.

14 If we find this was an abuse of discretion to
15 invoke this doctrine and reverse on that basis, do we need
16 to get into whether or not the new law applies?

17 MR. LANGUEDOC: Right. I was waiting for
18 somebody to ask me that question.

19 JUDGE GARCIA: And I indulged you.

20 MR. LANGUEDOC: And thank you for asking it. And
21 the answer is, no, you - - - you could decide - - - you
22 could decide that, for example, this court is not going to
23 reach the issue of the applicability of the HSTPA to this
24 action, but - - -

25 JUDGE GARCIA: Because even under the prior law,



1 if we were to decide that, even under the prior law, it was
2 an abuse of discretion.

3 MR. LANGUEDOC: That's - - - that is possible,
4 that you could do that.

5 If I could very quickly - - - the cite for the
6 Zitman case is 177 A.D.3d 565.

7 And in terms of the - - - of the GBL, if I could
8 just have a seconded - - -

9 CHIEF JUDGE DIFIORE: Um-hum.

10 MR. LANGUEDOC: - - - to address that?

11 JUDGE FEINMAN: So - - - so all you have is
12 paragraph 31, right?

13 MR. LANGUEDOC: Excuse me? Of my complaint - - -
14 of the complaint - - -

15 JUDGE FEINMAN: The - - - the only thing that's
16 relevant to that, that's in your complaint, unless I missed
17 something, is paragraph 31 at record page 15, or page 5 of
18 your complaint.

19 MR. LANGUEDOC: I - - - I don't think that's
20 correct, Your Honor. I think first of all - - -

21 JUDGE FEINMAN: So what else is there?

22 MR. LANGUEDOC: Pardon me?

23 JUDGE FEINMAN: What else is there?

24 MR. LANGUEDOC: Well, the complaint all - - - the
25 complaint is replete with allegations that the plaintiffs

1 were rented apartments that were represented to them to be
2 market apartments and that were charged illegal rents. And
3 then the complaint goes on to allege that these were
4 consumer-related activities that were aimed at the public
5 at large, and that the plaintiffs were injured as a result.

6 JUDGE FEINMAN: See, so that's what I was looking
7 at was - - - what I was trying to find is allegations that
8 go towards what was represented to the public as opposed to
9 these individual litigants.

10 MR. LANGUEDOC: So the al - - -

11 JUDGE FEINMAN: Or individual tenants.

12 MR. LANGUEDOC: - - - the allegations - - - the
13 allegations in the complaint are simply that these facts
14 were represented to the public or that they were aimed at
15 the - - - excuse me - - - that the - - - the conduct was
16 aimed at the public at large and that it was deceptive.

17 And I would say that that's sufficient - - -

18 JUDGE FEINMAN: I guess the trouble that I'm
19 having is - - - is just the language seems pretty
20 conclusory and just sort of a broad statement.

21 MR. LANGUEDOC: I think it - - - I think it
22 satisfies the 3211(a) standard, and I think that, you know,
23 we would await the discovery process. I think that almost
24 by definition, landlord-tenant contracts or landlord-tenant
25 arrangements, are consumer activities, and that the - - -



1 the GBL prohibits deceptive business practices. That's
2 what we're alleging.

3 JUDGE RIVERA: Well, how - - - how did the
4 landlord solicit tenants?

5 MR. LANGUEDOC: Excuse me?

6 JUDGE RIVERA: How did the landlord solicit
7 tenants?

8 MR. LANGUEDOC: It - - -

9 JUDGE RIVERA: Is that anywhere in the complaint?

10 MR. LANGUEDOC: The complaint - - - I don't know
11 if the word "solicits" is there. I think it says that the
12 - - - the - - - the actions were consumer-based and they
13 were directed at the public at large.

14 JUDGE STEIN: Weren't you - - -

15 MR. LANGUEDOC: And they were deceptive.

16 JUDGE STEIN: When you read the allegations of
17 the complaint, aren't they essentially saying that these
18 were not represented to be rent-regulated apartments?

19 MR. LANGUEDOC: Right, that - - - that's the
20 point I was getting at - - -

21 JUDGE STEIN: Okay. So - - -

22 MR. LANGUEDOC: - - - was that taken as a whole -
23 - -

24 JUDGE STEIN: - - - so what you're saying is that
25 they were violating the Rent Stabilization Law, right, and



1 they didn't tell you that they were violating the Rent
2 Stabilization Law. Isn't that the essence of what you're
3 alleging here?

4 MR. LANGUEDOC: Yes. But also that they were
5 violating the General Business Law, because they - - - they
6 - - -

7 JUDGE STEIN: Right, but doesn't Schlessinger
8 address that and say that that's not enough to - - -

9 MR. LANGUEDOC: No, I don't think it does.

10 JUDGE STEIN: - - - find a violation of the GBL?

11 MR. LANGUEDOC: I think that - - - I think that -
12 - - first of all, by its own terms, the GBL can be an
13 additive claim. It can be overlapping. You can claim
14 both. Secondly, there might be times when there's a
15 violation of the GBL but not the RSL, or the - - - or one
16 or the other.

17 In this case I think that, you know, the
18 complaint as a whole satisfies the requisite standards for
19 setting forth a cause of action under the GBL. You know, I
20 would also note that a number of amici, you know, got
21 together to submit a brief to this court in which they - -
22 - they pointed out cases such as the purchase of a dog,
23 purchase of insurance policy, entering into a mortgage
24 agreement, an equipment lease, and other things that are
25 within the am - - - clearly within the ambit of the GBL.



1 And I would submit that - - -

2 JUDGE RIVERA: There's a difference because it's
3 a regulated market?

4 MR. LANGUEDOC: No, no. There's not. Because a
5 lot of these - - -

6 JUDGE RIVERA: No?

7 MR. LANGUEDOC: - - - other - - - a lot of these
8 other matters involved regulated markets as well.

9 JUDGE RIVERA: But that's what I'm saying. This
10 is also a regulated market?

11 MR. LANGUEDOC: This is - - - this is also a
12 regulated - - -

13 JUDGE RIVERA: That's my point.

14 MR. LANGUEDOC: - - - market.

15 JUDGE RIVERA: Um-hum.

16 MR. LANGUEDOC: Right. So we're entitled to seek
17 relief under both statutes, the RSL and the GBL.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. LANGUEDOC: Thank you.

20 (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 Daniel Collazo, et al. v. Netherland Property Assets LLC and Parkoff Operating Corp., No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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