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COURT OF APPEALS

STATE OF NEW YORK

LAURA DILORENZO,

Appellant,

-against-

NO. 78

WINDERMERE OWNERS LLC, ET AL.,

Respondents.

20 Eagle Street
Albany, New York
October 14, 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: This is appeal number 78,
2 DiLorenzo v. Windermere Owners.

3 Counsel?

4 MR. BOGATIN: Yes. Sorry. Good afternoon, Your
5 Honor and the court. Marc Bogatin for the plaintiff, for
6 the appellant. I would ask to reserve two minutes on
7 rebuttal, please.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. BOGATIN: Thank you.

10 The Appellate Division in the opinion below held
11 that a plaintiff - - - I'm sorry - - - that a defendant-
12 landlord in a rent-overcharge case, where the - - - the
13 landlord has obtained a destabilization of an apartment
14 based on the payment of individual apartment improvements,
15 IAI, the Appellate Division held that the landlord has no
16 obligation under the law to comply with - - - with what's
17 referred to as the useful life rule. It's plaintiff's
18 position - - - we submit that that was wrong. That holding
19 was wrong.

20 JUDGE STEIN: Counselor, are we - - - are we no
21 longer talking about whether they established that they
22 made repairs in excess of the threshold? Now we're just
23 talking about whether it - - - the - - - their deregulation
24 violated the useful life rule?

25 MR. BOGATIN: That - - - that's correct, Your



1 Honor. Yes, that is correct. Given the procedural posture
2 of the case, where we are now - - -

3 JUDGE STEIN: Okay.

4 MR. BOGATIN: - - - obviously it's our position
5 they didn't make enough. But no, that's - - - that's
6 behind us, that's been litigated; the Appellate Division
7 ruled that they met that part of the burden.

8 JUDGE STEIN: Okay.

9 MR. BOGATIN: That they did prove that they spent
10 X. Okay. We - - - we - - -

11 JUDGE STEIN: And - - - and so then are we
12 looking at - - - at the - - - the proof insofar as it
13 related, or - - - or - - - or negated, any relation to the
14 earlier repair?

15 MR. BOGATIN: Yes, Your Honor. A hundred
16 percent. Hundred percent.

17 JUDGE STEIN: Okay. And - - - and the trial
18 court came to one conclusion, right, and the Appellate
19 Division came to another, right?

20 MR. BOGATIN: On - - - on the question of law, we
21 believe, yes, Your Honor.

22 JUDGE STEIN: Well, also on the facts - - -

23 MR. BOGATIN: Not on a factual matter, on a - - -
24 on a legal matter.

25 JUDGE STEIN: On the fa - - - on the facts of



1 whether they - - - they violated the - - - they were
2 duplicative of, or they proved that they were not
3 duplicative - - -

4 MR. BOGATIN: No, that's - - - we - - - we don't
5 - - - we don't agree with that - - - that position. The -
6 - - we believe the Appellate Division ruling is very clear.
7 The Appellate Division ruled as a matter of law that the
8 landlord has no obligation to comply with any useful life
9 schedule.

10 JUDGE STEIN: Well - - -

11 MR. BOGATIN: It's right in their opinion.

12 JUDGE STEIN: Let's - - - let's assume we don't
13 agree with you on that. I think that there could be a
14 reading of it to say that they - - - what they said was
15 that they - - - they didn't have to comply with the
16 schedule that applies to the - - - the more general types
17 of improvements. But if so - - - so if we don't agree with
18 you on that, then am - - - am I correct that it's a factual
19 difference and that we have to determine which set facts
20 more comports with what the record is?

21 MR. BOGATIN: Well, if - - - if you're looking at
22 - - - if one is looking at the facts, we believe that
23 there's a total fail - - - absence and failure of proof on
24 the part of the landlord. The landlord's witness, the
25 property manager, Baigelman, said - - - was asked



1 repeatedly, or at least two or three times, tell us about
2 the prior improvements. He said I have no idea; I've got
3 no recollection.

4 JUDGE STEIN: Okay.

5 JUDGE WILSON: I think before you get to that, I
6 think Judge Stein was trying to ask about the appropriate
7 standard of our review. That is, the trial court made one
8 set of findings; Appellate Division made an opposite set of
9 findings. Is our standard of review to decide which of
10 those is more supported by the record?

11 MR. BOGATIN: Okay.

12 JUDGE WILSON: Or is it a different standard?

13 MR. BOGATIN: I would say, in part, yes, but I
14 don't believe that the - - - well, first of all, I don't
15 believe there is any evidence whatsoever introduced by the
16 landlord as to compliance with useful life.

17 On appeal, they're saying that useful life was
18 satisfied or made irrelevant because the prior improvements
19 were washed away. That's their language from their brief.
20 Washed away by a flood.

21 If the look at the evidence in the trial record,
22 there's no testimony by the landlord's witness or anybody
23 else's witness that there was any flood damage to this - -
24 -

25 JUDGE FAHEY: So are we - - -



1 MR. BOGATIN: I'm sorry.

2 JUDGE FAHEY: I'm here. That's okay.

3 MR. BOGATIN: Oh, yes.

4 JUDGE FAHEY: So are we then into the legal
5 question of who has the burden of proof?

6 MR. BOGATIN: Of course - - - I mean, yes, yes, a
7 hundred percent, Your Honor.

8 JUDGE FAHEY: All right. So - - -

9 MR. BOGATIN: I certainly agree with that.

10 JUDGE FAHEY: So - - - so - - - but it seems that
11 we can't avoid a factual analysis in deciding this, right?

12 MR. BOGATIN: Well, I - - - I would - - - I would
13 put it a little bit differently, but - - -

14 JUDGE FAHEY: Go ahead.

15 MR. BOGATIN: - - - I would put it whether or not
16 there's any proof. I think there's an absence and failure
17 of proof. That's our view.

18 JUDGE FAHEY: Um-hum. And what about the useful
19 life argument that it - - - that the proof you're - - -
20 that the useful life rule only applies to equipment and
21 furnishings and not to improvements, and that the bulk of
22 these - - - a bulk of this work was characterized as
23 improvements?

24 MR. BOGATIN: Yes, Your Honor. I - - - we
25 believe that's the - - - a distinction - - - their



1 distinction without a difference. First of all - - -

2 JUDGE FAHEY: I'm sorry; it's a distinction
3 without a difference?

4 MR. BOGATIN: Well, we - - - we would
5 characterize that argument, which is their argument, a
6 distinction, without a difference.

7 JUDGE FAHEY: Well, you know, the problem here is
8 that I'm subjected to a great deal of HGTV. My wife
9 watches it religiously. And - - - and as a result of that,
10 I - - - I - - - from having to stand around and watch HGTV,
11 I've come to understand that furnishings and equipment are
12 - - - are characterized much differently than improvements.
13 And - - - they aren't all the same thing. And - - -
14 plumbing work, electrical work, that tends to be
15 improvements. Furnishings are the shades; equipment is the
16 dishwasher. The - - - that's the way I understand how
17 those of terms of art are used in this setting from my off-
18 the-record experience.

19 And is that your understanding?

20 MR. BOGATIN: Your Honor - - - no, Your Honor. I
21 - - - I believe - - -

22 JUDGE FAHEY: Okay, tell me why that is
23 incorrect. That's what I need to understand.

24 MR. BOGATIN: Okay. We believe - - - the - - -
25 the state legislature has indicated there's no distinction



1 between equipment and improvements. In the HSTPA, I
2 believe it's read - - - the Administrative Code 26-516, I
3 believe, is the cite. But putting aside the actual cite,
4 the legislature says - - - they refer to the useful life of
5 improvements. The landlord has to maintain records, useful
6 life of improvements. They didn't say equipment. They
7 didn't say furnishings. They said improvements.

8 At least as far as the legislature's concerned,
9 there's no difference. Equipment is subsumed under
10 improvements. The same is true of the DHCR. When the
11 actual - - - useful life rule was actually promulgated - -
12 - or, enacted, by the legislature in '93, I believe, and
13 there's the two-page memorandum from DHCR to the governor
14 at the time, which is included in our brief, DHCR doesn't
15 refer to useful life of equipment. They say, useful life
16 of improvements.

17 And I think if you actually look at - - - at
18 their argument, my opponent's argument, I think the
19 distinction breaks down and becomes unworkable. They say
20 in their brief that the land - - - the plumbing invoice - -
21 - the plumbing invoice for 13,000 dollars, is all
22 improvements, and not equipment. And they say it's a
23 13,000-dollar charge for labor. They're actually wrong.
24 It's 10,000 for labor, 4,000 for materials. And if we talk
25 about plumbing, materials wouldn't - - - obviously, it's



1 pipes, it's piping, pipes, faucets. That's equipment. I
2 don't know; it's equipment.

3 JUDGE WILSON: So - - - so let me - - -

4 MR. BOGATIN: And obviously the labor attached to
5 that would - - - would fall under categ - - - I mean, the
6 labor - - -

7 JUDGE WILSON: Let me - - - let me get you back
8 to Judge Stein's - - -

9 MR. BOGATIN: I'm sorry?

10 JUDGE WILSON: - - - question on the useful life
11 schedule for MCIs and its application, if at all, to the
12 IAIs. So is it your position that the useful life - - -
13 you know, useful lives in that schedule, are applicable to
14 IAIs as a mandatory matter, or per the DHCR guidance? When
15 you're dealing with IAIs it's a more flexible issue, and in
16 - - - in answering that question, I just wanted to point -
17 - - which I'm sure you know - - - refrigerators, for
18 example, which people might think of as equipment or
19 appliances, are on the MCI schedule with a useful life.

20 MR. BOGATIN: Your Honor, that's - - - it - - -
21 it's a good - - - interesting question. I guess if you
22 look at the statute, I guess technically the schedule for
23 MCI improvements - - - useful life schedule, rather, is
24 technically not incorporated within the useful life rule,
25 which is in the division - - - provision, rather, above.



1 It's certainly something the courts can look at, and if you
2 look at the way it's - - - the courts have applied useful
3 life rule in the past, they just go to the MCI schedule and
4 apply it towards the IAI rule.

5 But even apart from the MCI schedule, there's no
6 question under the IAI, it's in the Stabilization Code and
7 the Stabilization Law, the landlord has to prove that
8 today's improvement is not within the useful life of
9 yesterday's improvement. There's no question about that.
10 The only question is what - - - either you go to - - -

11 JUDGE WILSON: Yes, but to - - - to put a point
12 on my question, could you - - -

13 MR. BOGATIN: I'm sorry?

14 JUDGE WILSON: To put a point on my question - -
15 -

16 MR. BOGATIN: Oh.

17 JUDGE WILSON: - - - suppose the useful life in
18 the MCI schedule is fifteen years. Could a landlord for an
19 IAI come in to either DHCR or a court and say, I have
20 conclusive proof that the refrigerator in this apartment
21 was nonfunctioning, and the repairs would have cost more
22 than getting a new - - - and so even though it's not
23 fifteen years old, I'm still entitled to an IAI. Could
24 they do that?

25 MR. BOGATIN: Well, certainly, Your Honor. I



1 think - - -

2 JUDGE WILSON: Okay.

3 MR. BOGATIN: Certainly, that just goes to the
4 question of who has the burden of proof. They didn't do
5 it; they didn't even try to do it.

6 JUDGE WILSON: Okay.

7 MR. BOGATIN: Today, in their brief, they say,
8 everything - - - they say that today. It was washed away,
9 it was an emergency - - - emergency situation. There's no
10 proof of that.

11 Oh, also in terms of the plumbing, let's say even
12 the plumbing invoice, the pipes are within the law. They
13 wouldn't have been washed away by any so-called flood. But
14 the bottom line from our point of view is, they never
15 introduced a single witness to say, this is the case. If
16 they had said, we - - - you know, the - - - the prior - - -
17 if they had said, I think it was refrigerator that - - -
18 that Your Honor was referring to. If they had said that, I
19 would be in a different position.

20 CHIEF JUDGE DIFIORE: Okay. Thank - - -

21 JUDGE STEIN: Does it make any - - -

22 MR. BOGATIN: They'd be in a different position.

23 JUDGE STEIN: Does it make any - - - does it make
24 any difference that there were some - - - you know, I - - -
25 I un - - - to me the purpose of all of this is so that the



1 - - - the - - - the landlord doesn't go in and make
2 unnecessary extravagant improvements so that the rent can
3 be raised - - - it - - - it can become a luxury apartment or
4 whatever, right.

5 And here, we did have some photographs, and - - -
6 and - - - and they, as you know, from what I can tell, they
7 - - - they don't show that there - - - this was some luxury
8 improvement here; it - - - it looks pretty basic. So can -
9 - - can that kind of proof corroborate or support an
10 inference that they wouldn't have spent this kind of money
11 if they didn't need to?

12 MR. BOGATIN: Your Honor, our position is - - -
13 is no, because first of all, the photographs don't show you
14 how - - - what the condition of the apartment was before
15 they made the improvements in '09. It doesn't tell you the
16 pre-improvement condition of the apartment. And moreover,
17 there are multiple inferences that can be drawn from the
18 fact that they spent, supposedly, a lot of money.

19 Maybe they wanted to spend more money to make the
20 apartment marketable. That's possible. Maybe they spent
21 more money - - - and I'm just suggesting - - - maybe there
22 were kickbacks going on. That's an inference you could
23 draw. I'm not saying there were kickbacks, but there
24 certainly - - - that's an inference. So I - - - I would
25 answer basically, no, I don't believe you can tell from the



1 photographs what the pri - - - you certainly can't tell
2 from the photographs what the prior improvements were, and
3 what the condition of the apartment was before the IAI.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 Counsel?

6 MR. BOGATIN: Yes. Thank you.

7 MR. FELDMAN: May it please the court, my name is
8 Richard Feldman, and I'm appearing for the respondents.

9 Prior to this court's decision in Regina in April
10 of 2020, there was a confusion that existed in terms of the
11 applicability of the four-year lookback rule, and what a
12 rent history was comprised of. This court made it clear
13 under Regina that absent fraud, which is not present in
14 this case, you can't look back more than four years. And a
15 land - - - and an owner-landlord does not have to retain
16 documents beyond six years.

17 Here, the lower court made errors of law when I
18 asked to preclude the consideration of the useful life
19 argument for - - - for improvements that were done in 1995
20 and 1998. Again, the action was commenced in 2011.
21 Obviously, more than four years.

22 JUDGE WILSON: So the - - - the arg - - - Counsel
23 - - -

24 MR. FELDMAN: And those - - -

25 JUDGE WILSON: Counsel, the argument you're making



1 then is effectively a landlord can replace anything in an
2 apartment as long as four years has gone by, and that's
3 then unquestionable.

4 MR. FELDMAN: The tenant in occupancy - - -

5 JUDGE WILSON: Yeah.

6 MR. FELDMAN: - - - would be the real party-in-
7 interest, because their rent would be in - - - would have
8 been increased one-one-fortieth - - - one fortieth of the
9 improvement.

10 JUDGE STEIN: But here - - - here they're saying
11 there was a vacancy.

12 MR. FELDMAN: Correct. And work was done. And
13 apparently there's no argument that 78,000 in qualified IAI
14 improvements was performed. And the argument now is, is
15 that work done in 1995 and 1998, as reflected on the rent
16 history, should somehow reduce or eliminate the
17 consideration of those - - -

18 JUDGE RIVERA: Well, I thought - - - I - - - no -
19 - - I'm over here, sorry.

20 MR. FELDMAN: Yes, I'm sorry.

21 JUDGE RIVERA: Do you see me there? Okay, that's
22 fair.

23 No, I - - - I thought the argument was that it -
24 - - the landlord bears the burden of establishing that
25 whatever - - - whatever improvements you make - - - you can



1 go make them, it's whether or not you can then seek to take
2 this rent out of rent stabilization. That - - - that's the
3 whole point. So I - - - I thought the argument was, to be
4 able to do that you have to show that the useful life of
5 the prior improvement has expired.

6 MR. FELDMAN: Except for one - - -

7 JUDGE RIVERA: Do you not understand the law that
8 way? Do you see it a different way?

9 MR. FELDMAN: I see it a different way, Your
10 Honor.

11 JUDGE RIVERA: Okay. What is that?

12 MR. FELDMAN: Given the document retention
13 policy, under the statute, where landlords only have to
14 retain documents for six years.

15 JUDGE RIVERA: No, that was not my question.

16 MR. FELDMAN: No, no, but it - - -

17 JUDGE RIVERA: No, no, no, please - - -

18 MR. FELDMAN: Sure.

19 JUDGE RIVERA: That was not my question. My
20 question is, did you see that requirement under the law - -
21 - put aside for the moment how you might establish that,
22 what - - - what proof you would have to bring forward to
23 establish that. I'm asking you if you see the law
24 functioning in that way, that those are the requirements
25 that - - - that the landlord is subject to?



1 MR. FELDMAN: I believe if it's raised in the
2 pleadings, so it's not a surprise by ambush, so the
3 landlord has an adequate opportunity to research and try to
4 obtain records that are decades old - - -

5 JUDGE STEIN: Well, wait a second. Wait a second
6 here. First of all, the - - - the - - - the - - - the
7 plaintiff sued for a rent overcharge, right?

8 MR. FELDMAN: Correct.

9 JUDGE STEIN: And you answered. And was there
10 anything in your answer that specified that the
11 deregulation was based on IAIs?

12 MR. FELDMAN: No, we simply - - -

13 JUDGE STEIN: So how - - - why - - - how - - -
14 how would it become the burden of the plaintiff to plead or
15 establish something - - - first of all, pre any discovery
16 at all, that - - - that they - - - they would - - - they
17 don't even know what it's based on?

18 MR. FELDMAN: So once they start a lawsuit
19 alleging a rent overcharge, and in the complaint they
20 clearly refer to rent registrations, so they're aware of
21 the increases in rent historically, so they can allege
22 whatever they want. The records are as available to them
23 as to anyone else, the DHCR records.

24 JUDGE WILSON: So they did - - - they did put you
25 on notice in the final pre-trial, right?



1 MR. FELDMAN: A month before the trial - - -

2 JUDGE WILSON: Yeah, so right. Just - - -

3 MR. FELDMAN: - - - after all discovery is
4 complete - - -

5 JUDGE WILSON: I just want to know if that's
6 true.

7 MR. FELDMAN: Yeah, that's correct.

8 JUDGE WILSON: Okay. So what did - - - if
9 anything, did you do when you saw that? Did you move the -
10 - - ask to move the trial date, ask for more time to find
11 things, ask to move in limine to prevent them from make - -
12 - anything?

13 MR. FELDMAN: The records from the plumber - - -

14 JUDGE WILSON: Yeah, no, I'm asking if - - - if
15 you did - - -

16 MR. FELDMAN: No, no, we didn't do any - - -

17 JUDGE WILSON: - - - if you, the lawyer, did
18 anything?

19 MR. FELDMAN: We did not. We did not, Your
20 Honor.

21 JUDGE WILSON: Okay.

22 MR. FELDMAN: We did not.

23 JUDGE STEIN: What - - - what - - - and have you
24 - - - did you speak to, at the trial court, anything that
25 you would have or could have done differently in terms of



1 presenting proof, had you known earlier? Did you present
2 any arguments to - - - to specify what prejudice you
3 suffered as a result of this to the trial court?

4 MR. FELDMAN: I did, Your Honor. On A96 and 97,
5 I - - - I objected, and also sought to include the rent
6 history, and that's A145 and 146.

7 JUDGE STEIN: Yup. And did you talk about what -
8 - - how it would prevent you from - - - from presenting - -
9 -

10 MR. FELDMAN: I believe I mentioned the fact that
11 these improvements were so old, '95 and '98, it made it
12 virtually impossible to find witnesses or to get records.

13 JUDGE STEIN: Well, let me ask you a little
14 differently. You did have some witnesses and some proof
15 regarding these - - - these repairs or improvements?

16 MR. FELDMAN: No, we had no witnesses as to the
17 1995 and 1998 improvements - - -

18 JUDGE STEIN: Well - - -

19 MR. FELDMAN: - - - in terms of contractors.

20 JUDGE STEIN: Nobody with personal knowledge,
21 right?

22 MR. FELDMAN: Correct.

23 JUDGE STEIN: You - - - you had people that
24 worked for you and could give some general information,
25 okay.



1 MR. FELDMAN: That - - - but again, it's - - -

2 JUDGE STEIN: Then - - -

3 MR. FELDMAN: - - - it's an over 400-unit
4 building - - -

5 JUDGE RIVERA: So - - -

6 MR. FELDMAN: - - - rent stabilized, filing DHCR
7 reports since 1984.

8 JUDGE RIVERA: So Counsel, let me ask you - - -
9 I'm over here again.

10 MR. FELDMAN: Yes.

11 JUDGE RIVERA: Counsel, let me ask you. So if -
12 - - if the schedule says the useful life of a particular
13 improvement is thirty years, what's your understanding of
14 whether or not the landlord then bears a burden to keep
15 documentation for thirty years. Is that the way you see
16 it, or do you see that that means nothing? What's - - -
17 what's the point of it?

18 MR. FELDMAN: I don't know the answer to that,
19 Your Honor. I - - - I - - - I could see arguments on both
20 sides of that question. There is the six-year statutory
21 requirement to maintain records. That's clear in the
22 statute. There may be a practical problem in terms of - -
23 - here, you had a sale of the building, so you have that
24 issue that goes along with that, and a change of agents.
25 You know, it - - - on a certain level, it renders



1 residential properties unmarketable to impose such lengthy
2 record keeping requirements, especially for records that go
3 back prior to the advent of the computer - - -

4 JUDGE WILSON: But your - - - your - - -

5 MR. FELDMAN: - - - that are on paper only.

6 JUDGE WILSON: But - - - but - - - but I - - -
7 doesn't your argument also entirely wipe out the MCI
8 requirements?

9 MR. FELDMAN: It doesn't, Your Honor. Well - - -

10 JUDGE WILSON: Well, some of those - - -

11 JUDGE FEINMAN: This is not an MCI case.

12 MR. FELDMAN: This is not an MCI. This is IAI.

13 JUDGE WILSON: I understand that, but - - -

14 MR. FELDMAN: Yes.

15 JUDGE WILSON: - - - your argument is that land -
16 - - or, you're not saying that landlords have a six-year
17 record retention for IAIs but thirty years for MCIs?

18 MR. FELDMAN: Just like the Appellate Division
19 First Department held in Fuentes, they said, you know what,
20 if you don't give the tenant the notice when an apartment
21 is deregulated, the remedy is, you must give that tenant a
22 rent-stabilized lease. But you can't go back and hit the
23 landlord with rent overcharges, because the document
24 retention policy is statutory; it's limited, six years. So
25 in this case - - -



1 JUDGE RIVERA: But - - - but - - - but - - -
 2 well, then what is - - - let - - - let's try it a different
 3 way. What is a tenant to do, since the records would
 4 originally be in the landlord's hands. I mean, the tenant
 5 - - - and there might be future tenants; tenant wasn't
 6 there when you made the improvement, et cetera, et cetera -
 7 - - what - - - what is that tenant to do, if you're not
 8 going to have these records? And you - - - because I
 9 thought you said the burden's on them; go find records.

10 MR. FELDMAN: Well, I said - - -

11 JUDGE RIVERA: If you can't find them because you
 12 didn't keep them, how is the tenant going to do that? Or
 13 did I misunderstand your argument?

14 MR. FELDMAN: You did not misunderstand it at
 15 all, Your Honor. And the problem is, given the passage of
 16 time, and here it's decades involving the Windermere, from
 17 1984, onward, and the - - - the improvements were done in
 18 '95 and '98, and the trial's in 2016? What is a landlord
 19 supposed to do?

20 JUDGE RIVERA: Yeah, but the law - - - the law is
 21 clear that you cannot - - - you - - - if it's a
 22 duplication, and the useful life has not expired, you - - -
 23 again, you can make any improvements you want; no one's
 24 saying you can't, in that sense. But you can't then use it
 25 to try and increase the rent, or take it out of rent



1 stabilization. That's - - - that's the point. It's not
2 about whether or not you can or can't, and how you would
3 retain your records, or what kind of proof you choose to
4 put forward to carry your burden.

5 MR. FELDMAN: I agree, Your Honor. However, in
6 this case, in this particular case before Your Honors - - -

7 JUDGE RIVERA: Yeah.

8 MR. FELDMAN: - - - the internal cohesion between
9 the various trades in terms of the work performed and the
10 scheduling of the work corroborates the fact that it was a
11 gut renovation, and that the entire apartment was done. So
12 if you look at the scheduling of the plumber, which is on
13 653 - - -

14 JUDGE RIVERA: Okay. So then just to be clear,
15 so this part of your argument is that if - - - if there is
16 some burden to carry, you satisfied it because you put
17 forward - - - if it's not the kind of documents the tenant
18 might argue for, you put forward the kind of testimony and
19 other documentation that carried your burden. All right,
20 that - - - that - - -

21 MR. FELDMAN: Correct. It shows - - -

22 JUDGE RIVERA: Okay.

23 MR. FELDMAN: - - - it's a gut - - -

24 JUDGE RIVERA: Fair enough.

25 MR. FELDMAN: - - - renovation - - -



1 JUDGE RIVERA: Fair enough.

2 MR. FELDMAN: - - - that was complete, and that
3 to the extent it was caused by water damage, the statute
4 allows under MCI to start a new - - - to wipe out the old
5 useful life schedules. Because the policy is to put these
6 housing accommodations back on the market, not keep them
7 off the market till a stale useful life runs its course.
8 That makes no sense to anyone.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel
10 Counsel?

11 MR. BOGATIN: Yes, Your Honor. With regard to
12 the question of - - - of proof, proof with regard to the
13 prior improvements and the question of prejudice. Apart
14 from the fact they never made a claim of prejudice, and
15 I'll let the record speak for itself, they never made a - -
16 - even once we were in the Appellate Division, they didn't
17 even claim to the Appellate Division there was prejudice,
18 though the Appellate Division did find prejudice at least.

19 But with regard to - - - I'm sorry - - - with
20 regard to the - - - they - - - they - - - they did have
21 within their possession evidence which could have answered
22 this question. What were the prior improvements? The
23 evidence showed that - - - the law shows that when they
24 made the prior improvements in '95 and '98 and took an
25 increase, they're supposed to file a registration statement

1 with DHCR which says, this is what we spent; this is what
2 we improved. And we - - - you have in the record blank
3 registration statements, which they were supposed to have
4 filled out.

5 JUDGE WILSON: Well, where - - - where do you see
6 that requirement in the statute of the regs? I mean, I
7 understand - - -

8 MR. BOGATIN: If I could - - -

9 JUDGE WILSON: - - - the form has space to do
10 that. But where is that requirement that they itemize?

11 MR. BOGATIN: Well, it's on the - - - it's on the
12 form. The form of the DHCR form. So the DHCR - - - DHCR,
13 by promulgating that form - - - with the blank, it's in the
14 record - - - they're asking them, meaning the landlord,
15 what did you spend, what did you spend it on. The - - -
16 the point is, when we filed - - - we filed suit 2011. The
17 evidence was they had those forms in their possession in
18 that year, 2011, which would have told us what they spent.

19 JUDGE WILSON: Yeah, they could - - - they could
20 - - -

21 MR. BOGATIN: But they never produced those.

22 JUDGE WILSON: They could've filled the forms out
23 - - -

24 MR. BOGATIN: I'm sorry?

25 JUDGE WILSON: - - - but they could have also



1 kept receipts and not filled the forms out, and still been
2 able to satisfy their burden of proof.

3 MR. BOGATIN: Well, they could've - - -

4 JUDGE WILSON: Right?

5 MR. BOGATIN: Yes, Your Honor, of course.

6 JUDGE WILSON: But it's not a requirement that
7 they fill the forms out.

8 MR. BOGATIN: Well, we have it on the form, but -
9 - - I'm sorry - - -

10 JUDGE WILSON: If you have them, convenient for
11 them. In hindsight, they probably should, but - - -

12 MR. BOGATIN: Well, then they can't - - -

13 JUDGE WILSON: And can you point me to a legal re
14 - - - can you point me to a legal requirement that they
15 itemize on those forms?

16 MR. BOGATIN: Other than the form itself, which
17 is a DHCR form?

18 JUDGE WILSON: Right.

19 MR. BOGATIN: I - - - I would just point you to
20 the DHCR form, which requires, an administrative agency, DH
21 - - - DHCR requires them - - - and certainly they have the
22 authority to do that - - - to itemize the improvements.
23 They didn't - - - they didn't produce those forms. And
24 Your Honor, could they have produced - - - of course they
25 could have, but they didn't. And they certainly - - -



1 their property manager at the time, '95, '98, was a witness
2 for them at the trial in this case, and he said, I don't
3 know; I don't know about the prior improvements. So I
4 don't see - - -

5 JUDGE RIVERA: But if - - - if a witness
6 testifies, I can't remember the whole itemization, here's
7 the total number, but all of that was done in that
8 apartment. All of that was done in that apartment. These
9 are the general types of repairs. Can't I - - - no, I
10 can't tell you now to the cent what was done in this room
11 or on this, but all these repairs, this is the total amount
12 we charged; that's the total amount paid, and it was in
13 that apartment. Is that enough?

14 MR. BOGATIN: Certainly, Your Honor. Certainly,
15 Mr. Baigelman, who was the property manager, their witness,
16 he could have testified in general terms as to what he did,
17 would have done, most likely did. He didn't even try to do
18 that. He didn't even try. It's their witness, not mine.

19 JUDGE RIVERA: So I - - - so is your position,
20 then, that their burden is they've got to bring in every
21 trades person who did every bit of work - - -

22 MR. BOGATIN: No.

23 JUDGE RIVERA: - - - to testify about what they
24 did in the apartment?

25 MR. BOGATIN: Some evidence. The prior - - - the



1 DHCR form, which they had in their possession when we
2 brought suit. They didn't bring it in. Mr. Baigelman.
3 Maybe somebody else. Maybe a document. Certainly, Mr.
4 Baigelman who was at trial, they could have had him testify
5 in general terms.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MR. BOGATIN: Thank you, Your Honors.

8 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Laura DiLorenzo v. Windermere Owners LLC, et al., No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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