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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF 160 E. 84TH STREET,

Appellant,

-against-

NOS. 109-117

DHCR,

Respondent.

(And Eight Other Proceedings.)

20 Eagle Street
Albany, New York
November 20, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: The first case on the
2 calendar is Matter of 160 East 84th Street v. DHCR and a number
3 of other appeals. Counsel?

4 MS. BITTNER: Thank you. Good afternoon. May it
5 please the court. Jillian Bittner of Horing Welikson Rosen
6 & Digrugilliers, for appellants. I would like to request
7 five minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. BITTNER: DHCR had no authority to issue the
10 addenda that effectively annulled orders of deregulation,
11 which were final and binding.

12 JUDGE GARCIA: But Counsel, isn't that addenda
13 really a interpretation of the statute? So it seems kind
14 of a bootstrap argument. If their interpretation of the
15 statute is correct, then they have authority to do it
16 because it's just a clarification of the statute. If it
17 isn't, sure, they don't have authority. They've just
18 misread the statute. So isn't really this a statutory
19 interpretation case?

20 MS. BITTNER: It's not a statutory interpretation
21 at all. First, the statute repealed the luxury
22 deregulation provision effective immediately. But more
23 than that, the only authority that DHCR has to modify or
24 annul a final order is where there is an instance of
25 illegality, irregularity, and a final - - -

1 JUDGE GARCIA: But the - - - the legislature
2 could annul the order, right?

3 MS. BITTNER: The legislature could have done
4 that, but that is not what is written in the - - -

5 JUDGE GARCIA: But it seems like that's their
6 argument, right? That was the effect of this legislation.
7 So here's - - - here's the addenda, which just makes clear
8 what the legislature has done.

9 MS. BITTNER: DHCR's argument is premised on a
10 false theory that there was a contingency. What the orders
11 here that appellants had, they were vested final orders.

12 JUDGE CANNATARO: So in order to accept that
13 argument that you just made, wouldn't we have to agree with
14 you to the extent that you argue that a unit doesn't exit
15 rent - - - excuse me, a unit exits rent stabilization upon
16 the issuance of the order and not upon the termination of
17 the rent stabilized period.

18 MS. BITTNER: That's exactly correct. Here - - -

19 JUDGE CANNATARO: Well, but isn't that contrary
20 to law?

21 MS. BITTNER: No. The vested right - - -
22 appellants possessed a vested right, which is an immediate
23 right of present or future enjoyment. Just because the
24 transition in status did not happen immediately does not -
25 - -

1 JUDGE TROUTMAN: So with respect to a lease and
2 whether an apartment is deregulated or remains regulated,
3 does DHCR have any responsibilities or duties?

4 MS. BITTNER: DHCR's authority ended once they
5 issued the luxury deregulation order. And thirty-five days
6 after, that order became final and binding.

7 JUDGE TROUTMAN: So in all instances, they have
8 no responsibilities, whether it is an instance where the
9 lease has now ended and an apartment remains regulated, or
10 in the alternative, it's deregulated. They don't need to
11 do anything or allow - - - or - - - and - - - nor are they
12 allowed to do anything. Is that what you're saying?

13 MS. BITTNER: Yes. So the lease expiration was
14 not a contingency. The two statutory criteria for luxury
15 deregulation were met once the income and the rent exceeded
16 the applicable deregulation threshold.

17 JUDGE TROUTMAN: So with respect to upon
18 termination of the lease, that was - - - that meant
19 nothing?

20 MS. BITTNER: Essentially, it did mean nothing
21 because it was to occur with certainty. There was no
22 contingency. The fact that the lease has expired after the
23 expiration of the HSTPA does not take away the vested right
24 that vested with the issuance of the order itself.

25 JUDGE RIVERA: Well, I'm not so sure you're right

1 about the - - - being a vested right. But the statute is
2 very clear that the unit had to be deregulated prior to
3 June 14, 2009, and is not deregulated. You agree that the
4 - - - the regulations continued to apply until the
5 expiration of lease, correct? That it is regulated during
6 that period, is it not?

7 MS. BITTNER: On the enactment date of the HSTPA,
8 the apartment was regulated. But the statute does not
9 provide that 6/14/19, which was the enactment date, is a
10 cut off. The statute does not state - - - state that
11 anywhere.

12 JUDGE GARCIA: No. No. You're not - - - or I'm
13 misunderstanding you. My question is: prior to June 14th,
14 2019, did the rent stabilization law apply - - - its
15 regulations apply to the units?

16 MS. BITTNER: Yes.

17 JUDGE RIVERA: Yes. Then it fits within the
18 statute because it is not deregulated. It is still
19 regulated. It is subject to regulation. That's all the
20 law says.

21 MS. BITTNER: But that ignores the vested right
22 that the appellants possess.

23 JUDGE RIVERA: You may have a policy argument for
24 the legislature, but as a legal matter, the statute, on its
25 face, is very clear. It had to have already been

1 deregulated, not ordered to be deregulated in the future.

2 MS. BITTNER: But that is interpreting the
3 statute, and we don't have any legislative history to base
4 that on.

5 CHIEF JUDGE WILSON: So let me - - -

6 JUDGE RIVERA: Of the plain language? I'm sorry.

7 MS. BITTNER: I would point the court to the
8 letter that we filed with this court on September 4th,
9 2024, referencing the court's holding in 850 Company v.
10 Schwartz, in which the court applied and relied upon
11 General Construction Law, section 93, an amended statute or
12 its repeal cannot affect pre-existing rights. In 850
13 Company v. Schwartz, this court held that a deregulation
14 remedy under an earlier statute, in the absence of further
15 legislative direction, will survive the earlier statutes,
16 expiration, and replacement with a new law.

17 JUDGE HALLIGAN: But the order itself - - - I'm
18 looking, just by way of example, at page 2009 of the
19 appendix. It's one of the orders. And it says that the
20 housing accommodation is deregulated effective upon
21 expiration of the existing lease. So I'm not sure I follow
22 what you mean when you say you have a vested right when the
23 order itself says that the apartment is not deregulated
24 until some later date. Can you help me understand that?

25 MS. BITTNER: Sure. So the vested right is the



1 right that accrues once the order issues and becomes final
2 and binding.

3 JUDGE HALLIGAN: But why is that? Is it your
4 position, for example, that DHCR could not do anything to
5 rescind that?

6 MS. BITTNER: My position on that is twofold. So
7 if we look at former RSL 26-504.1, housing accommodations
8 that are excluded from rent stabilization, all that that
9 requires is that the criteria - - - the implementing
10 criteria in 26-504.3 be satisfied. There's no question
11 that those criteria were satisfied herein. Both the income
12 and the rent were above the threshold.

13 JUDGE HALLIGAN: So even though the order says
14 that it's not deregulated until the date on which the lease
15 expires, you would say that 504.1 says that - - - that it's
16 excluded from rent stabilization?

17 MS. BITTNER: Yes. Additionally, I - - -

18 JUDGE HALLIGAN: So is the order wrong then?

19 MS. BITTNER: No. And that's exactly why DHCR
20 doesn't have authority because the order was final and
21 binding thirty-five days after its issuance.

22 JUDGE HALLIGAN: But the order says that it's
23 deregulated effective the date of the expiration of the
24 lease, which is a different date, I think, than what you're
25 asserting.

1 MS. BITTNER: Right. But there is no
2 contingency. That date would come to pass and no party, as
3 Judge Troutman brought up, the lease would not affect that.
4 And at the time the lease - - -

5 JUDGE CANNATARO: Right, but there is a
6 contingency. There's a future date at which it becomes
7 effective. So how is it not - - - whether it's a right or
8 a vested right, how is it not an expectation of a right to
9 come, but not the realization at the time the issue is
10 ordered, given that the language says there is a future
11 contingency that has to take place; a date has to come and
12 go?

13 MS. BITTNER: Well, the term contingency, it
14 doesn't really fit in this circumstance because by a date
15 certain known to both appellants and to the tenant to - - -
16 and the tenant, that lease end date would come.

17 JUDGE CANNATARO: So then answer the question
18 that I originally asked, which is, how is this not just an
19 expectation of a right?

20 MS. BITTNER: Because the right accrued - - - the
21 right vested while the rent stabilization law provision
22 under which this order issued, that - - -

23 JUDGE RIVERA: So if we disagree with you about
24 that, do you lose?

25 MS. BITTNER: If you disagree with me - - -

1 JUDGE RIVERA: In other words, does your entire
2 argument turn on the court agreeing with you that your
3 clients had a vested right at the time that you've
4 identified?

5 MS. BITTNER: I think it goes beyond that because
6 there's a finality issue here. And for the court to allow
7 DHCR another bite at the apple when they had no right to
8 under the code - - - because this is not - - - again, this
9 is not an issue where there was an illegality, an
10 irregularity, or fraud. There was nothing incorrect with
11 the initial order. So to allow - - -

12 CHIEF JUDGE WILSON: So I think earlier, you said
13 - - - I don't want to put words in your mouth if you didn't
14 say this - - - that the legislature could have essentially
15 required that these apartments remain regulated.

16 MS. BITTNER: Absolutely. And I think - - -

17 CHIEF JUDGE WILSON: And - - - okay. Hold on a
18 minute. So it - - - it could do that?

19 MS. BITTNER: It could have.

20 CHIEF JUDGE WILSON: You just think it didn't do
21 that in the statute?

22 MS. BITTNER: It could have. And I - - -

23 CHIEF JUDGE WILSON: And if it had done - - - and
24 that's - - - could have done that in the face of the DHCR
25 orders, right?

1 MS. BITTNER: Yes. The legislature could have
2 done that. But I would suggest that, even without the
3 legislative history - - -

4 CHIEF JUDGE WILSON: So sorry. I haven't quite
5 finished.

6 MS. BITTNER: No.

7 CHIEF JUDGE WILSON: So if the legislature had
8 done that, and your view is there was a vested right, would
9 you then have a takings claim?

10 MS. BITTNER: Yes. Because the orders were
11 unquestionably final at the time that the HSTPA was
12 enacted. There was no action that anyone could lawfully
13 take under the law - - - the rent stabilization law or the
14 code to append those rights. And I just want to point out
15 to that, about two weeks after the HSTPA, there was the
16 cleanup bill. And that was another opportunity where the
17 legislature could have clarified that. And I think the
18 language there suggests to the contrary because it says
19 that all units that were deregulated should remain
20 deregulated. I don't know that the legislature
21 contemplated a case where the orders were final and
22 binding, but yet the lease expired after. But I would
23 submit that that does not matter here. Again, the orders
24 were final and binding, and the lease does not control.

25 CHIEF JUDGE WILSON: Thank you.

1 MS. BITTNER: Thank you.

2 MR. GRIECO: May it please the court. Matthew
3 Grieco, for the respondent. During the era that
4 deregulation was permitted, deregulation was always
5 prospective and occurred upon expiration of the lease in
6 effect at a time a deregulation order issued.

7 JUDGE GARCIA: Counsel, can I ask you something
8 on that, if you know this? In your brief, you mention that
9 in - - - I think it was '97, they changed the amount - - -
10 the threshold amount from 250 to 175. And then in 2011,
11 they raised it up to 200,000. So in 2011, it goes up to
12 200,000 for annual income threshold. When that happened,
13 did you do the same thing you did here? Any apartment that
14 was being deregulated because it was 175,000 or more that
15 didn't meet the 200, did you rescind all those orders?

16 MR. GRIECO: I do not know the answer to that
17 question, Your Honor. I - - - I'm - - - I haven't seen
18 anything in the record or in my research that addresses
19 that question.

20 JUDGE GARCIA: It would be the same theory,
21 right? You wouldn't have authority anymore to deregulate
22 for \$175,000 if the threshold is now 200.

23 MR. GRIECO: If it was challenged, I mean - - - I
24 - - - the same legal premise would apply. The - - - but
25 the important thing to understand the reason that this is

1 not a retroactivity case is that stabilization and
2 deregulation are, at all times, a matter of statutory
3 classification. The RSL sets forth in section 26-504 and
4 the subsequent sections, the universe of rent stabilized
5 apartments. And any apartment that falls within that - - -
6 in that universe is a rent stabilized apartment unless
7 something happens pursuant to statute that allows it to be
8 removed. And that requires - - - if it's going to be
9 through high income deregulation, it requires a DHCR order.

10 JUDGE GARCIA: And in this case, you took a
11 number of units out, and the division saw it fit to put an
12 addendum on to existing orders saying, we no longer,
13 essentially, have the authority to do this. You're not
14 going to be deregulated. And I just wonder when that
15 ceiling was raised if the 175,000 threshold limit
16 apartments that were about to be deregulated, if you saw
17 the need to do the same thing then.

18 MR. GRIECO: Yeah. I don't know the answer to
19 that question. I'm happy to submit a letter if you want me
20 to - - - if you'd like me to address it after the argument.

21 JUDGE HALLIGAN: Would you address the argument
22 your adversary made that they had a vested right, and - - -
23 and that I take it was because the orders were final?

24 MR. GRIECO: Yeah. So it is not a vested right
25 because both this court and the U.S. Supreme Court have

1 been very clear that an order that operates into the future
2 - - - and as a number of the questions during my
3 counterpart's argument acknowledged the - - - these orders
4 operated into the future.

5 JUDGE HALLIGAN: What does that mean, operated
6 into the future?

7 MR. GRIECO: The - - - any benefit that they
8 would confer, would confer - - - would be conferred in the
9 future. And there would - - -

10 JUDGE HALLIGAN: But there was no further action
11 that had to be taken to render them effective; is that
12 right?

13 MR. GRIECO: But by both the language of the
14 statute and by the plain text of the orders themselves, the
15 effective date was already set to be in the future.

16 JUDGE CANNATARO: But would that alter what is
17 allegedly the final and binding nature of the order? Once
18 the order is made, if it sets a date for some future
19 operation, which you now think may be no longer applicable,
20 does that change the fact that the order was issued, and as
21 your adversary says, was final and became final and
22 binding?

23 MR. GRIECO: So from a due process retroactivity
24 perspective, it does not present any due process or
25 constitutional problem. The U.S. Supreme Court made this

1 clear in the Landgraf case, which - - - and this court has
2 cited it in the Regina case and elsewhere, that if an order
3 is going to operate into the future - - - if an order says
4 this thing is going to be a benefit that you obtain in the
5 future, that removal of that expectation is not a vested
6 right from a - - -

7 JUDGE CANNATARO: But is there an example of
8 anything that happened prospectively like that that
9 involved the issuance of an order? Because this is - - -
10 it's somewhat unusual that an order establishes a right
11 that occurs at some date in the future. Usually, these
12 things are contemporaneous.

13 MR. GRIECO: Yeah. There is an example in
14 Landgraf itself. It talks about an injunction order, where
15 the injunction was only going to require something to be
16 done in the future and the statute was changed. And that's
17 not from Landgraf itself. It's one of the precedents cited
18 in Landgraf is given as an example. So the - - -

19 CHIEF JUDGE WILSON: Well, if you have an option
20 contract, right, or a future strike price, that's a - - -
21 you have a vested interest in that, no?

22 MR. GRIECO: You can have an interest that goes
23 into the future, but the - - - but where it becomes a
24 constitutional issue is whether you have an interest that
25 can be - - - whether it can be unsettled by legislative

1 action. And this court has always taken the position that
2 if - - - if what you're expecting is to come in the future,
3 that the - - - and particularly in the area of rent
4 stabilization, which has been subject to amendment many
5 times over the years, sometimes in ways that are preferred
6 by owners, sometimes in ways that are preferred by tenants,
7 but it's gone back and forth many times over the years - -
8 - that an expectation of a benefit you're going to get
9 under the RSL that you do not yet have in hand in the sense
10 of actually having, not an order, but having the thing
11 itself, in this case, a deregulated apartment, which I
12 understand my adversaries to have acknowledged during her -
13 - - during her argument that the apartments were still
14 regulated as of June 14th, 2019, which I don't think is
15 debatable because the statute and the regulation - - - and
16 the statute and the order both said that the deregulation
17 would occur effective upon the expiration of the lease. So
18 if the appellants didn't have deregulated apartments on
19 June 14th, 2019, which they did not, and they only had a
20 belief that they were going to get such apartments at some
21 date in the future, and then the legislature repealed the
22 statute that allowed any form of high income deregulation,
23 the apartments could not become deregulated because the
24 orders could not go into effect. And the - - - the
25 appellant's focus on the finality of the orders misses the

1 point because the orders, by their own terms, did not cause
2 the legal effect of deregulation before June 14th. They
3 couldn't have that effect afterward. And the - - - their
4 focus on the finality of the orders from DHCR's perspective
5 is misplaced because that would disregard the legislature's
6 authority to change how a statutory scheme works going
7 forward.

8 JUDGE RIVERA: Okay. So could you - - - I'm
9 sorry if you have and I just didn't hear you. My
10 apologies. Could you address the impact of Section 4(e)
11 that allows - - - or provides for the offering to the
12 tenant of a market rate lease - - -

13 MR. GRIECO: Sure.

14 JUDGE RIVERA: - - - in advance of the expiration
15 of the lease?

16 MR. GRIECO: Sure. So first of all, I don't
17 understand the appellants to argue that that provision
18 would actually have allowed the owner to evict the tenant
19 prior to the expiration of the lease. And that
20 interpretation would not be consistent with any of the
21 other language in the statute, which plainly contemplates
22 that the lease - - - the existing lease would run. The
23 best understanding of that provision is that, because
24 holdover proceedings can take a long time, that if someone
25 is not - - - if someone is not going to renew after an

1 apartment is going to be converted to market rate, that
2 there - - - it would give an appropriate amount of lead
3 time for the owner and other relevant parties if the - - -
4 if for some reason there's going to be a holdover problem.
5 But it does not suggest that the deregulation happened - -
6 - happened before that time, and it - - - and it could not
7 have occurred that way.

8 JUDGE HALLIGAN: Can I ask - - -

9 JUDGE RIVERA: Is there anything else - - - based
10 on these orders, is there anything else in this landlord-
11 tenant relationship that changes as a consequence of the
12 order? Obviously, we've discussed 4(e), there's an
13 opportunity to offer a - - -

14 MR. GRIECO: I mean - - -

15 JUDGE RIVERA: - - - market rate lease.

16 MR. GRIECO: - - - 4(e) is my understanding of
17 what - - - of the limitation on the trigger. And the
18 result there would simply be that if, for some reason, a -
19 - - the apartment in this case, the reason is the
20 legislature abolished deregulation. If for some reason the
21 apartment did not become deregulated prior to that, then
22 any holdover proceeding that may have been commenced would
23 simply be dismissed as moot. It's not a complicated
24 outcome if that proves to be necessary.

25 JUDGE HALLIGAN: Can I ask you - - - over here -



1 - - in, I think, all but at least some of the orders
2 denying the pars, and I'm looking here at page 89, it says
3 that - - - there's an assertion that HSTPA specifically
4 states, and then there's a quote, "If the apartment remains
5 rent regulated on or after June 14th of 2019, then that
6 apartment is no longer subject to the statutory provisions
7 of high rent high income deregulation." Is that, in fact,
8 a quote from HSTPA? Because I couldn't find it.

9 MR. GRIECO: Yeah. I think that that is a - - -
10 I don't know, but I think it's not a direct quote. I think
11 that's a summary of HSTPA.

12 JUDGE HALLIGAN: So that provision is not - - -
13 is not in the statute, to the best of your knowledge?

14 MR. GRIECO: It is an interpretation of what the
15 statute means.

16 JUDGE HALLIGAN: Okay.

17 MR. GRIECO: Yeah.

18 JUDGE HALLIGAN: Thank you.

19 MR. GRIECO: I do also want to say that, you
20 know, you could imagine the appellant's arguments working
21 as to a different statute and different statutory scheme if
22 you had an order that became effective on the day that it
23 issued or in a date prior to the change in the law. But
24 the fundamental mistake and premise of their argument is
25 that because an - - - because an agency's order is

1 administratively final, and final only as to something that
2 is given into the future and not given now, that that
3 strips the legislature of the ability to change the
4 statutory scheme. It puts the cart before the horse and -
5 - - and makes the agency action - - -

6 JUDGE RIVERA: Well, the order when issued,
7 perhaps effective is not the best word, but it is a valid
8 order in that moment unless - - - right - - - it's
9 superseded, overruled, whatever. That order exists. I
10 think that's closer to your argument about why they start
11 out with flawed premise. That's different, and I think
12 Judge Halligan was suggesting this before, from what is the
13 remedy or the resolution that's set out in the order.
14 That's what takes place later. But the order itself, it's
15 a valid piece of paper.

16 MR. GRIECO: Well, yeah. Nobody is disputing
17 that on the day that the orders were issued, that they were
18 valid. I mean, DHCR issued the orders. It was following
19 the law as it existed at that time and continued issuing
20 deregulation orders until right up when HSTPA was enacted
21 because, of course, they didn't - - -

22 JUDGE TROUTMAN: So was DCHR mandated, upon the
23 change of the law, to provide notification at that point,
24 and would they be required to do same if we were to hold
25 against your view?



1 MR. GRIECO: So it was certainly best practices
2 for DHCR to issue the explanatory addenda because - - - and
3 we deal with this, I think, possibly in our response to
4 amicus brief, that when a - - - when the legislature works
5 a fundamental change in a statutory scheme, the agency that
6 administers the statute can and should advise stakeholders
7 of how that applies to anything that's - - - that's
8 currently out there. Now, in one of the many, many Supreme
9 Court decisions below, the one that has the most detail - -
10 - the greatest detail and thorough reasoning would be the
11 decisions issued by Justice Edmead in New York County
12 Supreme. And she laid out in part of her decision, I think
13 this is page 42 of the record, how - - - there were
14 conceivably other ways that this could have been litigated
15 through declaratory judgment actions and that kind of
16 thing. But the fact that it just so happens that they
17 chose - - - that the appellants chose to bring this in the
18 form of an Article 78 against the explanatory addenda,
19 which we don't have a problem with the fact that they chose
20 that particular procedure - - -

21 JUDGE CANNATARO: The absence of an addenda, I
22 assume, in your opinion, would not have changed the effect
23 of the statutory change, though?

24 MR. GRIECO: That is correct. That is why it was
25 responsible and best practices for DHCR to issue it because

1 the - - - it was the legislature that prevented the - - -
2 by abolishing deregulation by removing any statutory
3 authority for apartments to become deregulated after June
4 14th, the legislature worked the change. DHCR was the
5 messenger, and the explanatory addenda was the message.

6 JUDGE CANNATARO: Along the lines of the question
7 you were asked earlier, when the income caps were adjusted
8 in the past, did similar addenda go out to interested
9 parties?

10 MR. GRIECO: I don't know whether in that
11 specific circumstance - - - I do know that there are
12 regulations in - - - set forth in our brief that - - - that
13 specifically say that one of of the roles of DHCR is to - -
14 - to ensure that the rent stabilization law is timely
15 implemented and that the legislative enactments are a
16 proper - - - appropriately implemented. DHCR has a broad
17 range of options in terms of providing notification to
18 stakeholders. I agree with the premise of a question that
19 Judge Garcia asked at the very outset of the argument,
20 where he pointed out that this case really comes down to
21 statutory interpretation. That, you know - - - that if you
22 agree with our position, then the explanatory addenda was
23 essentially necessary. But in addition to that being true,
24 it is also the case that there's a regulatory authority in
25 this - - -

1 JUDGE CANNATARO: I'm sorry. We agree with your
2 interpretation the addenda was necessary or unnecessary?

3 MR. GRIECO: Well, it was - - - it was - - - the
4 addenda was proper.

5 JUDGE CANNATARO: But not essential?

6 MR. GRIECO: I agree with you, Your Honor, that
7 the legal outcome for all stakeholders should be the same,
8 but the - - - but it was an appropriate action for DHCR to
9 issue it so that everyone was fully apprised of the law.

10 JUDGE GARCIA: It's a clarification of the
11 statute, that would be the position. The addenda just
12 clarifies the effect of the statute?

13 MR. GRIECO: That's right. That it told the
14 parties what the legislature had already done, a legal
15 effect that had already occurred before it - - - it
16 happened.

17 CHIEF JUDGE WILSON: So your position is, had you
18 never issued the addenda and one of the tenants in these
19 apartments at the termination of the existing lease had
20 said, wait a minute, this is still a regulated apartment,
21 the answer would have been, yes, it's a regulated
22 apartment?

23 MR. GRIECO: That's right. And we even say in
24 our brief and I believe in a footnote, talking about the
25 StuyTown case, that the - - - that there would have been



1 potential declaratory judgment against DHCR by tenants had
2 DHCR not done this, which again, comes back to why it's
3 best practices. I do also wanted to - - - - and I - - -
4 I think I've covered why the regulation - - - why the
5 application of the statute is not retroactive. But I do
6 want to address just parenthetically, even if the court
7 were to conclude that, in some way, what either the
8 legislature did or DHCR did here counts as retroactive,
9 which we don't believe that it does, but even if it did, it
10 would fall well within the range for limited retroactivity
11 that due process permits. This court made clear in Regina
12 that if something is retroactive, then the justification
13 only has to be a legitimate legislative purpose
14 accomplished by rational means. And also in Regina, the
15 court pointed out that the rational basis only needs to be
16 commensurate with the degree of retroactive effect. So
17 here, even if this very, you know, small universe of cases
18 that were in this sort of time lag in between when the
19 leases expired and when - - - and when HSTPA was enacted,
20 even if that were counted as a form of retroactivity, it'd
21 be a very modest form of retroactivity, and it'd be fully
22 justified by the clearly stated policy goal set forth in -
23 - - in the statute, which is to stop the removal of
24 apartments from the rent stabilization regime by creating a
25 bright - - - a bright line rule - - - a bright line date



1 for when all deregulation stopped. We would ask that the
2 court affirm the judgments of the First Department.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. BITTNER: All the legislature did here was to
5 take away high income deregulation prospectively after
6 6/14/19. That is not what the addenda says. General
7 Construction Law, section 93, clearly provides the repeal
8 of a statute or part thereof shall not affect or impair any
9 right accruing - - - accrued or acquired, but the same may
10 be enjoyed, asserted, enforced as fully and to the same
11 extent - - -

12 JUDGE TROUTMAN: So is it your argument that DHCR
13 deregulated the apartment. Once they gave that
14 notification, it was done. It was vested. And even though
15 there was a change in the law, the - - - that was of no
16 effect?

17 MS. BITTNER: Yes. An order of deregulation is
18 final once the time to challenge it has expired. That's
19 the Dowling case. And this court held in Schaeffer v.
20 Gable - - -

21 JUDGE TROUTMAN: And that time to challenge, was
22 it when it went into - - - when it was realized or is it
23 when they issued the order?

24 MS. BITTNER: The time to challenge an order of
25 deregulation is thirty-five days from its issuance date.



1 It has nothing to do with the lease expiration date.
2 There's no right to touch those orders once the thirty-five
3 day window expires, except if there was illegality,
4 irregularity, and - - - irregularity or fraud.

5 JUDGE TROUTMAN: And a change in the law is of no
6 moment is your argument?

7 MS. BITTNER: Yes, it is. And it was this
8 court's position in Schaeffer v. Gable that they would not
9 apply a change in the law to a final order of the state
10 rent administrator. With regard to the arguments advanced
11 by my - - -

12 JUDGE RIVERA: Let me ask you this: after - - -
13 let's say we agree with you about that. After - - - then
14 the date when it's now - - - the lease has expired, it's
15 now deregulated, would a future tenant have any grounds to
16 challenge that deregulated status?

17 MS. BITTNER: No, they wouldn't. The time to
18 challenge the order would be - - -

19 JUDGE RIVERA: No, no no. Not the order. Some
20 other grounds. Is there any other basis in law to
21 challenge deregulation moving forward?

22 MS. BITTNER: A tenant could always challenge a
23 deregulated status or status of an apartment, but the
24 response to that and what would preclude any further or
25 deeper examination would be the finality of DHCR's order.



1 Again, this is - - - the legislature repealed the provision
2 of luxury deregulations prospectively. And as Judge
3 Halligan, I believe, mentioned, quoting one of DHCR's
4 addenda, that quoted language does not appear in the
5 statute and it does not appear in the cleanup bill. The
6 legislature never articulated 6/14/19 as a cut-off date to
7 cut off vested rights. And as to Judge Cannataro's point,
8 the rights here were not contingent because a contingency
9 may or may not happen. Here, there was absolute certainty
10 that the leases would end on a date certain and the orders
11 would come to fruition. In terms of Landgraf and Regina -
12 - -

13 JUDGE RIVERA: Then wouldn't the statute have
14 said deregulated or ordered to be deregulated? Wouldn't it
15 have recognized that there's this window during which there
16 might have been an order for deregulation that,
17 nevertheless, cannot be acted upon until the lease expires?

18 MS. BITTNER: We don't really know because
19 there's no legislative history. What we can go on is - - -

20 JUDGE RIVERA: We're left with the plain text is
21 what I'm saying to you.

22 MS. BITTNER: So the initial text says repealed
23 effective immediately. That's it. Those three words. The
24 cleanup bill seems to suggest that it was not the
25 legislature's intent to claw back these units for which

1 there were final orders. I don't know that the legislature
2 - - - I don't think anyone will know that the legislature
3 could have contemplated that the leases expired after and
4 this question would arise. But certainly - - - but for the
5 HSTPA, we would not be here today. So I would submit DHCR
6 is reading something into the statute that is not there.
7 They are impermissibly retroactively applying the statute
8 to orders that were final. And just to very briefly touch
9 on - - - this does not serve, as I believe my adversary
10 said, what is a legitimate legislative purpose or have a
11 rational basis because it's not as if these units are going
12 to return to the rental market. The rents for them are not
13 going to be reduced. These are still going to be very high
14 rent apartments. The tenants who occupy them now can
15 essentially continue - - -

16 JUDGE RIVERA: Well, that's true whether it's the
17 day before or the day after the cut off. So that doesn't
18 really make any point.

19 MS. BITTNER: Well, if the lease expired the day
20 before, 6/13, we wouldn't be here because - - -

21 JUDGE RIVERA: That's my point, right? It
22 doesn't matter either way.

23 MS. BITTNER: Okay. And I just wanted to point
24 out, as a last point, the cases that are relied upon by the
25 attorney general in their brief, all involved this court's

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or other court's application of a change in a statute to pending proceedings. This is not a pending proceeding. None of the sixteen cases were pending at the time that the HSTPA was enacted. They were all final and binding. So by allowing DHCR to retroactively change a final and binding order, basically, this could open the floodgates that they can reach back and change any final and binding order that they no longer agree with. Thank you for your time.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of 160 E. 84th Street v. DHCR And 8 Other Appeals, No. 109-117 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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