

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

BURROWS,
Appellants,

-against-

75-25 153RD STREET, NO. 16
Respondent.

20 Eagle Street
Albany, New York
February 11, 2025

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:

ROGER A. SACHAR, ESQ.
NEWMAN FERRARA, LLP
Attorney for Appellants
1250 Broadway, 27th Floor
New York, NY 10001

DEBORAH E. RIEGEL, ESQ.
ROSENBERG & ESTIS, P.C.
Attorney for Respondent
733 Third Avenue
New York, NY 10017

DANIEL S. MAGY, ESQ.
OFFICE OF THE ATTORNEY GENERAL
Attorney for Amicus
450 Lexington Avenue
New York, NY 10017

Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Burrows v. 75-25 153rd Street.

3 MR. SACHAR: Good after - - - excuse me.

4 CHIEF JUDGE WILSON: Let's - - - why don't we
5 give you just a minute to let everybody file out? So
6 you're not disturbed. We've got a big collection of people
7 there.

8 MR. SACHAR: It's a gaggle.

9 JUDGE GARCIA: Don't take it personally.

10 MR. SACHAR: I won't.

11 CHIEF JUDGE WILSON: Okay. Thank you.

12 MR. SACHAR: Good afternoon. May it please the
13 court. Roger Sachar, Newman Ferrara, we represent the
14 appellants. I'd like to request five minutes for rebuttal.

15 CHIEF JUDGE WILSON: Okay.

16 MR. SACHAR: This should be fairly
17 straightforward. After the case in the First Department,
18 the legislature enacted a piece of clarifying legislation.

19 JUDGE GARCIA: Can they do that?

20 MR. SACHAR: Absolutely.

21 JUDGE GARCIA: I mean, this was in a statute,
22 right? This was a common law gloss on a statute that this
23 court decided. And they can clarify a common law rule or a
24 common law gloss on a statute by saying, that's not what
25 you meant?

1 MR. SACHAR: Absolutely. That's - - - that's - -
2 - well, that is a bigger question of what was meant by
3 Regina in footnote 7.

4 JUDGE GARCIA: Oh, but let's assume they are
5 right, which I'm not saying, but just for purposes of this
6 question. Can you change that rule by legislative edict
7 later and in this way avoid any type of retroactivity
8 problem?

9 MR. SACHAR: That's General Motors v. Romein,
10 United States Supreme Court, which was cited with approval
11 in Regina. There, the Michigan Supreme Court issued a
12 ruling that was contrary to what the legislature thought
13 the intent of the statute was. And the - - - after that
14 happened, the Michigan legislature said, no, that - - -
15 that isn't what this statute is supposed to be.

16 CHIEF JUDGE WILSON: But I think that's different
17 from what Judge Garcia is asking you. That was a statute,
18 and they were clarifying the meaning of a statute. And
19 here we have a common law rule.

20 MR. SACHAR: Yes. I don't see any distinction
21 here, right? Law is law, right?

22 JUDGE RIVERA: Well, but - - -

23 MR. SACHAR: No?

24 JUDGE RIVERA: No. But the only people who get
25 to clarify that common law rule are the people in front of

1 you.

2 MR. SACHAR: That's correct. But a legislature
3 can certainly enact a statute that is contrary to common
4 law.

5 JUDGE GARCIA: It could. And then we would
6 determine whether or not that - - -

7 JUDGE RIVERA: Right.

8 JUDGE GARCIA: - - - statute applies going
9 forward or it's retroactive or not. But it seems this is a
10 way to end run a retroactivity issue.

11 MR. SACHAR: It may very well be, but the - - -
12 it - - - it's there still isn't a problem. The law would -
13 - - in order for there to be a retroactivity problem, there
14 must be increased consequences for past conduct. And - - -

15 JUDGE GARCIA: I'm just talking about the
16 practice of doing this. If we're going to just accept that
17 that was a clarification of a common law rule, then we
18 don't have a new statute. And we would look at a new
19 statute and a change in the law to determine all these
20 things we say you look at. But by clarifying, you avoid
21 that because you're saying that was always the law. That's
22 always what this court meant.

23 MR. SACHAR: And that's - - - if you read
24 Thornton, Grimm, and Conason, that is always what this
25 court meant. It always - - -

1 JUDGE GARCIA: But let's say it was not?

2 MR. SACHAR: It never had a common law fraud
3 standard.

4 JUDGE GARCIA: Hypothetically, could they do
5 that?

6 MR. SACHAR: Absolutely, they could. They - - -
7 they can say - - -

8 JUDGE GARCIA: Clarify what we didn't mean.

9 MR. SACHAR: If you meant a common law fraud in
10 Regina, they could. And they could apply it retroactively
11 without violating the Constitution.

12 JUDGE RIVERA: But wouldn't - - - wouldn't - - -
13 wouldn't the only thing they'd be able to do is abrogate
14 the common law?

15 MR. SACHAR: Judge Rivera, again?

16 JUDGE RIVERA: Navigate the common law. Isn't
17 that the only thing - - -

18 MR. SACHAR: Yes.

19 JUDGE RIVERA: - - - they would be able to - - -

20 MR. SACHAR: They would abrogate it.

21 JUDGE RIVERA: - - - says, yes, that's what the
22 Court of Appeals said. But we want to come up with a
23 different rule, and we're going to enact it through our
24 legislative powers.

25 MR. SACHAR: And then we're going to apply it to

1 any case that is pending.

2 JUDGE RIVERA: But that is different from saying
3 this is what the Court of Appeals meant?

4 MR. SACHAR: Yes, that is different from what the
5 court - - - they're saying we're enacting this. And then -
6 - -

7 JUDGE CANNATARO: And isn't that what they did
8 here? They made a clarification of our interpretation of
9 the common law.

10 MR. SACHAR: They made a clarification that your
11 interpretation, if that's what you did in Regina, footnote
12 7, that your - - - that interpretation was incorrect.
13 That's what they did. But that does not lead to a
14 constitutional problem.

15 CHIEF JUDGE WILSON: Interpretation of what?

16 MR. SACHAR: What fraud is meant within the
17 context of the rent regulations.

18 JUDGE HALLIGAN: Well, that's a different
19 question than what common law fraud means, right?

20 MR. SACHAR: Yeah. Well - - - okay. So the
21 question is whether or not common law fraud is what was
22 meant when the court first used the term fraud in Thornton.
23 It came from a DHCR guide that say in cases of fraud - - -

24 JUDGE HALLIGAN: The legislature is - - -

25 JUDGE SINGAS: Aren't we the only ones who can

1 say what it means? What we meant?

2 MR. SACHAR: The legislature can certainly - - -
3 well, yes, you would - - -

4 JUDGE SINGAS: The legislature can say what we
5 meant?

6 MR. SACHAR: Yes, you would be the ones to say in
7 Regina footnote 7, we meant common law fraud.

8 JUDGE RIVERA: Okay. And that - - - that could
9 differ from what the legislature thinks. But putting aside
10 whether or not they could, in fact, go through this process
11 to clarify what the Court of Appeals means, I think your
12 other argument was that the clarification, if we're going
13 to call it that, is correct.

14 MR. SACHAR: Yeah. The - - -

15 JUDGE RIVERA: That the prior case law did not
16 require that all the elements of common law fraud be met.
17 So why don't you go down that route.

18 MR. SACHAR: Not until Regina footnote 7. There
19 is no case prior to Regina footnote 7 that said common law
20 fraud. Now - - -

21 JUDGE CANNATARO: You think footnote 7 represents
22 some sort of sea change from what came before?

23 MR. SACHAR: Absolutely, one hundred percent. If
24 you look in Thornton, there could never have been reliance.

25 JUDGE HALLIGAN: Okay. So what - - - what is the

1 definition, and why, in your view, is it the correct
2 definition?

3 MR. SACHAR: The definition in the legislation,
4 Your Honor, or the definition in the - - -

5 JUDGE HALLIGAN: No. Set aside the legislation,
6 if you would.

7 MR. SACHAR: In the case law, it's regulatory
8 fraud. It is and - - - and this is the exact quote from
9 Graham.

10 JUDGE HALLIGAN: And why is that correct as
11 opposed to common law fraud? Why is - - - why?

12 MR. SACHAR: Because if you have common law
13 fraud, it becomes almost impossible to show the element of
14 reliance. Right? Because if I, as a current tenant coming
15 in, I can't rely on my predecessor's reliance, I would have
16 to show - - -

17 JUDGE HALLIGAN: So where are other
18 circumstances? I mean, it - - - it's a question of
19 legislative intent. Right? And so where are there other
20 statutes that use the word fraud or fraudulent and refer to
21 what you call regulatory fraud, which I take it as
22 something shy of all of the elements of common law fraud,
23 as opposed to common law fraud?

24 MR. SACHAR: Exactly. That's an Executive Law
25 663 subsection 2 and the Martin Act, both do not require

1 common law fraud, even though they use the word fraud. And
2 in fact, cases - - -

3 JUDGE HALLIGAN: And - - - but those are - - -
4 those are both, if memory serves me, provisions. I think
5 it's 63(12) you're referring to probably.

6 MR. SACHAR: And 63(12). I'm sorry I couldn't
7 read my handwriting.

8 JUDGE HALLIGAN: Right. Right. And the Martin
9 Act, those are provisions, I think, where there's extensive
10 precedent setting forth the elements and how they're
11 understood and so forth. I don't - - - do we have that in
12 this context?

13 MR. SACHAR: We don't have very many rent
14 regulatory decisions that talk about fraud. We have the
15 big three, right? Last time I was here, I called them the
16 murderers row: Thornton, Grimm, and Conason. And in each
17 one of those cases, you never had common law fraud. You
18 couldn't have because - - - use Thornton for an example.
19 Cyndi Lauper and the landlord are in cahoots to say, we're
20 not using this as our primary residence. Well, there's no
21 reliance if everybody is in cahoots together. They - - -
22 they weren't relying. They were doing the exact opposite.

23 JUDGE CANNATARO: Assuming all of that's true,
24 I'm still having a hard time understanding why Regina
25 somehow changes the field. I mean, footnote 7 says what it

1 says, but I don't - - - I'm not sure how it incorporates a
2 common law fraud requirement onto what we had previously
3 been talking about, what a party was required to show for a
4 fraudulent scheme to deregulate.

5 MR. SACHAR: I don't think it did. I don't think
6 Regina footnote 7 changed it at all.

7 JUDGE CANNATARO: So let me ask you my question
8 again. Did - - - does Regina represent a sea change in
9 what had come before?

10 MR. SACHAR: I don't believe so, no.

11 JUDGE CANNATARO: Okay. Because that's the
12 opposite of what you said, that's why I'm asking.

13 MR. SACHAR: I'm sorry. I might have
14 misunderstood your question. The First Department thinks
15 so. I don't think so.

16 JUDGE CANNATARO: Okay.

17 MR. SACHAR: That - - - sorry. I didn't mean to
18 sidetrack you. And that's the point. Right? So the First
19 Department in this case, goes you have to show common law
20 fraud. They start doing this in - - - in 2020 - - - late
21 2022 through 2023. The Second Department has done it in
22 2021, in a brief passage. But I don't think Regina changed
23 the rules. It was - - - it's a footnote, and I think if it
24 had - - -

25 JUDGE RIVERA: So if I'm understanding - - -

1 JUDGE CANNATARO: So if that's the case - - -

2 JUDGE RIVERA: - - - your argument, your argument
3 is if you look at all of the jurisprudence that is making a
4 decision on the merits, where this is a necessary component
5 of the analysis in those cases, the court has considered
6 fraud in a different context in rent regulation and at a
7 minimum doesn't require reliance. But forget the other
8 elements; we're just dealing with reliance right now.

9 MR. SACHAR: That's exactly right. And frankly,
10 I think that if the Court of Appeals in Regina had put - -
11 - set forth a new standard, I think they would have said it
12 very clearly in the majority. And I think it would have
13 been very clearly addressed in the dissent.

14 JUDGE CANNATARO: Not in a footnote.

15 MR. SACHAR: Not in a footnote. Yes. We don't
16 make laws by footnote.

17 JUDGE TROUTMAN: So you think the footnote is
18 just dicta?

19 MR. SACHAR: No. I read - - - it could - - - it
20 could be. There's a number of different ways to look at
21 it. It could be dicta. If you read the entirety of the
22 footnote, the second sentence which nobody ever talks
23 about, seems to be referencing regulatory fraud. But if it
24 isn't one of those things, you cited three cases with
25 approval that didn't have common law fraud and said, hey,

1 we're going to change this. Common law fraud means this.

2 JUDGE TROUTMAN: And the factors could just be
3 factors you consider, not exclusive?

4 MR. SACHAR: That's right. And that's how the
5 clarifying legislation plays in.

6 JUDGE CANNATARO: By the way, was reliance an
7 issue in Regina? Was that a dispute over whether there was
8 reliance?

9 MR. SACHAR: The only issue of reliance would
10 have been the landlord's reliance on DHCR. That's what
11 people were talking about. That was the main point of
12 Regina, right?

13 JUDGE CANNATARO: Right. I mean, I view Regina
14 as a dispute over whether - - - about the landlord's
15 intent. I mean, that obviously involved a case about how
16 the landlord went about doing what they did. And at the
17 time, they were following what they thought was reliable
18 guidance from DHCR.

19 MR. SACHAR: Exactly. And the minute DHCR was
20 corrected by this court in Roberts, they went - - - they
21 went and reregistered.

22 JUDGE CANNATARO: So that to me means what we're
23 really discussing is, was there intent to engage in a
24 fraudulent scheme or was there not intent?

25 MR. SACHAR: Right. And don't forget, that's



1 what the clarifying legislation does too. It says we're
2 going to assess owner's knowledge to see if it - - - and
3 when you assess it you look at all the law, all of the
4 stuff, to see if it indicates owner's knowledge as a way of
5 circumventing rent regulation.

6 JUDGE SINGAS: Chief, can I just ask? Can you
7 address the rent concession and the preferential rent
8 quickly first, please?

9 MR. SACHAR: Yeah. Absolutely. So in 2019, the
10 legislature passes HSTPA. And as part of that, it
11 eliminates preferential rents. The question is whether or
12 not a landlord has to account for a concession when - - -
13 now under HSTPA or when it registers apartments for the
14 first time in a 421-a building. So the language from the
15 code is the amount charged and paid. In our view - - - and
16 we look at landlord advertisements, they're using
17 concessions to circumvent this preferential rent bar.

18 JUDGE HALLIGAN: But why not follow Fact Sheet
19 #40?

20 MR. SACHAR: Fact Sheet #40 doesn't say you can't
21 pull concessions. First off, Fact Sheet #40 was superseded
22 after HSTPA.

23 JUDGE HALLIGAN: Okay. So that question
24 specifically. Your view is that Fact Sheet #40, we can't
25 look to because it was superseded?

1 MR. SACHAR: No. Well, that's one of the points.
2 The second point is look at it and read it, and where does
3 it say in there you can pull one-time rent concessions? It
4 doesn't. It says a amortized rent is a preferential rent
5 and will be treated as such. And it differentiates that
6 from one-time rent concessions. But it doesn't tell you
7 what you're supposed to do.

8 And the only point the court below made with
9 respect to this was to say, well, we assume the legislature
10 knew about Fact Sheet #40. But that - - - when it passed
11 HSTPA. But this court has held that that's the most
12 dubious of arguments when you're interpreting legislative
13 intent. Thank you.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. MAGY: May it please the court. Daniel Magy
16 from the New York State Attorney General's Office, on
17 behalf of the State of New York, amicus curiae in support
18 of appellants.

19 The Appellate - - - Appellate Division's decision
20 that tenants must show reasonable reliance to invoke the
21 fraud exception fundamentally misapplies this court's
22 cases, as my colleague mentioned. And it also violates the
23 driving purpose behind the fraud exception, which is to
24 protect the public and the rent regulation system, not just
25 the individual tenant bringing an action.

1 JUDGE RIVERA: So do we need to address, in our
2 determination or resolution, the quote-unquote, clarifying
3 legislation? Is that relevant really at all to the case?

4 MR. MAGY: You don't have to address that. You
5 could say that the Appellate Division erred in requiring
6 reasonable reliance and remand it to the Appellate Division
7 to consider any unanswered questions in the first instance.

8 If the court chose to address the clarifying
9 legislation, as we argue in our brief, you should find that
10 it's not retroactive, then that it applies to pending
11 actions like this one. And that even if it is retroactive,
12 it satisfies due process, and the legislature intended it
13 to do so.

14 There is some concern. I heard questions about
15 whether the legislature can do this; can it clarify what
16 Your Honor said in prior cases? And the answer to that
17 question is yes. And I would maybe like to pivot sort of
18 the thinking about. It's not the legislature saying this
19 is what the court meant, or this is what you meant in
20 Regina or Thornton, prior cases. It's saying that the
21 interpretation that this court, in - - - in this court's
22 decisions, that followed the legislature intent - - -
23 legislature's intent.

24 But what happened is, Burrows, the First
25 Department's decision in this case was like an aberrational

1 decision that no longer follows the legislature's intent,
2 and therefore, the legislature - - -

3 JUDGE HALLIGAN: Well, why is that not just a
4 straightforward legislative override? It happens from time
5 to time where a court reads a statute, interprets it in a
6 particular way, and the legislature wants some different
7 policy, and it overrides the court decision and enacts a
8 different statutory provision. I don't really understand
9 what clarifying legislation is that is distinct from an
10 override, but maybe you can illuminate that.

11 MR. MAGY: I - - - I think the way you just
12 described it is exactly what happened. And maybe the - - -

13 JUDGE HALLIGAN: So if what the legislature is
14 doing then is it's saying, you know, the - - - the court -
15 - - the First Department decision suggests X. The rule is
16 Y. Then don't we go through the retroactivity analysis as
17 we would with respect to any other newly enacted statute?

18 MR. MAGY: Yeah. Yes. The court would go
19 through that analysis. The - - - our position here is,
20 though, on that first step, whether it is retroactive.

21 JUDGE HALLIGAN: Yes.

22 MR. MAGY: The answer is no.

23 JUDGE HALLIGAN: And why is that?

24 MR. MAGY: It is not retroactive because it
25 doesn't change the prior law in the sense of the consistent

1 history of this court's decisions from Thornton on and the
2 interpretation of the lookback rule under the prior HST - -
3 - under before the HSTPA.

4 CHIEF JUDGE WILSON: But if that's right, we
5 don't have to get to the statute at all.

6 JUDGE HALLIGAN: Right.

7 MR. MAGY: Correct. And as I said, you don't
8 have to get to the statute. If this court remands, though,
9 says the First Department was wrong to require reasonable
10 reliance, and remands, then the First Department, though,
11 may have to address that question whether the - - - whether
12 they - - - what we are calling the clarifying legislation
13 applies and whether the plaintiffs have met that standard.
14 Because we do argue that it applies to pending actions like
15 this one.

16 This court doesn't have to address that question.
17 But at some point in this litigation, that question would
18 have to be answered. So to answer your question - - -

19 JUDGE CANNATARO: In this litigation, it would
20 have to be answered? If our holding was - - - you know,
21 that the Appellate Division erred in imposing a reliance
22 requirement, and they should go back and reconsider it
23 because that's what our law has always been, through
24 Thornton and all the other cases. Why would that - - - why
25 would the legislation arise in this litigation?

1 MR. MAGY: Because the legislation applies to any
2 action pending. It doesn't say that we're pending, but - -
3 -

4 JUDGE HALLIGAN: But how would there be an open
5 question then that the legislation would be relevant to?

6 JUDGE CANNATARO: We resolve it based on our
7 common law, based on our case law, which, you know, under -
8 - - under your version of our holding says we never imposed
9 a common law fraud requirement or a reliance element
10 requirement. So the question of whether the legislation
11 fixed anything becomes moot, doesn't it?

12 MR. MAGY: Sure. And perhaps the answer is that
13 the legislation applies, but we don't have to do any
14 further analysis because they met the standard that this
15 court has set. And that's perfectly fine.

16 I was just saying in other actions there is this
17 legislation, and it applies in - - - in any action in any
18 court. And so the analysis goes under that statute now.

19 JUDGE GARCIA: So if we agree that this is what
20 we meant, which is just hypothetically, essentially the
21 same as this clarifying legislation, it's moot. Really.
22 What is it - - - what effect does it have? We're saying
23 the same thing, right?

24 If we say our rule was different, then it's new
25 legislation, then it's changed the rule. So it doesn't

1 clarify anything. It's new. So I don't see how it can
2 really be clarifying in any way. Either we meant that, in
3 which case no harm, no foul, and everything's kind of the
4 same. Or we didn't mean that, we had a different rule.
5 And now you've changed the rule, and we could accept that
6 as a new statute.

7 MR. MAGY: Sure. So one, I think there may be
8 just an issue with the use of the word "clarifying
9 legislation" as a shorthand.

10 JUDGE GARCIA: You don't know of another time
11 we've gotten clarifying legislation of this kind?

12 MR. MAGY: I - - - I don't view this as being
13 different from really any of the other normal circumstances
14 where there's a statute, there's an interpretation of the
15 statute, and the legislature then amends the statute - - -

16 JUDGE RIVERA: But - - - but is our - - -

17 MR. MAGY: - - - in response.

18 JUDGE RIVERA: - - - is our discussion of fraud
19 in the rent regulation context an interpretation of the
20 statute?

21 MR. MAGY: I believe it is because if you read -
22 - -

23 JUDGE RIVERA: What statute?

24 MR. MAGY: The lookback rule. Because Thornton
25 says - - - this is what - - - there's the - - - there's

1 just a lookback rule. But we are going to find this fraud
2 exception because the legislature could not have intended
3 for the lookback rule to apply to cases like this.

4 JUDGE RIVERA: Do you agree it's not expressed in
5 the legislation?

6 MR. MAGY: It's not express - - -

7 JUDGE RIVERA: It's carve-out that the court
8 identified an exception to give - - -

9 MR. MAGY: Correct.

10 JUDGE RIVERA: - - - meaning to the legislation.

11 MR. MAGY: Correct. But it's still an
12 interpretation of that legislation to say that that - - -
13 that rule doesn't - - - that law does not apply to
14 circumstances like these. And the legislature for - - - as
15 the court continued to follow that rule, didn't see any
16 reason to enact legislation because it agreed with what
17 this court had done.

18 JUDGE RIVERA: But - - - but you might say - - -
19 let's - - - let's say I went with that. You might say that
20 the way the court thought about fraud in the context,
21 though, is not necessarily so obvious that that was the
22 legislative intent? Yes or no?

23 MR. MAGY: I'm not sure I understand the
24 question.

25 JUDGE RIVERA: The way - - - let's assume for one

1 moment that the court agrees that all of the elements of
2 common law fraud are not required in the rent regulation
3 context, and that's really what the court had decided in
4 those cases.

5 MR. MAGY: Yeah.

6 JUDGE RIVERA: Right? That doesn't necessarily
7 flow from trying to give - - - what you're saying, trying
8 to give real meaning to the legislation.

9 MR. MAGY: But it still is an interpretation of
10 that legislation when one of the litigants says this is a
11 statute of limitations, that requires - - -

12 JUDGE RIVERA: Well, it could be interpretation
13 of the statute to say, well, it couldn't possibly have
14 meant that that owner that commits fraud gets the benefit?

15 MR. MAGY: Right. Sure.

16 JUDGE RIVERA: But the court could then say, and
17 this is how we would - - -

18 MR. MAGY: Understood.

19 JUDGE RIVERA: - - - define fraud for these
20 purposes.

21 MR. MAGY: Absolutely. That is possible. But
22 what happened here is consistently, over years and years,
23 this court had interpreted fraud the exact same way, never
24 requiring reasonable reliance.

25 JUDGE RIVERA: Well, yes. But that goes to that

1 stare decisis.

2 MR. MAGY: Sure.

3 JUDGE RIVERA: And whether or not you can really
4 call this clarifying legislation - - -

5 MR. MAGY: And - - -

6 JUDGE RIVERA: - - - or at least in part.

7 MR. MAGY: And let me just try to answer Judge
8 Garcia's question as to whether - - -

9 JUDGE RIVERA: Well, before - - - I'm sorry. I'm
10 - - - I'm not trying to cut off Judge Garcia's question,
11 but just to clarify. Apart from this issue about whether
12 or not the legislature could pass, quote-unquote,
13 clarifying legislation of a common law rule. Isn't there
14 some issue about whether or not the fraudulent scheme as
15 defined in that legislation is different from what we have
16 said in the past? Even if we agreed that, as Judge Garcia
17 has said that - - - you know, whatever they said about the
18 elements of fraud, it aligns with what this court intended,
19 so it - - - it's almost irrelevant.

20 MR. MAGY: So yes, that - - - that would be an
21 issue. Our position, though, is that it isn't a change
22 from what this court had said for years and years.

23 JUDGE RIVERA: So isn't the same as in the
24 question of fraud?

25 MR. MAGY: Exactly. But just to answer Judge

1 Garcia's question as to whether, if this is a change, then
2 what happens if the court disagrees and says no, we did
3 require reasonable reliance or common law fraud? The
4 answer is that maybe that makes the clarifying legislation
5 retroactive, but that's just step one. And you still have
6 to go to legislative intent.

7 JUDGE GARCIA: But would you still go around the
8 - - -

9 MR. MAGY: You still have to go to due process.

10 JUDGE GARCIA: I'm sorry. It wouldn't get you
11 around the retroactivity analysis. It would begin the
12 retroactivity?

13 MR. MAGY: Correct. You just say, okay, you
14 know, our position is there is - - - it's not retroactive.
15 But let's assume that it is, then you go to legislative
16 intent. You have that here. It clearly applies to pending
17 actions, so it must apply retroactively. Two, it's
18 rational for the legislature to say that the court has - -
19 - you know, misinterpreted the lookback rule. You know,
20 the Burrows court did it to require reasonable reliance
21 that does not protect tenants; that does not protect the
22 system. The whole point is to penalize fraud. And the
23 legislature thinks requiring reasonable reliance does not
24 do that; therefore, it satisfies due process. So even if
25 it's a change in the law, it doesn't make the clarifying

1 legislation unconstitutional in any way.

2 And that - - - you know, just to almost circle
3 back, you don't have to address that question at all in
4 this case. But if you do, you get to the same point. That
5 - - - that the tenants have met their burden, at least at a
6 motion to dismiss, to satisfy the elements of a fraudulent
7 scheme. There's a misrepresentation here. There's at
8 least indicia of knowledge because they did this for every
9 apartment in the building. The law is clear as - - - that
10 this was illegal. And you also have a scheme here in the
11 sense that this is hurting tenants. And they're - - - and
12 they're gaining an advantage to the landlord, allowing them
13 to set a legal rent that is well higher than what they were
14 permitted to do. And reserve the right for any new tenants
15 to come in to charge them thousands of dollars more than
16 they should have been entitled to.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. MAGY: Thank you.

19 MS. RIEGEL: Good afternoon, Your Honors. May it
20 please the court. My name is Deborah Riegel from the law
21 firm of Rosenberg & Estis for the landlord respondent.

22 I understand why appellant's counsel wants to
23 focus on Regina. Because I feel like I have been debating
24 what footnote 7 means since the day the decision came down.

25 But we are not here to relitigate Regina. We are



1 here on an order of the Appellate Division that found
2 unequivocally, whether you base it on reliance or some
3 other basis, it - - - they found unequivocally there was no
4 fraudulent scheme here. And - - -

5 JUDGE RIVERA: So why is that? Why is there no
6 fraudulent scheme?

7 MS. RIEGEL: And - - - and - - -

8 JUDGE RIVERA: Of course, the Appellate Division
9 did decide that Regina required reliance, but we'll put
10 that to the side for a moment.

11 MS. RIEGEL: So - - - so why is there no
12 fraudulent scheme here? This case is almost identical to
13 the Reich component of Regina. This is a case where this
14 landlord incorrectly, but openly and truthfully, registered
15 rents from the very date - - -

16 JUDGE RIVERA: Well, unlike - - - well, not - - -
17 not like Regina. Because you don't have the DHCR saying
18 yes, that's exactly correct. What you've done is lawful.

19 MS. RIEGEL: No. But from a - - - but from a
20 disclosure standpoint, Your Honor, every year from the very
21 inception of this - - - of the tenancies - - -

22 JUDGE RIVERA: Is that about reliance? Is - - -
23 is your point there that - - -

24 MS. RIEGEL: No.

25 JUDGE RIVERA: Okay.

1 MS. RIEGEL: My point is that there was a statute
 2 of limitations in place until the enactment of the HSTPA.
 3 And none of us dispute that pre-HSTPA law applies here. So
 4 there was a statute of limitations. That statute of
 5 limitations, which is sometimes conflated with the lookback
 6 rule. But prior RSL 26.516a(1) said, where the amount of
 7 rent set forth in the annual rent registration statement
 8 filed four years prior to the most recent rent registration
 9 statement, is not challenged within four years of its
 10 filing, neither such rent, nor service of any registration
 11 shall be subject to challenge at any time thereafter.

12 These registrations were filed in 2007. They
 13 bring this case in 2020. Thirteen years later. Two owners
 14 later. After my client bought the building based on
 15 registrations that were filed and that were public record,
 16 based on the fact that the statute of limitations had
 17 expired, and based on the fact that no challenge had been
 18 brought.

19 So what they are arguing is my client should have
 20 had a crystal ball on a number of bases. And when we get
 21 to Waller, we'll talk about that as well. My client should
 22 have had a crystal ball to know that what was proper and -
 23 - - and final under the law as it existed, might somehow no
 24 longer be final.

25 JUDGE TROUTMAN: Well, when you're saying proper,

1 what was filed was filed unilaterally. It's what the
2 landlord says it was if it's not challenged. You don't
3 know if it was accurate or not. But if it's not
4 challenged, it's not challenged. But it doesn't
5 necessarily mean what you're arguing now.

6 MS. RIEGEL: Well, when I say proper, I mean it -
7 - - it had - - - by virtue of the passage of time and the
8 expiration of the statute of limitations, those rents - - -
9 and I understand the argument - - -

10 JUDGE TROUTMAN: They went unchallenged. They
11 went unchallenged.

12 MS. RIEGEL: They were not challenged.

13 JUDGE TROUTMAN: And so are you really arguing,
14 it's really unfair? They went on for a number of years
15 unchallenged, and now, after all of that passage of time,
16 your client is disadvantaged?

17 MS. RIEGEL: Well, I do think there's an
18 equitable piece of this here. But there's also just - - -
19 this is a statute of limitations.

20 JUDGE GARCIA: But if that's the case, why would
21 you ever need - - - why would you ever employ the fraud
22 exception? Maybe I'm missing something here. I mean, that
23 Thornton, Grimm, they all are older cases. Why wasn't the
24 answer in those cases? It's a four-year statute of
25 limitations, sorry.

1 MS. RIEGEL: Because they were timely brought.
2 And - - - and there was fraud.

3 JUDGE GARCIA: They were brought within - - -

4 MS. RIEGEL: I'm sorry. They - - - they were
5 either timely brought or there was an actual fraud. And to
6 compare what happened - - -

7 JUDGE HALLIGAN: Well, has it - - - I want to
8 understand the distinction there. Because isn't the
9 question here in part what the standard for fraud is? I
10 mean, if it's permissible to proceed if there's fraud, even
11 if it's not brought within the four-year statute of
12 limitations, I take it you're saying that's permissible?
13 And then the question is, what are the elements of fraud
14 that are required? Is that fair?

15 MS. RIEGEL: I think it's fair. But I don't
16 think - - - and I - - - and I - - - again, the focus on
17 footnote 7, I think, distracts from the fact that whatever
18 definition of fraud this court or the Appellate Division
19 wants to apply, the hallmark of fraud is an intent to hide
20 and deceive. Nothing was hidden here.

21 JUDGE CANNATARO: So essentially what you're
22 saying is that there are no indicia of fraud anywhere here?

23 MS. RIEGEL: There - - - there is no indicia of
24 fraud. The only thing that counsel points to as his
25 indicia of fraud are the publicly filed rent registrations,

1 which were known and available.

2 JUDGE CANNATARO: And to which - - - in the lower
3 court, in Supreme Court, your response to that was, yes,
4 but you have to show reliance. So it sounds to me like
5 you're making a different argument here than the one that
6 you were making in supreme court. Now you're just saying
7 there's no evidence of fraud anywhere. But that's - - -
8 that's not what you put forth below.

9 MS. RIEGEL: I think what we - - - I think what
10 we put forth below is that there was no fraud because these
11 were openly disclosed, and they were available. And - - -

12 JUDGE GARCIA: So you couldn't rely on them, I
13 thought was the argument from that, though?

14 MS. RIEGEL: Well - - -

15 JUDGE GARCIA: So no one could rely on that
16 because the information was known?

17 MS. RIEGEL: In addition to the fact that the
18 information was all known and the claim should have been
19 brought within the statute of limitations period, you can't
20 get to the fraud exception because you knew all of this.

21 JUDGE GARCIA: But how do you square that,
22 though, with our prior decision in Thornton where they
23 clearly knew?

24 MS. RIEGEL: So I think to compare what happened
25 here to what happened in Thornton in determining fraud.

1 The facts in Thornton are egregious. There was an actual
2 intent to deceive in Thornton. You had a landlord and a
3 tenant who conspired to take an apartment out of rent
4 stabilization.

5 JUDGE RIVERA: Who's being deceived?

6 MS. RIEGEL: Excuse me?

7 JUDGE RIVERA: Who's being deceived? What's the
8 intent to deceive?

9 MS. RIEGEL: The - - -

10 JUDGE RIVERA: If everybody knows? If they're
11 coconspirators, what - - - where is the deceit?

12 MS. RIEGEL: The scheme in Thornton was that the
13 landlord was renting to Thornton, who would then
14 potentially have the right to sublet that apartment. And -
15 - - and so there - - - there was an intent to deceive and
16 there was an intent to defraud. And whether I agree and I
17 - - - I quarrel a little bit with a private plaintiff
18 bringing a case in order to vindicate rent stabilization.
19 I think, Thornton - - - you got to where you got on
20 Thornton because the facts were so egregious. That is not
21 present here.

22 What you have here - - -

23 JUDGE RIVERA: If I'm understanding your
24 argument. You're sort of saying, okay, owner is not
25 telling the truth, but as long as they were loud and proud

1 about it, you can't bring an action?

2 MS. RIEGEL: But this owner was telling the
3 truth. They believed that - - - and because it's
4 consistent with their leases, they registered rents that
5 were consistent with their leases. They made a mistake.

6 JUDGE SINGAS: Yeah. But they had legal
7 regulated rent and actual rent being paid. So that wasn't
8 allowed.

9 MS. RIEGEL: It wasn't allowed, but it wasn't
10 fraudulent. They didn't - - -

11 JUDGE HALLIGAN: What's the distinction between
12 the two? And I mean - - - well, can you start with that?

13 JUDGE RIVERA: And can you decide that I have
14 motion to dismiss?

15 JUDGE HALLIGAN: I have a follow-up question.

16 MS. RIEGEL: Well, so the distinction between the
17 two, I think, is any intent to deceive the tenant. They
18 gave the tenants leases that said there were preferential
19 and legal rents. Incorrect? Yes, incorrect. Fraudulent?
20 Fraud has to mean something more than making a mistake.

21 JUDGE HALLIGAN: How do we know - - -

22 JUDGE GARCIA: I'm sorry.

23 JUDGE HALLIGAN: Go ahead.

24 JUDGE GARCIA: Did they base subsequent rents on
25 the higher rent level, not the preferential rent?

1 MS. RIEGEL: No. Not for these plaintiffs.

2 JUDGE SINGAS: But they could have.

3 MS. RIEGEL: But that's not in this record.

4 JUDGE SINGAS: So is your position that from the
5 initial rents that were being set that nothing - - - there
6 was no increases that weren't authorized by - - -

7 MS. RIEGEL: Not only - - -

8 JUDGE SINGAS: - - - you know, regular rent
9 increases - - -

10 JUDGE GARCIA: Based on the lower number?

11 JUDGE SINGAS: - - - based - - -

12 MS. RIEGEL: They - - - all of the increases for
13 these - - - all of the increases for the apartments these
14 plaintiffs occupy were taken off of the lower number. And
15 in fact, there is no real dispute that the increases were
16 based on the lower number.

17 CHIEF JUDGE WILSON: When you say the lower
18 number - - -

19 JUDGE HALLIGAN: Is this on the - - - is this on
20 the motion to dismiss, or am I - - -

21 MS. RIEGEL: It is on the motion to dismiss.

22 JUDGE HALLIGAN: - - - misunderstanding the
23 posture?

24 MS. RIEGEL: Yes.

25 JUDGE HALLIGAN: Okay. So how do we know all of



1 these facts?

2 MS. RIEGEL: Because we have documentary
3 evidence. We have the registrations, and we have the
4 leases. And in fact - - -

5 JUDGE HALLIGAN: So you're saying - - - your - -
6 - your position is that as - - - as a matter of law, no
7 matter what exactly the standard for fraud is that we would
8 settle on, it can't be met?

9 MS. RIEGEL: Yes. Because there's no deception.
10 Because if - - - for two reasons. One - - -

11 JUDGE HALLIGAN: Why doesn't that go? I thought
12 - - - I think Judge Cannataro said this. I thought below
13 that went to reliance, in your view, not broadly to whether
14 there was fraud here or not, or misrepresentation.

15 MS. RIEGEL: I - - - I believe - - - I believe,
16 and obviously you and Judge Cannataro may read our
17 arguments differently.

18 JUDGE HALLIGAN: Understood.

19 MS. RIEGEL: I believe that the argument below is
20 that there was not fraud. In part because you couldn't
21 rely, in part because this was fully disclosed to these
22 tenants, in part because there was a distinct statute of
23 limitations that specifically said, if you have
24 registrations, those registrations have to be challenged
25 within four years, or the rent is forever enshrined.

1 JUDGE GARCIA: But did you make this argument
2 which I'm hearing now, that it wasn't fraud because we
3 never used anything but the preferential rents to base
4 increases on?

5 MS. RIEGEL: Yes. And in fact, counsel responded
6 to it. And the response was not that there were increases
7 that exceeded the permissible increases for his plaintiffs.
8 What his argument is, is that, well, there were vacancy
9 allowances at points along the way. And how do we know
10 whether those vacancy allowances were proper?

11 Well, if it's a fraud claim, they're required to
12 plead specifically what the fraud is. It's not maybe there
13 was something that doesn't smell right. And that's the
14 only thing they point to. They do not say - - - in fact,
15 they concede that when we reconstructed the rents and
16 showed the court that there were no improper increases,
17 they concede in their brief, that those increases for the
18 plaintiffs were proper.

19 JUDGE CANNATARO: And it's not enough for
20 plaintiff to say we have our initial rent registrations
21 that don't comply to, at least for purposes of surviving a
22 motion to dismiss?

23 MS. RIEGEL: Not four years later when that
24 information was available to them. Because then what
25 you're saying, I - - - I think, is there's a different

1 standard for these plaintiffs' compliance with the statute
2 of limitations and for knowledge of the law and for
3 compliance with the law, than there is for a landlord.
4 Because they have the same constructive knowledge of the
5 statute of limitations that we do.

6 JUDGE CANNATARO: Well, what I'm saying is,
7 what's the bare minimum for demonstrating a fraudulent
8 scheme of some sort?

9 MS. RIEGEL: Some deception. And there was no
10 deception here because - - -

11 JUDGE CANNATARO: So now it's about intent. So
12 now the - - - it sounds like you've changed the tenor of
13 the argument from reliance to intent. As long as the - - -
14 even if the initial rent registration was incorrect,
15 improper, if there was no intent to deceive when it was
16 done, then it's okay?

17 MS. RIEGEL: I suppose at its base what I'm
18 saying is, the only thing they have argued here, which this
19 court and the lower courts have consistently said is not
20 sufficient. The only thing they have pointed to here is an
21 alleged illegality in the rent. And this court and the
22 Appellate Divisions have said you can't just say the rent
23 was improper. There has to be something more.

24 JUDGE CANNATARO: That's just a rent overcharge,
25 is what you're saying?

1 MS. RIEGEL: Correct. And if - - - and if that
2 is the standard that this court adopts, that any mistake in
3 a rent registration is indicia of fraud, well then the
4 exceptions now swallow the rule.

5 JUDGE RIVERA: Well, they're not claiming like
6 one little mistake, right? I mean, I thought their
7 argument was there's a full-blown pattern and that, in
8 part, gives you some of that indicia?

9 MS. RIEGEL: Well, there - - - they are alleging
10 one mistake. They're alleging the same mistake for all of
11 the apartments.

12 JUDGE RIVERA: Not the same type of mistake, the
13 same class of mistake repeated over and over. But let me -
14 - - let me - - - I just want to clarify this other point
15 you're making about or understand it for myself, about the
16 rent increases. Am I understanding this argument as sort
17 of a rent creep argument that - - - that yes, there - - -
18 there's a number that would be permissible. And if we had
19 gone above that number, yes, that would have been a
20 violation of the law. But since we didn't go above that,
21 we got closer, perhaps the numbers should, by law, been a
22 little bit lower, that somehow we haven't violated the law?

23 MS. RIEGEL: No. What I'm saying is there was no
24 overcharge here. There is simply purely no overcharge.

25 JUDGE RIVERA: Well, even if there's no

1 overcharge. If the numbers are incorrect, why is that not
2 a violation of rent regulation law? Because the point is
3 you're trying to get these accurate numbers for fear that
4 down the line you are going to end up with an apartment
5 that no longer is fully regulated.

6 MS. RIEGEL: Well, because I'm addressing the
7 complaint as they pleaded it. And their complaint, as
8 pleaded, seeks damages for rent overcharge, and there are
9 no overcharges, pure and simple, at its very base.

10 JUDGE GARCIA: Wasn't that a damages issue - - -

11 MS. RIEGEL: There are no overcharges.

12 JUDGE GARCIA: That may be a damages issue. But
13 let me just ask you this. Let's say the preferential rent
14 was 1,000 and the legal rent is 2,000. So it should have
15 been registered at two, but it's registered at one and it's
16 disclosed.

17 MS. RIEGEL: Uh-huh.

18 JUDGE GARCIA: Under the - - - what happened
19 here, you're saying that the rent that these plaintiffs
20 were charged is not an overcharge based on what you could
21 have increased that \$1,000 figure at over that period of
22 time under the law?

23 MS. RIEGEL: Correct. There was simply no
24 overcharge. And you know, and - - - and I think, this - -
25 -

1 JUDGE RIVERA: But isn't the result of that that
2 you continue to have the wrong numbers, and that's the
3 violation?

4 MS. RIEGEL: Having wrong numbers is different
5 than having fraudulent numbers, though. And I think this
6 goes back to - - -

7 JUDGE RIVERA: But that is a motion to dismiss.
8 Maybe later on you're going to be able to persuade whoever
9 decides that issue that there was no fraud or as you say,
10 no intent to defraud.

11 MS. RIEGEL: I think that there are fraud
12 questions that are susceptible to determination on a motion
13 to dismiss. I - - - look, I think every time one of us
14 gets a complaint, we think about whether we can meet the
15 standard on a motion to dismiss. And obviously, I thought
16 in this case that we could.

17 And I think this goes to what Chief Judge Wilson
18 said in the dissent in Regina, which is that the maintainer
19 produce provision of the law, which also is implicated here
20 because as a subsequent purchaser my client doesn't have
21 records, if we go back to supreme court - - - is meant to
22 protect landlords who do file timely but incorrect
23 registration statements. Statements that show an illegal
24 rent for an apartment that the landlord still considers
25 regulated.

1 That's what happened here. These are incorrect
2 registrations. I can't hide from that. These are
3 incorrect registrations, timely filed, with no records
4 should this case go back because we are twenty years down
5 the road. That's exactly the purpose of a statute of
6 limitation.

7 JUDGE HALLIGAN: How do we know from the record
8 before us - - - you said there's documentary evidence - - -
9 that this is what you call - - - I'm not sure I understand
10 the distinction between a wrong number and a fraudulent
11 number. I assume it has to do with scienter, but - - - but
12 you tell me. How do we know that on this record
13 specifically? How - - - how does the record - - - what is
14 the documentary evidence that establishes what I take your
15 position is, which is there's no scienter and therefore
16 it's wrong, but not fraudulent?

17 MS. RIEGEL: I think what tells you that is that
18 the increases comported with my client's obligation - - -
19 the prior owner, and then my client's obligation under the
20 law to only increase those rents consistent - - - to only
21 increase the preferential rents consistent with rent
22 guidelines. If my client was trying to defraud the
23 plaintiffs, that might be a different result.

24 JUDGE GARCIA: But how - - - you're saying
25 defraud the plaintiffs. Let's say in my hypothetical, we

1 had 1,000 preferential, 2,000 was the legal rent. Now,
2 with the increases you've been entitled to on the 1,000,
3 the rents 3,000, you could charge, let's say 6,000 using
4 the other figure. They move out. Can you charge the new
5 tenant \$6,000, if we say this is okay?

6 MS. RIEGEL: I'm sorry. I want to make sure. So

7 - - -

8 JUDGE GARCIA: So 1,000 is registered - - -

9 MS. RIEGEL: Right.

10 JUDGE GARCIA: - - - as the rent. But really the
11 market rent is is two. You're saying over this period of
12 time you were only using the increases to the \$1,000
13 preferential, so there are no overcharges. At this point
14 in time, let's say that gives you a \$3,000 rent. If you
15 had used the original figure, it would be \$6,000 with the
16 increases.

17 MS. RIEGEL: Right.

18 JUDGE GARCIA: Tenant leaves. Can you charge the
19 next tenant \$6,000?

20 JUDGE CANNATARO: Do you get the benefit of your
21 registration?

22 MS. RIEGEL: No. And they didn't take the
23 benefit of the registration.

24 JUDGE RIVERA: Why not?

25 MS. RIEGEL: And the record reflects that.



1 JUDGE RIVERA: Why - - - why can't you charge the
2 six?

3 JUDGE GARCIA: Because you're saying you can't
4 look back. So now it's 6,000. That was the rent. That
5 was the fair market rent. Isn't that a fraud? If it's
6 true.

7 MS. RIEGEL: But it's not. And it's clear on the
8 record that it's not true. I understand the hypothetical.

9 JUDGE RIVERA: What's the - - - what's the - - -
10 wait a minute. What's so clear on the record that it's not
11 true?

12 MS. RIEGEL: That the - - - we know none of the
13 rents were increased from the preferential rent - - - no.
14 There was no jump up to the legal rent.

15 JUDGE RIVERA: Well, that was the - - - that was
16 the hypothetical. That was the hypothetical.

17 JUDGE GARCIA: Let's say the plan is to do that.
18 Why isn't that a fraudulent scheme?

19 JUDGE RIVERA: And then you finally reach that
20 tenant where you want to charge the six, and they're
21 willing to pay the six.

22 MS. RIEGEL: But then they'd have a right to
23 challenge at that point. If the rent jumped, let's say - -
24 -

25 JUDGE GARCIA: Isn't it - - - again, isn't that a

1 damages issue? Because if you're saying - - - if what you
2 say is true and then you go back and now - - - okay. Look,
3 you haven't been overcharged. There's no damages here.

4 MS. RIEGEL: I don't know that the court below
5 was constrained to allow the case to continue if it
6 concluded that there was a statute of limitations that had
7 expired and there was no fraud. Having reached that
8 conclusion, I don't know that the court is constrained to
9 allow the case to continue through discovery, just to get
10 to the point where there are no damages.

11 JUDGE GARCIA: I think we're switching horses
12 here a little bit. But I'm saying there could be an intent
13 to defraud. You're saying it just hasn't matured enough
14 yet to give damages. That's, I think, the hypothetical.
15 Right? Okay. These tenants haven't been affected yet, but
16 the next occupancy you're going to charge, let's say,
17 \$6,000, and that would be based on these. And then you're
18 saying they could come in and do that. But that seems to
19 me it's the same scheme. It just hasn't ripened yet.
20 You're saying there's just no damages yet?

21 MS. RIEGEL: But it's not a scheme. But again,
22 not a scheme to deregulate. This has to be a scheme to
23 deregulate.

24 JUDGE RIVERA: Oh, but that's a different issue.

25 MS. RIEGEL: Not an - - -

1 JUDGE RIVERA: That - - -

2 MS. RIEGEL: Not an overcharge scheme.

3 JUDGE RIVERA: That's a different issue about
4 whether or not deregulation means you completely remove
5 that unit from the regulated stock. Or you simply set up a
6 scheme by which you're not in full compliance of the
7 regulatory requirements, the most pertinent one, and - - -
8 and the one for most tenants that they're really going to
9 care about, is the amount that they have to pay.

10 MS. RIEGEL: So I think that while I disagree
11 with counsel about the application of the new law, I think
12 if you look to the new law, you have the clearest
13 indication, at least of what the legislature believes a
14 fraudulent scheme to deregulate is, because the initial
15 draft of that bill included specific language about a
16 scheme to overcharge. That language was removed from the
17 final law.

18 JUDGE RIVERA: But that's what I'm saying. You
19 could have a scheme to slowly creep it up and eventually,
20 perhaps get to Judge Garcia's hypothetical. Right?

21 MS. RIEGEL: You could. Except in this - - -

22 JUDGE RIVERA: Because it's about the numbers. I
23 mean, the whole - - - the point of rent regulation, of
24 course, is you want to maintain this affordable housing
25 stock. What does it mean to be affordable? That the rent

1 has to be in a particular range. That's the whole
2 ballgame.

3 MS. RIEGEL: You could but in the context of this
4 building - - -

5 JUDGE RIVERA: Yes.

6 MS. RIEGEL: - - - these apartments were always
7 going to deregulate at a point in time because it was 421-a
8 building. This isn't a - - - you know, a what I'll call -
9 - - you know, a historic rent stabilized building where by
10 virtue of the HSTPA no units were ever going to be
11 deregulated. We didn't need a scheme to deregulate the
12 units because eventually they were all coming out.

13 JUDGE RIVERA: But you may want a scheme to get
14 you a particular amount of money before you get to the
15 deregulation.

16 MS. RIEGEL: I understand your point, but I would
17 say that's not a fraudulent scheme to deregulate.

18 JUDGE HALLIGAN: One - - -

19 JUDGE RIVERA: And if we disagree with you?

20 MS. RIEGEL: I'm sorry?

21 JUDGE RIVERA: And if we disagree with you, are
22 we done?

23 MS. RIEGEL: Won't be the first time.

24 JUDGE HALLIGAN: One question about the rent
25 concession, if I can?

1 MS. RIEGEL: Sure.

2 JUDGE HALLIGAN: So you point us to Fact Sheet
3 #40, which distinguishes between concessions for specific
4 months and prorated concessions, right? And it looks to me
5 that the lease rider - - - it's in very small print - - -
6 but I think it says that there's two free months, but it's
7 not specified. So why isn't that effectively a prorated
8 scheme as opposed to one for say, August, September?

9 MS. RIEGEL: So I first want to point out that in
10 my view, this court doesn't have jurisdiction to even reach
11 the concession argument. It was not raised in the motion
12 for leave to appeal.

13 JUDGE HALLIGAN: I understand that. But if we
14 were to reach it?

15 MS. RIEGEL: If you were to reach it, I don't
16 think that any of the jurisprudence requires that the rider
17 specifically say, we're giving you a two-month concession
18 for August and September or May and June. It's - - -

19 JUDGE HALLIGAN: So specific months just means a
20 number of months, not - - -

21 MS. RIEGEL: A distinct - - - yes.

22 JUDGE HALLIGAN: - - - any actually specified
23 months?

24 MS. RIEGEL: A distinct - - - a distinct number
25 of months as - - - as distinguished from an amortized rent

1 reduction over the course of the lease. So the distinction
2 - - - the distinction being you're getting May and June
3 free, as opposed to we're reducing your rent for the
4 entirety of the lease from 3,500 to 3,300. It's an
5 amortization as opposed to a - - - a discrete set of - - -
6 set of - - -

7 JUDGE RIVERA: Months.

8 MS. RIEGEL: - - - months.

9 JUDGE HALLIGAN: Although it further says that if
10 you don't fulfill the terms, that the free months shall be
11 deemed null and void. And I take it that means that if you
12 attempted to terminate the lease before the end, you would
13 try to recoup those two months of free rent. So it seems
14 to me like it could be viewed as prorating.

15 MS. RIEGEL: I still don't think that would be
16 prorating. I think that's a contractual agreement that - -
17 - you know, we're going to give you this concession, so
18 long as you comply with the terms of your lease. It's
19 still a distinct concession, you know. And - - - you know,
20 the brief - - - appellant's brief spends a lot of time
21 talking about needing to have a reason or not having a
22 reason. You know, the - - - the case law does not speak to
23 a - - - and nor does Fact Sheet #40 speak to a requirement
24 for having a reason.

25 And the most benign example of a reason is in

1 Century Operating, which was - - - you know, we're giving
2 you a concession for - - - based on the economic market.
3 Is that - - - is that a reason, or are we now going to say
4 that if that's the reason you put in your riders, that you
5 can look to see if the economic conditions really were
6 sufficient to justify the concession?

7 And the last point I want to make, because I know
8 my light - - -

9 CHIEF JUDGE WILSON: Yeah. And I have a question
10 for you, too. But go ahead - - -

11 MS. RIEGEL: Okay.

12 CHIEF JUDGE WILSON: - - - make your last point.

13 MS. RIEGEL: The other point about this
14 concession argument is they spill a lot of ink about this,
15 again, being a scheme and an attempt to evade the
16 restriction on revoking preferential rents, and this is
17 when I spoke about a crystal ball. This concession was
18 given two years before the statute changed to prevent
19 revocation of preferential rents. So to suggest that my
20 client was trying to evade a law two years before it
21 existed, and on that basis, this court should find that
22 there should be a net effect of rent, I think is a
23 monstrous stretch and certainly not supported by anything
24 in the record.

25 CHIEF JUDGE WILSON: So I'm struggling with an

1 answer you gave, or I think you gave in response to part of
2 Judge Garcia's hypothetical where there's a 3,000 - - - the
3 1,000 is increased to 3, the 3 is increased to 6. The
4 tenant leaves. And he asked, then could you charge the
5 6,000? And I thought your answer was at that point the new
6 tenant could sue.

7 MS. RIEGEL: If - - - I - - - I believe - - -

8 CHIEF JUDGE WILSON: Yeah.

9 MS. RIEGEL: - - - that hypothetically - - -

10 CHIEF JUDGE WILSON: Yeah.

11 MS. RIEGEL: - - - if in 2020 - - -

12 CHIEF JUDGE WILSON: Yeah.

13 MS. RIEGEL: - - - the rent jumped from \$3,000 to
14 \$6,000 - - - that - - -

15 CHIEF JUDGE WILSON: Right. And six was what
16 would have been allowed using the - - - the higher figure.
17 Yeah.

18 MS. RIEGEL: That jump - - -

19 CHIEF JUDGE WILSON: Yeah.

20 MS. RIEGEL: - - - is susceptible to challenge.

21 CHIEF JUDGE WILSON: How?

22 MS. RIEGEL: Because that tenant has a claim
23 based on registrations. There would be a registration
24 statement in 2020, right? That would show a jump from
25 3,000 to \$6,000. I don't think you could go backwards to

1 the 2007 registrations and argue all the way back to 2007.
2 But I think you'd have a discrete claim starting with that
3 registration and that jump in the rent.

4 CHIEF JUDGE WILSON: So that your allowable rent
5 - - - if the prior rent had been 3,000, and let's say the -
6 - - your allowable increase was two percent, you'd be stuck
7 with that two percent. You couldn't go up to the - - - the
8 6,000. Is that what you're saying?

9 MS. RIEGEL: Well, I think it depends at what
10 point in time in the legislative scheme we're talking
11 about. Could there have been a vacancy allowance? You
12 know? So I think it - - - it would depend on - - - but I
13 think - - - I think if you took more than what was
14 permissible -

15 CHIEF JUDGE WILSON: Based on the prior year's
16 rent and whatever allowances were permitted.

17 JUDGE CANNATARO: But the point is it has nothing
18 to do with the incorrect initial registration. It's just
19 based on a cap - - -

20 MS. RIEGEL: It has to do with - - -

21 JUDGE CANNATARO: - - - on how much you can - - -

22 MS. RIEGEL: Right. It has to do with - - -

23 JUDGE CANNATARO: - - - charge on a vacancy?

24 MS. RIEGEL: Yes. It has to do with that
25 discrete set of conduct.

1 JUDGE GARCIA: But if the original 3 - - - if the
2 3,000 at that point is a preferential rent, why couldn't
3 you increase it to 6? Because that would be your argument,
4 right? We were charging you 3,000 but that's a
5 preferential rent. So now you're getting charged what you
6 should be, you can't go back any further. That's the
7 market rent. So it's a jump, but we can do it.

8 MS. RIEGEL: I suppose - - - look, I suppose you
9 could. I would expect a challenge on that.

10 CHIEF JUDGE WILSON: And could they go back and
11 look at the old rent statements then?

12 MS. RIEGEL: I don't think so. Because the
13 statute of limitations had run.

14 JUDGE GARCIA: Okay. That's what I would guess.

15 CHIEF JUDGE WILSON: Thank you.

16 MS. RIEGEL: I'm consistent, if nothing else,
17 Your Honor.

18 CHIEF JUDGE WILSON: And we're going to take a
19 five-minute. Oh. I'm sorry. Let's go to rebuttal.

20 MR. SACHAR: If you - - - Judge, if you're - - -

21 CHIEF JUDGE WILSON: Afterwards.

22 MR. SACHAR: - - - you're in charge.

23 CHIEF JUDGE WILSON: No, no, no. Yeah.

24 MR. SACHAR: Okay. I'll tell you what. I'll
25 talk quickly then. Three quick points.

1 CHIEF JUDGE WILSON: Take your time.

2 MR. SACHAR: My colleague mentioned that there
3 must be some deception, and she accused me of relitigating
4 Regina. I'm not litigating Regina. We're relitigating
5 Thornton. In Thornton there was no deception. Everybody
6 knew what they were doing.

7 Second point. My colleague made a lot of mention
8 about vacancy increases. Hey, we reconstructed, we take
9 the vacancy increase. We don't know what terms and
10 conditions that first renewal were. In fact, we know from
11 all the other registrations in the building for people who
12 did renew, they were charged market rate increases. And
13 vacating in response to a market rate increase is certainly
14 rational.

15 So they're claiming we get the benefit of pulling
16 these preferential rents.

17 JUDGE SINGAS: But why don't they get that
18 benefit? If the landlord didn't increase or didn't set a
19 rate for a vacant apartment, that's impermissible under the
20 law. Like, why don't you have to demonstrate that? Like,
21 why isn't that fatal to your fraudulent scheme?

22 MR. SACHAR: It isn't fatal because you know, for
23 a motion to dismiss, it would not be fatal. If we go in
24 and every one of these tenants, they get a no market rate
25 increase, they increased them to two percent or the four or

1 whatever it is. Okay. Then that's an issue.

2 But we don't know that. And you wouldn't know
3 that here. All we have to do here is the colorable claim
4 of fraud. And that's what we got. Because - - -

5 JUDGE CANNATARO: And - - - and that's based
6 simply on the rent registration?

7 MR. SACHAR: Correct.

8 JUDGE CANNATARO: So that's all it takes to
9 survive a motion to dismiss?

10 MR. SACHAR: Is showing 387 illegal registrations
11 that the landlord then utilized to take market rate
12 increases? Yeah.

13 JUDGE CANNATARO: Uh-huh.

14 JUDGE GARCIA: Can you address the scheme to
15 deregulate?

16 MR. SACHAR: Absolutely. So - - - and in fact,
17 it was Justice Troutman who mentioned this in a decision a
18 couple of months ago. We give the legislation the broadest
19 possible meaning to enact the legislature's intent. And
20 fraudulent scheme to deregulate, if they had said that it's
21 only if you give them a free market lease, and you - - - if
22 you put rent stabilized on the top of it, you register it,
23 you can do whatever you want.

24 Well, the legislature wouldn't have solved the
25 Burrows' problem. It would be - - - that would encourage

1 landlords to file false registrations, which is the whole
2 point of Thornton.

3 JUDGE GARCIA: Is - - - and I may just have this
4 wrong. But at the time this was done, in the beginning,
5 was there a possibility you could get luxury decontrol?

6 MR. SACHAR: No. This - - - so this is 421-a,
7 right? There is no luxury decontrol in 421-a.

8 JUDGE CANNATARO: And they will decontrol at some
9 point?

10 MR. SACHAR: Yes.

11 JUDGE CANNATARO: When the 421-a expires?

12 MR. SACHAR: Correct. So the whole point is to
13 get as much - - - extract as much as you can. And that
14 gets us back to the argument she said there's nothing
15 egregious here. There sure is. They took sixty million
16 dollars from the people of the City of New York, and they
17 did not follow the law once.

18 Unless there's any other questions - - -

19 JUDGE RIVERA: Would it - - - did any tenant pay
20 more than they should have?

21 MR. SACHAR: Yes. Every - - -

22 JUDGE RIVERA: If they had followed the law? I
23 think that's the point.

24 MR. SACHAR: I'm sorry. If they had followed the
25 law, would it? No. If they followed the law, that's fine.

1 That - - -

2 JUDGE RIVERA: No, no, no. But did the tenants
3 who paid rent, did they actually pay more than they would
4 have if they had properly filed the documents?

5 MR. SACHAR: We don't know that because we don't
6 know the circumstances on which those tenants vacated.
7 Right? Because you don't know - - - once they start doing
8 this, right? And they're taking market rate increases - -
9 -

10 CHIEF JUDGE WILSON: So that's kind of funny to
11 say. I've got a damages action, but I don't know if I have
12 any damages.

13 MR. SACHAR: You at least have the - - - not
14 until you get into this. This is why we have like the RSL
15 code that says you go back to that last registration,
16 right? Because it's the fruit of the poisonous tree.
17 Everything has been tainted by this initial registration
18 scheme. So - - -

19 JUDGE RIVERA: I thought the pleading was we
20 think we are damaged.

21 MR. SACHAR: We are. Because - - -

22 JUDGE RIVERA: And we should be able to get
23 discovery to prove it?

24 MR. SACHAR: Right. Well, no, no, no, let's be
25 careful here. There's - - - once we show the scheme,



1 right?

2 JUDGE RIVERA: Yeah.

3 MR. SACHAR: Then we have two - - - I'm going to
4 call them statutory formulas, but one is from the rent
5 stabilization law. One is from the rent stabilization
6 code. One says you freeze the rent at the first rent.
7 That's RSL 26-517(e). And we know once we do that that our
8 people were paying more than that. And the other is the
9 default formula that you use, and you look at the least
10 expensive rent stabilized apartment. So you don't - - -
11 you don't ever do this recalculation. You use one of those
12 two formulas.

13 JUDGE CANNATARO: So you get damages - - - if you
14 establish the fraudulent scheme, you get damages no matter
15 what in this case.

16 MR. SACHAR: Exactly, right.

17 JUDGE CANNATARO: So the fact that your adversary
18 argued that we were only basing rent increases off the
19 preferential rent, and no one was really harmed here, is
20 beside the point, I guess?

21 MR. SACHAR: Exactly.

22 JUDGE RIVERA: Oh, I'm sorry. Then why did you
23 say, "we don't know", when you're asked are there damages?
24 I thought you said we don't know.

25 MR. SACHAR: We don't know because it - - - it



1 stem from that - - - we know. I'm sorry. I mis-answered
2 the question. Let me clarify. We don't know what the rent
3 would be today had they followed the law the entire time.

4 JUDGE RIVERA: I see.

5 JUDGE GARCIA: Because you're not using the
6 preferential rent as - - -

7 JUDGE RIVERA: I got it.

8 JUDGE GARCIA: - - - your baseline, right?

9 JUDGE RIVERA: Understood.

10 MR. SACHAR: Okay. Thank you very much.

11 CHIEF JUDGE WILSON: Thank you.

12 (Court is adjourned)

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Burrows v. 75-25 153rd Street, No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 16, 2025

