APL-2020-00127

To be argued by:
DIANA LAWLESS
15 minutes requested

Court of Appeals
State of New York

In the Matter of

ROBINSON CALLEN as Trustee of CASPER R. CALLEN TRUST c/o SALON REALTY CORPORATION,

Petitioner-Respondent,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

NEW YORK CITY LOFT BOARD,

Respondent-Appellant,

(caption continued on inside cover)

REPLY BRIEF

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April 2, 2021

(caption continued from cover)

and

RICHARD FISCINA, LUKE WEINSTOCK, ZENIA DE LA CRUZ, AND MARIA THERESA TOTENGCO,

Respondents-Respondents.

In the Matter of the Application of

RICHARD FISCINA,

Petitioner-Respondent,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

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NEW YORK CITY LOFT BOARD,

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and

ROBINSON CALLEN AS TRUSTEE OF CASPER R CALLEN TRUST, LUKE WEINSTOCK, ZENIA DE LA CRUZ, and MARIA THERESA TOTENGCO,

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PRELIMINARY STATEMENT

In their briefs, respondents do everything but meaningfully address the core issues. Most importantly, they fail to engage with the only question before this Court: whether the Loft Board, having rationally rejected the settlement agreement as against public policy, was required to accept the withdrawal of the tenants' coverage application, thereby leaving them to occupy the units illegally. Since accepting the withdrawal would have blessed respondents' overt efforts to evade the Loft Law, the Board rationally rejected it.

Respondents' efforts to skirt the issues are as blatant as their attempt to avoid the Loft Law. They launch a series of spurious attacks on the rationality of the Board's decision to reject their illegal settlement agreement. For example, while respondents accuse the Board of taking inconsistent positions on the validity of proposed settlement agreements, they manage to show only that for the past nine years, the Board has consistently rejected settlement agreements like theirs.

But respondents' chief canard is that the Board should have left them free to pursue rent stabilization outside the Loft Law. While it's true that there are other paths to the rent stabilization of buildings illegally occupied by residential tenants, only the Loft Law legalizes those tenancies in the interim. Respondents do not and cannot defend the First Department's erroneous holding that the Board was required to abet respondents' plan to perpetuate their illegal living arrangement outside the Loft Law—and outside the Board's oversight.

At its core, respondents' complaint is about the inconvenience of being required to follow the law. But it is up to the Legislature to choose which policies to prioritize when it drafts laws. And here it has chosen the administrative framework of the Loft Law to regulate residential use of commercial buildings. Respondents do not hold a veto over that legislative choice.

ARGUMENT

RESPONDENTS CANNOT JUSTIFY REQUIRING THE LOFT BOARD TO ABET AN ILLEGAL OCCUPANCY

A. It is pointless for respondents to attack the Board's decision to reject the settlement agreement.

Respondents do not dispute our jurisdictional point: without a cross-appeal, the First Department's holding that the Board properly rejected the settlement agreement is not at issue here (App. Br. 24). Ignoring that bar, respondents argue that the Board's rejection of the agreement was irrational and unauthorized. Even assuming jurisdiction, this Court should reject their arguments.

Guided but not bound by common-law contract principles, the Board exercised its authority under 29 RCNY § 1-06(j)(5) to review the settlement agreement and determine its compatibility with the Loft Law (*see* App. Br. 24–35). In a rational exercise of its discretion, the Board rejected the agreement as (1) devised to perpetuate an illegal living arrangement, outside the Loft Law and without the Board's oversight; and (2) resting upon promises to waive the Loft Law, a statutory protection designed to benefit

the public (*see id.*). None of respondents' arguments cast doubt on the rationality of the Board's decision to reject a settlement agreement that violates public policy, let alone on the authority of the Board to review the agreement in the first place.

1. Respondents cannot overcome the rationality of the Board's decision to reject an agreement designed to formalize an illegal living arrangement.

The settlement agreement contemplated continued residential occupancy of the building without a residential certificate of occupancy, without a pending Loft Law application, and without Loft Law coverage. Under MDL §§ 283 and 301(1), that living arrangement is "illegal pure and simple," as this Court recognized in *Chazon, LLC v. Maugenest*, 19 N.Y.3d 410, 413 (2012), so the Board acted rationally by rejecting the settlement agreement (App. Br. 28–31).[1]

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[1] As the tenants concede, MDL § 283 is interpreted to allow residential occupancy during the pendency of a coverage application, so the length of time it takes to resolve a coverage application does not "prolong[]" an illegal residential occupancy (*see* Brief for Respondents Weinstock, de la Cruz, and Totengco ("Tenants' Br.") 31–32). And while there are a handful of other exceptions to the residential-certificate-of-occupancy requirement (*see id.* 2, 29–30), only one is applicable here: the Loft Law.

Respondents have no real answer to our illegality point, so they trivialize this Court's precedent. While Callen attempts to limit *Chazon* to its facts (Brief for Respondent Callen ("Callen Br.") 31), he cannot explain why inconsequential factual distinctions (in *Chazon*, the landlord sought to eject tenants for non-payment of rent) undermine the rule that, without Loft Law coverage or a residential certificate of occupancy, residential occupancy of a commercial building is simply illegal.

Respondents also attempt to trivialize the illegality of the living arrangement proposed in the settlement agreement. They argue that without evidence of safety hazards, the Board should have ignored the "technical" illegality of their arrangement (Callen Br. 6, 27, 30–32, 36–37; Tenants' Br. 24, 27–33). But the absence of safety violations is hardly determinative when the City lacks the resources to cite and pursue every safety violation in over one million buildings. *See Matter of N.Y.C. Yacht Club v. N.Y.C. Dep't of Bldgs.*, 172 A.D.3d 606 (1st Dep't 2019) (recognizing City Department of Building's discretion not to issue notice of violation). And regardless of how safe the building may

be for illegal residential occupancy, the Board has no obligation to endorse an agreement to sidestep and violate laws enacted by the Legislature. *See Chazon*, 19 N.Y.3d at 413.

Besides, living outside the law has real-world costs. As respondents recognized in their settlement agreement (R120), their illegal occupancy could trigger a vacate order at any time until the building obtains a residential certificate of occupancy. And the tenants' new strategy—to breach the agreement and decline to pay rent if Callen fails to obtain a residential certificate of occupancy (Tenants' Br. 32–33)—would add the risk of eviction. Without Loft Law protection or an independent legal right to residential occupancy, the tenants' failure to pay rent would invite an eviction proceeding. With Loft Law protection, however, the tenants would not need to worry about losing their homes if they withheld rent in response to Callen's failure to meet its Loft Law obligations, including the obligation to obtain a residential certificate of occupancy, on schedule. *See Chazon,* 19 N.Y.3d at 415–16; MDL §§ 285(1), 302(1)(b).

Contrary to respondents' further argument (Callen Br. 24, 30, 32; Tenants' Br. 13, 33–34), neither an agreement to pursue rent stabilization, nor rent stabilization itself, legalizes an illegal residential occupancy. Where a building lacks a residential certificate of occupancy, only Loft Law coverage can legalize the residential occupancy on an interim basis while work is done toward obtaining one. *See Chazon*, 19 N.Y.3d at 413.

Trying a different tack, the tenants argue that it was irrational for the Board to reject the proposed agreement here, having supposedly accepted other agreements that provide for illegal residential occupancy (Tenants' Br. 13, 22–24). But they are mistaken. All their cited cases show is that, for the past nine years, the Board has consistently rejected settlement agreements that call for residential occupancy without a residential certificate of occupancy or Loft Law coverage.[2] The Board's consistent

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[2] In *Matter of Frankel*, Loft Bd. Order No. 3522 (Sept. 17, 2009), the settled application was for non-compliance with legalization, rather than for Loft Law coverage. Other orders in the case make clear that a Loft-Law-protected tenant "sold her rights" as a term of the settlement agreement, which—as further discussed below—she was free to do under MDL § 286(6) and (12).

approach in similar cases only highlights the rationality of its determination here.

2. While established Loft Law rights can be sold or abandoned, the Board rationally rejected an agreement to waive the Loft Law.

In addition to directly promoting an illegality, the proposed settlement agreement more broadly violated public policy because the tenants agreed to waive the Loft Law, including their rights to make and pursue a coverage application, which further justified the Board's decision to reject it (*see* App. Br. 32–34). Respondents do not dispute the public policy animating the Loft Law: to benefit the public and the residential occupants of commercial buildings by creating a procedure for those buildings to become safe and legal for residential occupancy. MDL § 280; *Chazon*, 19 N.Y.3d at 413, *see generally* Bill Jacket, L. 1982, ch. 349. But they wrongly claim that this agreement did not offend public policy because the Loft Law is freely subject to waiver (Tenants' Br. 14–17).

The Loft Law provisions respondents point to—MDL §§ 286(6) and (12)—only confirm the rationality of the Board's

determination here. Those provisions authorize a residential tenant to execute a limited waiver of specified Loft Law benefits—mainly, the right to rent regulation—by selling them to the landlord. But no similar provision authorizes the wholesale evasion of the statute being attempted here. And the express limits placed on what is waivable under §§ 286(6) and (12) underscore that the Legislature did not intend that the Loft Law's legalization framework would be optional. *See Morales v. Cnty. of Nassau*, 94 N.Y.2d 218, 224 (1999) (discussing the "standard canon" of *expressio unius est exlusio alterius*).

In short, §§ 286(6) and (12) allow tenants covered by the Loft Law to sell the physical improvements they have made, or their right to rent-stabilized status, to the owner. The opportunity to execute that limited waiver—commonly known as a "sale of rights"—encourages residential occupants of commercial buildings to seek Loft Law coverage and, if their units obtain coverage, allows them to recoup expenditures they have made to improve their units for residential occupancy.

When a Loft Law tenant engages in a sale of rights, the Loft Law's rent stabilization provisions no longer apply to their unit. But all other Loft Law requirements continue to apply until the owner obtains a residential certificate of occupancy. *See Matter of Fievet v. N.Y.C. Loft Bd.*, 150 A.D.3d 402, 403 (1st Dep't 2017). Thus, the unit remains under the Board's regulatory oversight and subject to the Loft Law's interim legalization provisions. Here, by contrast, respondents propose to waive the entire public framework of the Loft Law—which is nowhere authorized in the text and would defeat the core statutory design.

Next, the tenants argue that the Board should have allowed them to waive the Loft Law framework because, under 29 RCNY § 2-10(f), a Loft Law tenant can "waive" their established Loft Law rights in a unit by dying, or otherwise permanently abandoning the unit (Tenants' Br. 15–16). But that provision just shows that a tenant's Loft Law rights remain enforceable until the tenancy expires; it has no bearing on the situation where the tenant continues to occupy the unit in question, as is true here.

The tenants fare no better in attempting to distinguish the cases we cited for the proposition that the Loft Law is non-waivable (App. Br. 33–34). Contrary to their argument (Tenants' Br. 17), *Matter of Nur Ashki Jerrahi Community v. New York City Loft Board*, 80 A.D.3d 323, 327 (1st Dep't 2010), confirms the Board's point. There, the First Department held that while specific Loft Law rights may be sold or abandoned, as discussed above, the Loft Law framework is not otherwise "subject to waiver by the tenant." The Second Department reiterated the framework's non-waivability in *Matter of Dom Ben Realty v. New York City Loft Board*, 177 A.D.3d 731, 735–36 (2d Dep't 2019), a case virtually identical to this one that the tenants don't even try to distinguish.

Just as futile are the tenants' efforts to find legal support for their view that illegal residential occupants of commercial buildings may waive the Loft Law (Tenants' Br. 15–16). In *Matter of Zabari v. New York City Loft Board*, 245 A.D.2d 200 (1st Dep't 1997), the First Department merely referenced post-coverage sales and abandonments of Loft Law rights. *See also Matter of Jo-Fra*

Properties, Inc., 27 A.D.3d 298, 299 (1st Dep't 2006) (recognizing that MDL § 286(12) permits sale of Loft Law rights).

Similarly unavailing is the tenants' effort (Tenants' Br. 16) to tease a general waivability principle out of *Lusker v. City of New York*, 194 A.D.2d 487, 487 (1st Dep't 1993). There, the First Department *rejected* the argument that a tenant who remained living in a unit had waived her right to file a Loft Law coverage application by entering into an agreement with her landlord to stop using her unit residentially.[3] Had the tenant in *Lusker* actually moved out before the Board resolved her coverage application, she would have forfeited her right to a coverage determination. But instead she continued to live in the unit. And here, of course, the tenants tried to waive the Loft Law while remaining (illegally) in the building.

It is of no moment that the proposed settlement agreement contemplated a conversion to rent stabilization and a resolution of the Loft Law coverage matter that would avoid both the risk of a

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[3] *See Matter of Zelmanoff*, Loft Bd. Order No. 939 (Aug. 23, 1989).

negative coverage determination and the supposed burdens of a positive one (*see* Callen Br. 4–6, 22–25; Tenants' Br. 14, 17–18, 29, 31–33). An agreement to waive the Loft Law violates public policy no matter what its putative benefits, and no matter how much the parties to the agreement would prefer to be governed by a regulatory scheme different from that adopted by the Legislature.

3. The tenants' attempt to withdraw their coverage application did not deprive the Board of jurisdiction to review the settlement agreement.

Finally, the tenants argue that once they sought to withdraw their coverage application, the application became "moot," thus depriving the Loft Board of jurisdiction to review the settlement agreement (Tenants' Br. 18–19). That legally unsupported argument makes no sense. By filing their coverage application, the tenants invoked the Board's jurisdiction. The Board's jurisdiction extended to its review of settlement proposals, 29 RCNY § 1-06(j)(5), which in this case included an agreement by the tenants to withdraw their coverage application (R114). Besides, nothing in

the Loft Law or its implementing regulations requires the Board to accept the withdrawal of a coverage application.

B. Respondents have not shown that it was irrational for the Board, having denied the settlement agreement, to reject the withdrawal of the coverage application.

1. Respondents make no attempt to defend the First Department's interference with the Board's delegated authority.

Having rationally rejected the settlement agreement, the Board rationally declined to allow the tenants to achieve the same goal—continued illegal residential occupancy—by other means: the withdrawal of their coverage application (*see* App. Br. 35–43). Once they invoked the Board's jurisdiction and announced their intention to evade the Loft Law, the tenants could not force the Board to approve their scheme (*see id.* at 42).

Contrary to logic, the First Department required the Board to accept the withdrawal, and thus bless the illegal residential occupancy (R738). In doing so, the court undermined the Board's authority to review settlement agreements, *see* 29 RCNY § 1-06(j)(5), and to superintend the complex and potentially dangerous

conversion process (*see* App. Br. 35–43). Even worse, the court effectively ordered the Board to be complicit in respondents' scheme to evade the law the Board is charged to administer (*id.*).

The First Department's reasoning is indefensible. In their 70 pages of briefing, respondents do not even attempt to defend it.

2. The purported availability of rent stabilization has no bearing on the rationality of the Board's decision.

Although the First Department found it dispositive, the potential availability of rent stabilization did not require the Board to allow the tenants to withdraw the coverage application. This building's purported eligibility for rent stabilization did not cure the illegality of ongoing residential occupancy without a residential certificate of occupancy. *See Chazon*, 19 N.Y.3d at 410; *accord Dom Ben*, 177 A.D.3d at 439 (following *Chazon*).

As respondents note, the Loft Law is not the only path to rent stabilization (Callen Br. 34–36; Tenants' Br. 2, 5, 8–9, 25–28). But the issue here is legal residential occupancy, not rent stabilization. Respondents have failed to show that any path other than the Loft Law legalizes an otherwise illegal residential

occupancy during the interim process through which a certificate of occupancy is pursued.

The tenants cannot use *Tan Holding Corp. v. Wallace*, 187 Misc. 2d 687 (App. Term, 1st Dep't 2001), to promote *de facto* rent stabilization as a Loft Law alternative (Tenants' Br. at 26–27, 33).[4] As the court recognized there, *de facto* rent stabilization at best provides rent stabilization for units that are or may become legal for residential occupancy; it does not legalize an illegal occupancy. 187 Misc. 2d at 688–69. Legalization requires either a residential certificate of occupancy, MDL § 301(1), or Loft Law protection during the period until a residential certificate of occupancy is obtained. MDL § 283; *see* 29 RCNY § 2-08(i) (*de facto* rent stabilization does not provide a Loft Law exemption).[5]

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[4] Under the judicially created doctrine of *de facto* rent stabilization, illegal residential occupancy is not a bar to rent stabilization if the unit is capable of becoming legalized for residential use and the owner knew of or acquiesced in the tenant's conversion to residential use. *See Acevedo v. Piano Bldg. LLC*, 70 A.D.3d 124, 130 (1st Dep't 2009); *Caldwell v. American Package Co., Inc.*, 57 A.D.3d 15, 22 (2d Dep't 2008).

[5] Contrary to the tenants' suggestion (Tenants' Br. 9), the front and rear portions of Callen's building are not "legally one building." Only the front building has a residential certificate of occupancy (R113).

Callen concedes that *de facto* rent stabilization provides only *rent regulation*, as opposed to legalized residential occupancy (Callen Br. 26–30). While his cited lower court cases purportedly allow rent stabilization for "illegal apartments" (*id.*), none of them bless the illegal residential use of commercial premises or treat rent stabilization as a substitute for legalization.

No friend of the Loft Law, Callen casts the tenants' attempt to withdraw their coverage application as a "proper" and "wise" choice to pursue rent stabilization outside the Loft Law, whose compliance burdens Callen disparages (*id.* at 24, 32–33). But once the tenants brought their illegal living arrangement to the Board's attention, they could not force the Board to honor their "choice" to evade the Loft Law and continue an illegal residential occupancy.

Like the First Department, respondents argue that the Board should have disregarded the illegality of the residential occupancy because the building might qualify for rent stabilization outside the Loft Law (Callen Br. 34–36; Tenants' Br. 2, 5, 8–9, 25–28). Their fixation on rent stabilization leads the tenants to ask this Court to resolve a split between the First and Second

Departments on the doctrine of *de facto* rent stabilization (Tenants' Br. 5, 8–9, 28). But the issue here is legalization, not rent stabilization, so unresolved questions about *de facto* rent stabilization are beside the point. If rent stabilization could legalize residential use in commercial buildings, "significant portions of the Loft Law would have been unnecessary." *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 493 (2004).

Because the withdrawal of the tenants' coverage application while the tenants remained living in the units would have perpetuated an illegal residential occupancy, the Board rationally rejected it, regardless of whether the tenants' units might qualify for rent stabilization outside the Loft Law.

C. Respondents have not shown that the Board exceeded its authority by remanding the coverage application for resolution.

Having disallowed the withdrawal of the coverage application, the Board took the next logical step: remanding the coverage application to OATH, under 29 RCNY § 1-06(j)(5), for further adjudication (see App. Br. 36–37). Respondents have failed to show that the Board acted irrationally or beyond its authority.

Respondents insist that the Board cannot "force" applicants to prosecute coverage applications (Callen Br. 21–22; Tenants' Br. 19, 33). But the Board's remand does no such thing. If respondents would prefer to avoid the adjudication of the coverage application, they have other options: either the tenants could vacate the building until Callen obtains a residential certificate of occupancy, or Callen could register the building with the Board (*see* App. Br. 42). Respondents' apparent unwillingness to embrace either lawful option does not restrict the Board's remand authority.

Despite their complaints about the Board "forcing" them to litigate the coverage application, the tenants float the possibility of skipping the OATH hearing held on remand, which in their view would "require[]" the dismissal of their coverage application, at least after some number of missed hearings (Tenants' Br. 20). For two reasons, the tenants' threat of default does nothing to undermine the rationality of the Board's decision to remand the coverage application for further adjudication.

First, the Board is entitled to believe that parties—or at least some parties—will wish to follow the law. So, while some

tenants might first opt to resolve a matter outside of the Loft Law, whether of their own volition or because of landlord pressure, they may thereafter recognize the need to pursue the Loft Law process once the Board rejects the attempt to evade the statute as unlawful and against public policy. These particular tenants' insistence that they will default on their coverage application, even if this Court confirms the Board's determination, does not require the Board to give in to cynicism as a matter of policy.

Second, the tenants' argument ignores the difference between recognizing practical limits to the Board's powers, on the one hand, and compelling the Board to be an instrument in the overt evasion of the statute that it exists to administer, on the other. It may be true that parties can engage in gamesmanship that the Board cannot stop—like a tenant's deliberate procurement of dismissal of a coverage application through repeated non-appearance. But that does not mean the only rational step is for the Board to sign off on withdrawal of a coverage application, rather than remand the application for further adjudication. The difference is that endorsing withdrawal

would place the Board's imprimatur on parties' open efforts to evade the Loft Law and continue illegal occupancy under a rejected settlement. It is at least rational for the Board to decline such an act of self-abnegation.

Trying another route, Callen argues that the Board is improperly seeking to assert jurisdiction over units that may not be subject to the Loft Law (Callen Br. 21, 32). But the Board is only asserting jurisdiction over the application to determine whether the tenants' units are covered by the Loft Law. Disputed coverage applications inherently involve the risk that the Board will find that tenants are not protected, or units are not covered, after weighing the evidence and arguments of all parties, such as the arguments Callen made in opposition to the coverage application before respondents executed the settlement agreement (R107–09). Assessing arguments for and against coverage is an important part of how the Board carries out its threshold duty of evaluating whether rental units are subject to the Loft Law.

Finally, respondents cannot escape the Board's jurisdiction by arguing that under *Blackgold Realty Corp. v. Milne*, 119 A.D.2d

512 (1st Dep't 1986), *aff'd on other grounds*, 69 N.Y.2d 719 (1987), buildings registered as rent-stabilized with the State Division of Housing and Community Renewal are exempt from the Loft Law (Callen Br. 36–37; Tenants' Br. 5, 18, 22). In *Blackgold*, the First Department construed the Loft Law as inapplicable to tenancies whose "lawful, rent-controlled status" had been established both administratively and judicially before the Loft Law took effect in 1982. 119 A.D.2d at 515. There is no evidence that the tenancies at issue here fall within that narrow exemption. In any event, the validity of the exemption remains an open question. On appeal there, this Court explicitly declined to determine whether "the Loft Law may be applied to rent-controlled buildings." *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 721 (1987).

Having rationally rejected the proposed settlement agreement and the tenants' related bid to withdraw their coverage application, the Board properly exercised its authority by remanding the application to OATH for further proceedings. Respondents' arguments to the contrary add up to nothing more than distractions.

CONCLUSION

This Court should reverse the Appellate Division's order to the extent it requires the Loft Board to accept the withdrawal of the tenants' coverage application.

Dated: New York, NY
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 4,072 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

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