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COURT OF APPEALS

STATE OF NEW YORK

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN  
THE CITY OF NEW YORK,

Appellant,

-against-

No. 40

D'AGOSTINO SUPERMARKETS, INC.,

Respondent.  
-----

20 Eagle Street  
Albany, New York  
October 15, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 40, Trustees of  
3 Columbia University v. D'Agostino Supermarkets, Inc.

4 Let's give counsel a moment to exit the  
5 courtroom.

6 (Pause)

7 CHIEF JUDGE DIFIORE: Okay.

8 MR. KRINICK: Good morning.

9 CHIEF JUDGE DIFIORE: Good morning, counsel.

10 MR. KRINICK: May I reserve two - - - three  
11 minutes for rebuttal, please, Your Honor?

12 CHIEF JUDGE DIFIORE: Three minutes, did you say?

13 MR. KRINICK: Yes, please.

14 CHIEF JUDGE DIFIORE: Yes, sir.

15 MR. KRINICK: May it please the court. My name  
16 is Evan Krinick, and I'm here today on behalf of Columbia  
17 University.

18 Columbia is entitled to the benefit of its  
19 bargain for three separate reasons. First, this is an  
20 agreement negotiated by sophisticated parties represented  
21 by counsel.

22 JUDGE RIVERA: Well, the real question is whether  
23 or not the damages that you came up with are a penalty,  
24 given - - -

25 MR. KRINICK: Well, here's why - - -



1 JUDGE RIVERA: - - - given that - - -

2 MR. KRINICK: - - - it's not a penalty.

3 JUDGE RIVERA: - - - given - - - excuse me - - -  
4 given that the focus is the breach of the surrender  
5 agreement. The lease no longer exists; that's been  
6 terminated.

7 MR. KRINICK: The lease has been terminated, but  
8 certain of its terms survived in the - - - in the  
9 settlement or surrender agreement. But here's why it's not  
10 a penalty. A penalty requires proof of one of two things,  
11 either the amount of the actual damages were capable of  
12 precise measurement when the agreement was executed, or  
13 that the sum provided in the agreement was grossly  
14 disproportionate to the actual damages. So we can look at  
15 those one at a time. When we executed the settlement  
16 agreement/surrender agreement - - - I'll just call it the  
17 agreement - - - we did not have a signed, sealed, delivered  
18 executed lease with a new tenant. We didn't know what the  
19 terms of that lease would be. We didn't know the amount of  
20 rent that we'd be charging. We didn't know the amount of -  
21 - -

22 JUDGE RIVERA: But Columbia University owns a lot  
23 of real estate. Certainly you all had a sense of the real  
24 estate market at the time. It's unfathomable to me that  
25 you have no clue as to what's ascertainable. In any event,



1 you came up with some number.

2 MR. KRINICK: Well, again - - -

3 JUDGE RIVERA: The number can't be a penalty so  
4 far afield, right?

5 MR. KRINICK: Well, we'll get to the gross  
6 disproportionate - - -

7 JUDGE RIVERA: Okay.

8 MR. KRINICK: I don't think it's that much  
9 afield, but listen, if anything teaches us this year,  
10 between March 1 or April 1 of this year, one month, you  
11 know, passed and the real estate market changed  
12 dramatically. Until you have a signed lease - - -

13 JUDGE RIVERA: But that's in the - - -

14 MR. KRINICK: - - - you really - - -

15 JUDGE RIVERA: That's in the middle of the  
16 coronavirus. It's sort of not the same situation.

17 MR. KRINICK: Clearly not, Your Honor. My point  
18 is that until you have a signed lease, you can't, with  
19 precise measurement, know the precise amount of your  
20 damages. The parties are allowed to estimate what those  
21 damages might be if they can't precisely measure it at the  
22 time. We didn't know if would take - - -

23 JUDGE WILSON: At the time - - -

24 MR. KRINICK: - - - a month to get a lease - - -

25 JUDGE WILSON: At the time you were pretty close



1 to having the terms worked out with H-Mart, no?

2 MR. KRINICK: Well, the record does not support  
3 that. The record supports that we were showing the  
4 premises to various tenants and that there were tenants  
5 interested. And I'm sure you can infer that we were in  
6 negotiations with the tenant. There's no hearing. There's  
7 no evidence. There's no testimony about that. That's all  
8 inferred from certain emails.

9 But I'm not going to dispute the fact that  
10 Columbia is sophisticated. They weren't waiting for them  
11 to vacate before we looked for tenants. And we were  
12 showing the property to tenants. But a negotiation is a  
13 negotiation. And we did not have a signed lease. And  
14 until we knew how much free rent, how much tenant  
15 improvement dollars, what the rent was going to be, you  
16 can't say, with precise measurement, we knew exactly what  
17 our damages would be. So the court has allowed - - -

18 JUDGE RIVERA: Is that what's required, exact  
19 precision?

20 MR. KRINICK: Precise measurement, I believe, is  
21 the test of this court.

22 JUDGE STEIN: And you wouldn't know that until  
23 the end of the term of the original lease, would you?

24 MR. KRINICK: I think we would - - -

25 JUDGE STEIN: I mean, is it possible to ever know



1           that until - - - until the first lease is - - - is - - -  
2           the term is concluded?

3                     MR. KRINICK: Yes, and here's the - - -

4                     JUDGE STEIN: How?

5                     MR. KRINICK: Here's the way I think - - -

6                     JUDGE STEIN: How do you know that the new tenant  
7           isn't going to - - - you know, isn't going to breach that  
8           lease?

9                     MR. KRINICK: Well, we don't know that, at the  
10          time we execute the settlement agreement, but we do know  
11          that we have an estimate as to what those actual damages  
12          are. We know the estimate equals 1.2 million dollars.

13                    JUDGE STEIN: Okay. So we're talking estimate,  
14          not precise damages.

15                    MR. KRINICK: Right, but what we - - -

16                    JUDGE STEIN: That's my point, okay.

17                    MR. KRINICK: Yeah, but we take the estimate - -  
18          -

19                    JUDGE RIVERA: Well, you certainly could have  
20          chosen not to release them, right?

21                    MR. KRINICK: I'm sorry, Judge?

22                    JUDGE RIVERA: And look - - - you could have  
23          chosen not to release them, not to terminate the lease,  
24          continue to hold them liable for that tenancy until you  
25          found a new tenant. You could have done that. You didn't.



1 You entered a surrender agreement, you've terminated the  
2 lease, and now again, what we have to decide is whether or  
3 not the damages provision you came up with rises to the  
4 level of constituting a penalty.

5 MR. KRINICK: Right, but - - -

6 JUDGE RIVERA: No one, I don't think, is - - -  
7 would be in disagreement that you're entitled to be  
8 properly compensated.

9 MR. KRINICK: The analysis for liquidated  
10 damages, we take the amount of the estimated damages, which  
11 we know, when we fix it at the future rent, is 1.2 million  
12 dollars. And the question is: is that grossly  
13 disproportionate? And the question is: to what? And I  
14 think the Appellate Division applied the wrong benchmark.  
15 They took the discounted amount that we agreed to accept in  
16 this deal and said we have to compare the - - - the  
17 estimated damages to the discounted amount.

18 JUDGE STEIN: You essentially made your  
19 liquidated damages be based on what the damages - - - what  
20 you could have obtained under the lease, right?

21 MR. KRINICK: We made the liquidated damages a  
22 formula at 1.2 million dollars, and we need to compare that  
23 to what our actual damages were. And our actual damages  
24 have nothing to do with the new lease. As soon as the new  
25 lease starts, we're no longer damaged. We've never claimed



1 damages based on the new lease. Our actual damages are the  
2 rent that we agreed to accept and the cost of procuring a  
3 new tenant, the broker's fees, the attorneys' fees, the - -  
4 - the free rent, the tenant improvement dollars. And in  
5 the record, we add that up - - -

6 JUDGE RIVERA: Well, you actually could have had  
7 damages under a new lease, because you might not have  
8 gotten the same rent. I mean, you could have made that  
9 analysis. I understand - - -

10 MR. KRINICK: But we haven't.

11 JUDGE RIVERA: Yeah, I understand you didn't, and  
12 - - -

13 MR. KRINICK: Right.

14 JUDGE RIVERA: - - - and that's not what we're  
15 talking about. But I - - - all right, correct me; perhaps  
16 I've misunderstood the surrender agreement. As I read that  
17 damages provision, what you basically did was you got to  
18 retake the premises, because they surrendered the premises,  
19 so you have the premises back to, as you agree, re-let to a  
20 new tenant. And you were trying, if they breached - - -  
21 they defaulted on the surrender agreement, to then get all  
22 of the rent you would have had if they stayed as your  
23 tenant.

24 MR. KRINICK: Your Honor, I don't - - - I think  
25 that's not our argument, and let me see if I can explain





1           why.

2                   JUDGE RIVERA:  No, I'm just asking you, did I  
3           misread the surrender agreement demand - - - damages - - -

4                   MR. KRINICK:  The surrender agreement would  
5           provide us the damages equal to 1.2 million dollars, which  
6           is the amount of the future rent.

7                   JUDGE RIVERA:  Right, every - - - if they had  
8           stayed - - -

9                   MR. KRINICK:  The question before the court - - -

10                   JUDGE RIVERA:  If they had stayed in possession,  
11           you didn't enter a surrender agreement, that would have  
12           been what you could have gone to court and gotten from  
13           them, because they signed off on a lease, and if they're in  
14           default, they've got to pay it, right?

15                   MR. KRINICK:  Right.  It was a good deal - - -

16                   JUDGE RIVERA:  But you would have had an action.

17                   MR. KRINICK:  - - - for them.

18                   JUDGE RIVERA:  Whether you could collect is  
19           another story.

20                   MR. KRINICK:  Yes.

21                   JUDGE RIVERA:  But so as I understood - - - I  
22           just - - - I'm just trying to clarify.  If I'm wrong, I  
23           want to be corrected.  I understood the damages to get you  
24           all of the rent that they would pay if they had not  
25           surrendered this lease and not returned the premises to



1           you, or let you regain the premises, and you also got the  
2           premises and the opportunity to re-let and the opportunity  
3           to collect rent for the same period that they - - - right,  
4           the damages was imposing rent on them.

5                     MR. KRINICK: The amount - - - I don't - - - the  
6           amount that we're entitled to under the agreement - - -

7                     JUDGE RIVERA: Yeah.

8                     MR. KRINICK: - - - equals the future rent.

9                     JUDGE RIVERA: Yes.

10                    MR. KRINICK: If we had never rented the premises  
11           - - -

12                    JUDGE RIVERA: Right.

13                    MR. KRINICK: - - - then we would have been made  
14           whole.

15                    JUDGE RIVERA: Right.

16                    MR. KRINICK: But if they had not breached, we  
17           took the entire risk of the vacancy. If we did not re-let  
18           the premises, and they did not breach and pay the  
19           discounted amount, then we would have had that as our loss.  
20           We never would have recovered any money. But when they  
21           breached - - -

22                    JUDGE FAHEY: Can I ask you then - - -

23                    JUDGE RIVERA: That's not a surrender agreement.

24                    MR. KRINICK: It's a settlement agreement. They  
25           already had - - -



1 JUDGE RIVERA: No, that's a - - -

2 MR. KRINICK: They're already in default; they  
3 owed us 270,000 dollars. Rather than sue them for that, we  
4 entered into this agreement. We took some risks that we  
5 wouldn't be able to re-let the premises. They took the  
6 risk that if they breached then they were going to be  
7 liable for more damages. That discounted amount is gone.  
8 Once they breach, it's off the table; it's not in the game  
9 anymore. They breached. They don't get the discount - - -  
10 breach and still pay the discount. Who would ever made  
11 that deal? What landlord would ever make that deal ever  
12 again? Oh, we'll give you a discounted amount if you pay  
13 promptly, and if you don't pay promptly, you still - - -

14 JUDGE RIVERA: Well, the landlord - - -

15 MR. KRINICK: - - - just pay the discounted  
16 amount.

17 JUDGE RIVERA: - - - who's going to make that  
18 deal is the landlord who thinks this tenant is going to  
19 default throughout, I can re-let, I can get a better tenant  
20 where I can continue to collect, and I'm going to get a  
21 payout from them for a good amount of money. That's a  
22 landlord who's going to enter that agreement.

23 MR. KRINICK: Well, hindsight tells us it was a  
24 good deal for the landlord. Hindsight tells us they  
25 breached and it was a bad deal for the tenant, but a bad



1 deal does not turn an enforceable agreement - - -

2 JUDGE RIVERA: Yeah, but they - - -

3 MR. KRINICK: - - - into a penalty.

4 JUDGE RIVERA: I'm sorry, aren't they liable for  
5 all of the money that you would have been due under the  
6 surrender agreement if they had not breached? You're  
7 getting all the money you wanted under that surrender  
8 agreement.

9 MR. KRINICK: No.

10 JUDGE RIVERA: You're getting your bargain.

11 MR. KRINICK: We're not - - -

12 JUDGE RIVERA: And you've got the premises.

13 MR. KRINICK: They're not liable anymore for the  
14 back rent that they agreed to pay. They're not liable for  
15 the - - -

16 JUDGE RIVERA: Well, that's the point of  
17 terminating the lease.

18 MR. KRINICK: They're not liable for that,  
19 they're not liable for the attorneys' fees, which they're  
20 liable under the lease. They're not liable for the  
21 broker's fee, which they were liable for under the lease.  
22 Both parties had good and bad here going into the deal.  
23 The date we signed this deal, both sides had benefits, both  
24 sides had risks.

25 But I - - - I go back to the question of gross -



1 - - if I can, Judge, finish this point?

2 CHIEF JUDGE DIFIORE: Yes, please.

3 MR. KRINICK: It's grossly disproportionate. The  
4 1.2 million dollars is the number. It is the future rent,  
5 but that's the number. And the question is: is that  
6 grossly disproportionate to what we were entitled to based  
7 on the breach?

8 JUDGE FAHEY: Can I ask, Judge - - -

9 MR. KRINICK: It's not limited to - - -

10 JUDGE FAHEY: Can I stop you there?

11 MR. KRINICK: Yes.

12 JUDGE FAHEY: Judge, is it all right if I - - -

13 CHIEF JUDGE DIFIORE: Yes, of course.

14 JUDGE FAHEY: I see the red light's on.

15 The Appellate Division decision said that the - -  
16 - the amount claimed was seven-and-a-half times what  
17 Columbia would have received if the surrender agreement had  
18 been fully performed. Do you remember that decision?

19 MR. KRINICK: Yes.

20 JUDGE FAHEY: Comment on it.

21 MR. KRINICK: Well, we're entitled to recover not  
22 just the damages from the surrender agreement, but also the  
23 damages from the breach, from the - - -

24 JUDGE FAHEY: Is that math correct?

25 MR. KRINICK: Excuse me; I'm sorry, Your Honor?



1 JUDGE FAHEY: Is the math correct? It's the  
2 mask; I'm sorry.

3 MR. KRINICK: If you're comparing the amount of  
4 the past rent that was a discounted amount in the  
5 settlement agreement, versus the amount of the 1.2 million  
6 dollars, I believe the math is correct. But my point is  
7 the benchmark that they're making the comparison with is  
8 incorrect. It - - -

9 JUDGE WILSON: A different way to look at that  
10 7.5 times number is that's how good the deal was for  
11 D'Agostino.

12 MR. KRINICK: It would have been, had they paid  
13 the payments - - -

14 JUDGE WILSON: Right.

15 MR. KRINICK: - - - in a timely fashion that they  
16 - - - they were required to do.

17 JUDGE WILSON: Right.

18 MR. KRINICK: But I think the benchmark here - -  
19 - I keep going back to that because the comparison between  
20 the 1.2 million dollars is not the 170,000 dollars they  
21 owe. That's a discounted amount. The comparison is  
22 between that and what we could have sued them for. If we  
23 had walked in - - - this is not the future rent - - - if we  
24 had walked in and said, you know what, we're going to sue  
25 you for the full amount of your damages, and it's - - -



1           it's in the record, and there should be a hearing on it if  
2           there's any dispute as to the numbers. There hasn't been a  
3           hearing on that. But it totals up to 750,000 dollars, what  
4           we could have sued you for. So if you don't breach, pay us  
5           171-, but if you do breach, you don't just pay us 171-.  
6           What's the consequence then of a breach? Then you've got  
7           to pay us our full damages, which would be about 750-,  
8           which is not grossly disproportionate to the 1.2 in the  
9           agreement.

10                       That's why it's not a penalty. The 1.2 in the  
11           agreement is the future rent, and if we had never rented  
12           it, that would have been equal to our - - - our future  
13           damages. But the question is not whether our damages are  
14           1.2 - - -

15                       JUDGE RIVERA: You're forgetting in that analysis  
16           that you got - - - you got also the premises that you could  
17           re-let, and you seem to not want to recognize that in this  
18           argument.

19                       MR. KRINICK: Well, hindsight - - -

20                       JUDGE RIVERA: But that's your big benefit, that  
21           you got the property back and you could re-let it.

22                       MR. KRINICK: Judge, it turned out to be a  
23           benefit; I'm not going to dispute that. But at the time we  
24           signed the agreement, at the end of May, it was a risk. It  
25           was a risk we were willing to take. A smart landlord



1 obviously would take that risk. But we can't say with  
2 certainty that we were going to re-rent.

3 JUDGE RIVERA: It's hard to see that as a risk  
4 considering the choice property we're talking about.

5 MR. KRINICK: Well, I think it's a - - - it's a  
6 risk of vacancy. But the tenant got benefits too. They  
7 walked away from 1.2 million dollars of potential  
8 liability, got to pay 260,000 dollars that they already  
9 owed us. They have to have some consequences.

10 JUDGE RIVERA: Sure. The most compelling deal is  
11 the one where both sides see a value to it. I don't  
12 disagree. You're right.

13 MR. KRINICK: But there has to be consequences to  
14 their breach. The Appellate Division said that's what you  
15 agreed to accept; now you've got to accept it with  
16 interest. We're not a bank. We didn't make a loan. That  
17 wasn't the deal we made. Pay us whenever you want. What  
18 if they'd paid us two years later? Would that be okay?  
19 Here they paid us six months later. Could they have paid  
20 us three years later and just added interest? That's - - -  
21 that's not the deal we made. My point is the courts should  
22 not be interfering in this situation. This is a  
23 sophisticated party who has made a deal that they both  
24 thought was in their best interest. There was a settlement  
25 of a potential litigation. There was a settlement of a





1 lease obligation. This court ought to back off and let the  
2 parties manage their own affairs, settle their litigation,  
3 come to a fair agreement that they both sign, and should  
4 not be stepping in to reset the parties' deal.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. KRINICK: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. LEDERMAN: May it please the court. Bruce H.  
9 Lederman for the respondent, D'Agostino Supermarkets.

10 Before I get to the remarks I prepared, I want to  
11 follow up on what Judge Rivera pointed out. There's a  
12 fundamental flaw in what's being said here. If there were  
13 no surrender agreement, if D'Agostino shut the doors, let  
14 itself get sued, mailed the keys back, and the premises  
15 were re-rented, the law of mitigation of damages would  
16 apply, and they would not get all of the rent.

17 The statement, over and over, that they're just  
18 getting what they're entitled to is absolutely not correct  
19 because, as Judge Rivera was pointing out, they got back  
20 the premises, and if there were no surrender agreement, and  
21 like I said, they just walked out, mailed the keys,  
22 Columbia re-rented it, I submit what you'd have here is a  
23 case of no damages.

24 JUDGE STEIN: Well, as I understood it, the lease  
25 didn't have - - - didn't require them to mitigate their



1 damages, but I - - - that's not what I want to talk about.  
2 What is it that you lost in this deal?

3 MR. LEDERMAN: This was a win-win for everybody.  
4 D'Agostino had a store on Broadway, by Columbia University,  
5 with a lease which was below market, because it was signed  
6 in 2002, right after 9/11, with modest escalations and - -  
7 -

8 JUDGE STEIN: But there's something troublesome  
9 to thinking that you can - - - you can breach a contract, a  
10 lease, that - - - that calls for, you know, many hundreds  
11 of thousands of dollars of payments, and enter into an  
12 agreement, a surrender agreement that says, okay, we can't  
13 pay you, but we - - - we'll - - - we'll agree to pay this  
14 if you let us off the hook. And then they say, okay, we'll  
15 let you off the hook if your pay this, and if you don't pay  
16 this, then you're not off the hook. So - - - and then you  
17 don't pay that either.

18 MR. LEDERMAN: Well, that's - - -

19 JUDGE STEIN: So what - - - I don't understand  
20 what the nature of that agreement is and - - -

21 MR. LEDERMAN: The nature of that agreement - - -  
22 and that's the whole point, although counsel said it's  
23 called an agreement, not a surrender agreement; if you turn  
24 to page 105, it's called a surrender agreement. And the  
25 whole point of the surrender agreement was that they would



1 accept 175,000 dollars of future payouts, and there was a  
2 clause - - -

3 JUDGE STEIN: Within a particular period of time.

4 MR. LEDERMAN: Yes.

5 JUDGE STEIN: Right, okay.

6 JUDGE WILSON: Look, if - - -

7 MR. LEDERMAN: And the law - - -

8 JUDGE WILSON: If at the time, you believed, to a  
9 certainty, the property was going to be re-rented, you  
10 wouldn't enter into that agreement at all, right, because  
11 your damages, as you started out saying, would have been  
12 next to zero. A new tenant would be right in there.  
13 They'd have to mitigate.

14 MR. LEDERMAN: Your - - -

15 JUDGE WILSON: And the reason you entered into  
16 the agreement was because you didn't know that. And the  
17 two parties agreed to allocate the risk by the - - - by the  
18 surrender agreement. Isn't that what happened?

19 MR. LEDERMAN: Any time, Your Honor, that there's  
20 a question of liquidated damages, somebody is necessarily  
21 challenging whether something that was agreed to was at the  
22 time an unreasonable penalty for a reasonable - - -

23 JUDGE WILSON: But this isn't a plain vanilla  
24 liquidated damages provision. This is a - - - you would -  
25 - - if, for example, the liquidated damage provision here



1 said five million dollars, I think we would then be in the  
2 world you're talking about. But to Judge Stein's point, if  
3 the liquidated damages are no more than the contract  
4 damages on the original lease, how can that be, in these  
5 sorts of circumstances, unconscionable?

6 MR. LEDERMAN: Because, at the time the agreement  
7 was signed, there was knowledge on both sides that it was  
8 the - - - that there was another tenant in the offing, and  
9 the clause did not provide - - -

10 JUDGE WILSON: But then you shouldn't have  
11 signed.

12 MR. LEDERMAN: - - - and did not contemplate  
13 that.

14 JUDGE WILSON: Then you shouldn't have signed.  
15 You should have counted on the fact the new tenant would  
16 come in and your damages would have been a few hundred  
17 dollars.

18 MR. LEDERMAN: Well, as I said, Your Honor, every  
19 case involving liquidated damages, going back to cases by  
20 Chief Judge Marshall of the United States in 1822, cases by  
21 this court in 1868, 1910, 2007 - - - 1997, 2005, every case  
22 which involves liquidated damages raises that fundamental  
23 question that somebody is looking back and challenging it.  
24 And in fact, the rules of liquidated damages, which are  
25 part of the bar association, are in cases - - - were



1 discussed by Judge Rivera in 2014, are in the restatement  
2 of contracts, and in fact, have been legislatively adopted  
3 in the Uniform Commercial Code; it has a formulation that  
4 the court must make a decision whether it's oppressive and  
5 whether it was something reasonably capable of estimation.

6 JUDGE GARCIA: Counsel, could they have sued on  
7 the original lease after this breach?

8 MR. LEDERMAN: No. And I think - - -

9 JUDGE GARCIA: They couldn't - - -

10 MR. LEDERMAN: They couldn't because if you - - -

11 JUDGE GARCIA: - - - elect to go on - - -

12 MR. LEDERMAN: - - - look at the surrender  
13 agreement, on page 106 of the record, it says it's  
14 extinguished, terminated, over.

15 JUDGE GARCIA: So why isn't the measure of  
16 whether this is a penalty compared to - - - and this isn't  
17 in the record - - - what they would have received had they  
18 been able to sue under the lease?

19 MR. LEDERMAN: Because that's a decision they  
20 made. And there are a multitude of other types of  
21 contracts. As Judge Rivera pointed out, they might have  
22 had a contract, and right now, in this age of COVID,  
23 they're being done all over the City, saying, we will make  
24 a good faith effort to release, but you're going to stay  
25 responsible for the rent. There could be - - - there are



1 contracts, which I've seen many, which talk about  
2 recovering discounted values. But it was a decision that  
3 Columbia made. Columbia was represented by Proskauer in  
4 drafting it. There are many contracts which turn out, for  
5 one reason or the other, to be unenforceable.

6 JUDGE RIVERA: Can I just clarify something?  
7 Under the surrender agreement, under its terms, was  
8 D'Agostino Supermarket still liable for the back rent it  
9 owed, or was all of that extinguished?

10 MR. LEDERMAN: It was liable for the back rent.

11 JUDGE RIVERA: Okay.

12 MR. LEDERMAN: That was the balance of 261,000 -  
13 - -

14 JUDGE RIVERA: That's what I thought.

15 MR. LEDERMAN: - - - dollars.

16 JUDGE RIVERA: When he said that you were liable  
17 - - - because I read the surrender agreement to mean that  
18 it did not extinguish any back due rent.

19 MR. LEDERMAN: No, the back due rent was the  
20 175,000 dollars. Remember, what you had here was a payout,  
21 six payments were - - - eleven payments. There was a  
22 default. We're not disputing that. When the - - - after  
23 the sixth payment was due, the full 175- was tendered.  
24 They rejected it. I'm not saying they had to accept it,  
25 but they made a decision to reject the full amount before



1 it was even due. And I submit here, the analysis of Judge  
2 Scarpulla, unanimously affirmed by the Appellate Division,  
3 is exactly the law of liquidated damages. This is a  
4 textbook case.

5 JUDGE RIVERA: I'm sorry, just to be clear on  
6 that last point, you're saying you tendered the remainder  
7 that was due under the surrender agreement before the last  
8 payment date. Is that what - - -

9 MR. LEDERMAN: Correct, yes.

10 JUDGE RIVERA: - - - you're saying?

11 MR. LEDERMAN: The document - - - the lease  
12 called for eleven payments of 175,000 - - - of 15,000  
13 dollars each. That's how you get to the 175,000.

14 JUDGE RIVERA: Um-hum.

15 MR. LEDERMAN: The payments would have gone  
16 through the summer of 2017. On December 30th, a check - -  
17 - it's in the record - - - was delivered for 175,000  
18 dollars, which was the six late payments, plus another  
19 payment, plus the future payments. That was rejected. So  
20 just on an equitable ground here, that was, you know, kind  
21 of a - - - that was their decision.

22 JUDGE RIVERA: Yes.

23 MR. LEDERMAN: And what comes up in this case is  
24 Columbia has chosen to pursue a path of aggressively  
25 seeking 1.3 million - - - it's 100,000 plus 290,000 dollars



1 of rent, plus water charges - - - saying that you didn't -  
2 - - we turned down the 175-, now we want 1.3 million, which  
3 really, with interest, is now 1.5 million. This has all of  
4 the hallmarks of - - - of an improper liquidated damage  
5 clause.

6 And again, unless this court is prepared to  
7 change the law, what has been the common law, going back to  
8 England, under any analysis of liquidated damages, on the  
9 two prongs that, either it's something not capable of  
10 calculation, or it's oppressive - - - it's a disjunctive  
11 test - - - I submit this court must affirm.

12 JUDGE RIVERA: May I ask, is it your position  
13 that the Appellate Division - - - I know it's a short  
14 writing, but is it a - - - did they make a factual  
15 determination that the damages were ascertainable? Is that  
16 a factual determination or a - - - a determination on the  
17 law?

18 MR. LEDERMAN: In my view, as we - - - in my  
19 view, it's a mix - - - upon analysis, it's a mixed question  
20 of law and fact which, constitutionally, is beyond the  
21 power of this court, at least as I read Karger's on Court  
22 of Appeals practice to review. That in making that  
23 decision, both Judge Scarpulla, in the well-reasoned  
24 decision, and the Appellate Division, in a short - - - but  
25 there was a lengthy oral argument which you can actually





1 watch online, they were fully aware.

2 Using your words, Judge Rivera, the court - - -  
3 it's a decis - - - it's an issue of fact, taking due  
4 consideration of the nature of the contract and the  
5 circumstances, and in making that determination, by  
6 definition, the Appellate Division and the court and the -  
7 - - and Judge Scarpulla made at least mixed findings of law  
8 and fact which, as I read it, are beyond the power of this  
9 court, unless this court wants to adopt, which I submit  
10 would be a terrible result of their analysis, which is  
11 basically a wrong syllogism. If you - - - if you're a  
12 businessperson, if you have a lawyer, no matter how onerous  
13 it is, it's enforceable. That's never been the law.

14 There are many situations where, for one reason  
15 or the other, the courts have it, and the factors they  
16 raise are factors which a court can consider. The court,  
17 Judge Scarpulla, was well aware that there was counsel, she  
18 considered it.

19 This was brought up in the Appellate Division, if  
20 you look at the argument online. So the courts below did  
21 exactly what this court, for 150 years, has been telling  
22 Supreme Court judges to do, analyze these factors, and come  
23 to a conclusion - - - and I submit, unless this court wants  
24 to change the law, it shouldn't.

25 If I could have, I'd like to end with just a



1 short anecdote, which I think you'll enjoy, and honestly I  
2 knew this before we came in here. According to the New  
3 York Times, in 2016, Justice Ruth Bader Ginsburg went to  
4 Venice to watch her grandson perform in the Merchant of  
5 Venice. And according to the New York Times - - - and I  
6 think this is just a nice story - - - she was asked to  
7 judge an appellate moot court argument of the issues raised  
8 by the Merchant of Venice.

9 And the question was asked to her: shouldn't the  
10 courts enforce a contract? It was a wealthy merchant from  
11 Venice who made a contract for a pound of flesh. And there  
12 were other issues, but as reported in the paper, Justice  
13 Ginsburg said this is all merry sport, but it's not  
14 something a court will do.

15 And I submit here that the penalty they're  
16 looking for is the commercial equivalent of a pound of  
17 flesh, a million-three for 175,000-dollar breach. I'd urge  
18 this court to follow the sage advice of Judge Ginsburg.

19 And it's nice to say you're a commercial party,  
20 you agree to it. But the law, for hundreds of years, going  
21 back to England - - - it's in the restatement of contract.  
22 It's been recited by Chief Judge Marshall. It's been  
23 recited by this court at least five or six times for 150  
24 years. It is what it is. There's no basis to change the  
25 law. It would be terrible policy to change the law. It's



1           been approved by the legislature in the Uniform Commercial  
2           Code for commercial contracts, and for that reason, I would  
3           urge this court to affirm. Thank you.

4                        CHIEF JUDGE DIFIORE: Thank you, Mr. Lederman.  
5                        Counsel?

6                        MR. KRINICK: First of all, the facts show that  
7           Columbia was trying very hard not to declare them in  
8           default. Just so we're clear, they missed a payment in  
9           May. Columbia didn't say anything. They missed a payment  
10          in June. Columbia didn't say anything. They missed a  
11          payment in July - - - or excuse me, they defaulted in - - -  
12          or excuse me, they defaulted in July, August, September,  
13          and October, four months before we sent them a notice to  
14          cure. And then they didn't cure.

15                      JUDGE RIVERA: But they did offer everything that  
16          was due before the last payment was due.

17                      MR. KRINICK: They didn't offer it - - -

18                      JUDGE RIVERA: I mean, you had put it in  
19          installments. I doubt that's for the benefit of Columbia,  
20          as opposed to the benefit of D'Agostino, which was in a  
21          distressed state. So - - -

22                      MR. KRINICK: They did - - -

23                      JUDGE RIVERA: - - - why isn't he right that it -  
24          - - you know, it - - - there's something wrong if he's - -  
25          - he concedes, you didn't have to accept it, but it's a



1 factor to consider as to whether or not we can really look  
2 at this as a penalty.

3 MR. KRINICK: Well, the assumption that Columbia  
4 set this up so there would be a default, and they would  
5 jump on the default immediately and try to recover the  
6 amount of the liquidated damages, is just belied by the  
7 facts. We sat back and waited for four defaults before we  
8 sent them a notice to cure, and then they didn't cure, and  
9 then miraculously, after we sued them, they came up with  
10 the money.

11 It's a little unseemly, also, that we enter into  
12 this agreement at the end of - - - of May, and then a few  
13 months later we're being told the agreement's  
14 unenforceable. Here, sign the agreement, thanks very much.

15 JUDGE RIVERA: Well, they did pay the first two  
16 significant installments - - -

17 MR. KRINICK: They paid the first two payments.

18 JUDGE RIVERA: - - - correct? No, so they  
19 didn't, from the get-go - - - they didn't come out of the  
20 box refusing to pay. And when you entered this agreement,  
21 you knew they were in a distressed state, so you know of  
22 course that they're looking for that benefit not - - - not  
23 to be in a - - - in a continued tenancy that,  
24 unfortunately, by then they're an icon, you're an icon,  
25 they've already realized they - - - they cannot continue



1 and they're trying to deal with their staff - - -

2 MR. KRINICK: But they agreed to - - -

3 JUDGE RIVERA: - - - and what might happen there.

4 Let me just confirm, because you had said something I  
5 wanted - - - you heard me; I checked with him whether or  
6 not I had misunderstood the surrender agreement, so I just  
7 want to give you the opportunity. Did the outstanding past  
8 due rent, before the effective date of the surrender  
9 agreement, survive the surrender agreement? That is to  
10 say, were those - - - any claim against them for back due  
11 rent still viable?

12 MR. KRINICK: Well, in our complaint in this  
13 lawsuit seeks only the future rent.

14 JUDGE RIVERA: No, no, I understand that. But I  
15 - - - I may have misheard you. I thought you said that the  
16 surrender agreement let them off the hook for the back  
17 rent, which is - - -

18 MR. KRINICK: No, no, no.

19 JUDGE RIVERA: - - - not the way I read it, so I  
20 just wanted to be clear.

21 MR. KRINICK: No, the back rent was what they're  
22 - - - what they already owed us.

23 JUDGE RIVERA: Yes, no, I know that.

24 MR. KRINICK: It was what we agreed to accept.

25 The conceded liability that we had a right to judgment on -



1 - -

2 JUDGE RIVERA: Yes.

3 MR. KRINICK: - - - we agreed to accept that - -

4 -

5 JUDGE RIVERA: Yes.

6 MR. KRINICK: - - - and let them walk away from  
7 the rest of the rent.

8 JUDGE RIVERA: Yes, so - - -

9 MR. KRINICK: But what if they defaulted?

10 JUDGE RIVERA: So that's what I'm saying; they  
11 owed whatever you - - - well, whatever had been set out.  
12 Let - - - let's not talk about a breach of the surrender  
13 agreement. If they had paid on time, whatever they owed,  
14 but they also were going to pay you everything that they  
15 owed in back rent for the time that they had benefited from  
16 being a tenant on that property.

17 MR. KRINICK: Right.

18 JUDGE RIVERA: Yeah.

19 MR. KRINICK: They conceded that they owed that  
20 amount of money. We said just pay what you owe us, go away

21 - - -

22 JUDGE RIVERA: Yes, okay.

23 MR. KRINICK: - - - and we'll make - - -

24 JUDGE RIVERA: No, I just wanted to clarify that.

25 MR. KRINICK: All right.



1 JUDGE RIVERA: I think I may have misheard you.

2 MR. KRINICK: No, okay. Thank you.

3 I think the key component here is that we have to  
4 look at this whole agreement at the time it was made. And  
5 at the time it was made, they hadn't paid the back rent,  
6 and if they continued not to pay rent, we would have been  
7 able to sue them for those damages until we got a tenant,  
8 and perhaps mitigated it, as well as the other costs of  
9 procuring a tenant. That was what we had at stake, and we  
10 gave that up. We gave them a discount.

11 JUDGE GARCIA: But why couldn't you have  
12 calculated that, in the sense, at the time you entered this  
13 new agreement, that your - - - your damages would be that,  
14 that if you violate this, if you violate the terms of this  
15 agreement, our damages will be what we would have gotten  
16 then.

17 MR. KRINICK: Correct, and then - - -

18 JUDGE GARCIA: Why couldn't that be the  
19 agreement? Instead, you liquidated it to be the maximum  
20 you could have gotten, right?

21 MR. KRINICK: Right.

22 JUDGE GARCIA: And wouldn't that account for your  
23 risk because - - -

24 MR. KRINICK: Well - - -

25 JUDGE GARCIA: - - - if in fact you never had



1           rented it for the rest of the term, that would have been  
2           your damages. But if it - - - if you had rented it for a  
3           higher amount, we would have had maybe costs or some  
4           reasonable amount.

5                     MR. KRINICK: Absolutely.

6                     JUDGE GARCIA: So in the sense of not being able  
7           to calculate it, why couldn't the provision just provide  
8           you with that remedy?

9                     MR. KRINICK: At the bargaining table, that - - -  
10          that could have been the result just as well it could have  
11          been the result that D'Agostino said - - -

12                    JUDGE GARCIA: No, no, but why couldn't you write  
13          that into your contract, that the measure of your damages  
14          would be a calculation based on what you would have  
15          recovered at a breach at that time. Your idea being, we're  
16          taking this risk that we're not going to rent. Why  
17          wouldn't that cover you then for that risk, in the sense of  
18          why isn't it calculable in that way, because you could have  
19          written a damages provision to accommodate that?

20                    MR. KRINICK: Well, it wasn't calculable how long  
21          it was going to take us to find a tenant. It wasn't  
22          calculable how much free - - -

23                    JUDGE GARCIA: Right, but this - - -

24                    MR. KRINICK: - - - free - - -

25                    JUDGE GARCIA: - - - would have given you,





1           essentially, a time machine. So you would have gone back,  
2           and you would have been there, and you would have recovered  
3           what you would have recovered at that breach. So if you  
4           hadn't rented, in fact, you wouldn't be assuming the risk  
5           because they would owe you for that amount. If you had, it  
6           would be mitigated.

7                       MR. KRINICK: Well, I think that's still the  
8           case, Your Honor, but you still have to find that the  
9           penalty here is the difference between the amount we agreed  
10          to accept and the amount of our actual damages. I mean,  
11          they could have negotiated a mitigation clause into the  
12          settlement agreement. They could have said our - - - our  
13          damages will be the full amount of the future rent, but you  
14          have to mitigate it.

15                      JUDGE RIVERA: But well, we don't know what your  
16          negotiations are, so we're just working with the language -  
17          - -

18                      MR. KRINICK: Correct.

19                      JUDGE RIVERA: - - - that you agreed to and  
20          adopted, right?

21                      MR. KRINICK: Right, so at the time we signed  
22          that agreement, not knowing what the future hold for that  
23          property - - -

24                      JUDGE RIVERA: Sure.

25                      MR. KRINICK: - - - I don't believe the damages



1 were ascertainable to precise measurement.

2 JUDGE RIVERA: If I may ask this, because I asked  
3 him, is it a factual finding by the Appellate Division? Is  
4 it a mixed question? Is it a decision on the law?

5 MR. KRINICK: It's a question of law. This court  
6 has repeatedly held that whether liquidated damages is a  
7 penalty is a question of law.

8 JUDGE RIVERA: No, no, no, I'm sorry, whether or  
9 not it was ascertainable. I know that other question, but  
10 this sub-question, whether or not it's ascertainable - - -

11 MR. KRINICK: Well - - -

12 JUDGE RIVERA: - - - at the time that you signed  
13 the surrender agreement.

14 MR. KRINICK: Oh, I think if there's a question  
15 of fact - - -

16 JUDGE RIVERA: That's the question - - -

17 MR. KRINICK: - - - we moved for summary  
18 judgment, they claimed it was a penalty. If they've  
19 established some question of fact as to whether it's  
20 ascertainable or whether it's grossly disproportionate to  
21 the actual damages then, under Van Duzer, we clearly need a  
22 hearing. I mean, at a minimum, if those are questions of  
23 fact - - -

24 JUDGE RIVERA: But I'm saying when the Appellate  
25 Division reached that determination, was that a finding of



1 fact? That's what I'm asking.

2 MR. KRINICK: No, that's not a finding of fact.  
3 There was no facts presented to the Appellate Division for  
4 it to render a finding of facts. I mean, no testimony, no  
5 - - - no hearing.

6 JUDGE RIVERA: So what is it based on? What is  
7 it based on?

8 MR. KRINICK: I think they based it - - - they  
9 ruled it as a question - - - they ruled it as a matter of  
10 law that the damages are ascertainable based on this  
11 record.

12 JUDGE RIVERA: Okay.

13 MR. KRINICK: And we don't think that's  
14 supportable on this record. And at a minimum, if they  
15 raised the question of fact, again, under Van Duzer, I  
16 think, at a minimum, we're entitled to a hearing where a  
17 court can then make factual findings as to what was  
18 ascertainable at that time and what our actual damages were  
19 in order to determine if they're grossly disproportionate  
20 to the amount in the agreement. I think, at a minimum,  
21 we're entitled to a hearing.

22 But I think, as a matter of law, we would suggest  
23 this court, as a matter of policy, should not be  
24 interfering where the parties have set their expectations  
25 in a clear, unambiguous writing. It's a settlement



1 agreement of a litigation - - - or a potential litigation.  
2 This court has time and time and time again enforced  
3 settlement agreements unless there's something particularly  
4 egregious, this court ought not to be setting the bar that  
5 the courts are entitled to step in. Landlords are not  
6 going to make deals with tenants if they think the  
7 discounted amount that they provide is going to be the  
8 maximum amount of their liability even if the tenant  
9 defaults. It sets a bad precedent out there for people who  
10 want to make arrangements among themselves and not fear  
11 that courts are going to come in - - -

12 JUDGE RIVERA: Well, all we need to do is decide  
13 whether this is a penalty, not whether some lower number  
14 would not be a penalty, correct?

15 MR. KRINICK: If there's - - - correct, if this  
16 is a penalty, then we're entitled to our actual damages,  
17 which is yet to be determined.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. KRINICK: Thank you.

20 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The Trustees Of Columbia University In The City Of New York v. D'Agostino Supermarkets, Inc., No. 79, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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