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COURT OF APPEALS

STATE OF NEW YORK

GRAHAM COURT OWNER'S CORP.,

Appellant,

-against-

No. 18

KYLE TAYLOR,

Respondent.

20 Eagle Street
Albany, New York 12207
January 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: The next case is
2 number 18, Graham Court Owner's Corp.

3 Counsel, you want any rebuttal time?

4 MR. WINIARSKY: Two minutes rebuttal, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
7 go ahead, counsel.

8 MR. WINIARSKY: Thanks. May it please the
9 court, for the appellant, Nativ Winiarsky from the
10 law firm of Kucker & Bruh. As this court is aware,
11 this case concerns itself with the reciprocity
12 statute concerning attorneys' fees in relation to
13 Real Property Law Section 234.

14 CHIEF JUDGE LIPPMAN: Why - - - why
15 shouldn't they be able to get fees if you're able to
16 get fees under 234?

17 MR. WINIARSKY: Because exactly - - -
18 because we're - - - we're - - - we're not able to.
19 And - - -

20 CHIEF JUDGE LIPPMAN: Say again. Because
21 you are not able - - -

22 MR. WINIARSKY: We are not able to.

23 CHIEF JUDGE LIPPMAN: - - - in effect you
24 are not able to?

25 MR. WINIARSKY: In effect and in reality.

1 And - - -

2 JUDGE RIVERA: But - - - but the - - - the
3 attorneys' fees are all within your control under
4 this agreement.

5 MR. WINIARSKY: Well, I'll - - - I'll
6 explain why our position is that we can't get. And
7 specifically, you have to look at the facts of - - -
8 of, I think, each of the particular case and look at
9 this case. This case was commenced in May of 2007;
10 decision wasn't rendered until June 2010. So by the
11 time there was a lower court determination as to who
12 the prevailing party was, the lease expired. And if
13 their lease expired, there's absolutely no
14 possibility of reletting.

15 And the only way - - - the only mention of
16 attorneys' fees is in the context of reletting. So
17 once the lease expires - - - and this case is not
18 atypical in that sense, because in any rent-
19 controlled case where you have a lease at the
20 inception, there are no renewal leases. In rent-
21 stabilized cases the leases are - - -

22 JUDGE PIGOTT: Well, wait a minute. The
23 attorneys' fee thing was - - - was viable when you
24 started this case.

25 MR. WINIARSKY: When you started the case,

1 but at the time when the lower court made a
2 determination as to who won, meaning if I received a
3 determination - - -

4 JUDGE PIGOTT: Yeah, but that doesn't make
5 any difference, does it? I mean if - - - if - - - if
6 - - - if they said, you know, the tenant wins. You
7 say well, judge, I'm deleting a paragraph on my - - -
8 on my lease. I just want you to know.

9 MR. WINIARSKY: Well, the - - -

10 JUDGE PIGOTT: And then you say well, I
11 don't have a - - - I don't have a chance to recover,
12 so - - - I mean, at the time you sued, they're
13 worried about attorneys' fees. You know you're going
14 to get them. Turns out you don't, but you had the
15 ability at the time of the lea - - - you're - - -
16 you're suing on a lease and the lease says you get
17 attorneys' fees and - - -

18 MR. WINIARSKY: The - - -

19 JUDGE PIGOTT: - - - the law says they do,
20 too.

21 MR. WINIARSKY: Well, there - - - there - -
22 - there's two things in relation to that. In the
23 first instance, again, the - - - they only get
24 attorneys' fees within the context of reletting. If
25 there is no reletting, which doesn't occur when

1 there's no expiration of the lease, there's
2 absolutely no way the petitioner in this case can
3 recover those fees.

4 JUDGE PIGOTT: Why is it in there, then?

5 MR. WINIARSKY: The - - - why - - - the - -
6 - the - - - the provision concerning attorneys' fees
7 and add-ins? Solely mitigation.

8 JUDGE PIGOTT: No. Why? I mean I don't
9 understand that at all. You're going to get the
10 money for the reletting, right, the landlord?

11 MR. WINIARSKY: From the - - - from a
12 future tenant?

13 JUDGE PIGOTT: Under any circumstance, if -
14 - - if you evict a tenant and you relet, it you get
15 the money.

16 MR. WINIARSKY: Not if the lease expired.
17 If the lease expires, there's no reletting.

18 JUDGE PIGOTT: Under any circu - - - if the
19 lease expired and you relet the apartment, the money
20 goes to you.

21 MR. WINIARSKY: If the lease expires,
22 there's no reletting for the purp - - - for the
23 benefit of the tenant.

24 JUDGE PIGOTT: Wait a minute. Stick with
25 me, please. If you - - - if you - - - if the lease

1 expires and you rent to another tenant, where does
2 the money go?

3 MR. WINIARSKY: If the lease expires, the -
4 - - the money from the - - - from the - - - from the
5 second tenant?

6 JUDGE PIGOTT: Yeah.

7 MR. WINIARSKY: That goes to the land - - -

8 JUDGE PIGOTT: The landlord.

9 MR. WINIARSKY: But not - - - but not for
10 the benefit of the tenant - - -

11 JUDGE PIGOTT: I understand that.

12 MR. WINIARSKY: - - - who you evicted.

13 JUDGE PIGOTT: So go back to your lease.

14 And if the - - - if the lease didn't expire and you
15 relet it, where does the money go?

16 MR. WINIARSKY: If the lease didn't expire
17 and you are, in fact, reletting, you're recovering
18 the monies that the tenant is - - - has otherwise
19 due. If the rent - - -

20 JUDGE PIGOTT: Where does the money go?

21 MR. WINIARSKY: To the landlord.

22 JUDGE PIGOTT: All right. So why do you
23 have to have anything in there about and it will be
24 applied to attorneys' fees? You don't. So you - - -
25 I mean, you're getting the money no matter what. But

1 for some reason your landlord, or the landlord, said
2 this is for attorneys' fees. I don't understand why.

3 MR. WINIARSKY: The - - - the - - - the
4 provision here, okay - - - the - - - the - - - the -
5 - - it says - - - D1 says you - - - that the landlord
6 gets rent, an additional rent, when he takes the
7 apartment back. Which is a critical factor, because
8 in - - - in your analysi - - - when - - - in - - - in
9 your question you said well, at the inception of the
10 - - -

11 CHIEF JUDGE LIPPMAN: I think the judge is
12 trying to say to you that conceptually, what's the
13 difference whether it expired or it didn't expire?
14 The provision provides that you get the money for
15 attorney fees.

16 MR. WINIARSKY: The - - -

17 CHIEF JUDGE LIPPMAN: And it specifically
18 says so I can get the money for attorney fees.

19 JUDGE RIVERA: Well - - - well, is your
20 point that once the - - - the lease, the contract,
21 expires, there's - - - there's no way to relet for
22 the benefit of the tenant?

23 MR. WINIARSKY: Exactly.

24 JUDGE RIVERA: Because they're released
25 from - - -

1 MR. WINIARSKY: Exactly.

2 JUDGE RIVERA: - - - their duties and
3 obligation under the lease?

4 MR. WINIARSKY: That's exactly my point.
5 That's correct.

6 JUDGE RIVERA: Okay.

7 MR. WINIARSKY: So once - - -

8 JUDGE RIVERA: But - - -

9 MR. WINIARSKY: - - - the lease expires,
10 and you're only reletting for the benefit of the
11 tenant, and there is no reletting, then you only
12 recover the expenses for - - - that you had in - - -
13 in reference to the reletting. But if there's no
14 reletting, there are no expenses.

15 JUDGE ABDUS-SALAAM: So the tenant if
16 completely off the hook if - - -

17 MR. WINIARSKY: Absolutely.

18 JUDGE ABDUS-SALAAM: - - - the lease
19 expires and - - -

20 MR. WINIARSKY: There's zero that the
21 landlord can recover. If I would have made that
22 motion for attorneys' fees at the time we won - - -
23 the lease expired. I only get attorneys' fees in the
24 context - - -

25 JUDGE RIVERA: What - - -

1 MR. WINIARSKY: - - - of reletting - - -

2 JUDGE RIVERA: What - - -

3 MR. WINIARSKY: - - - which can never
4 happen.

5 JUDGE RIVERA: What they're - - - what
6 they're not released from, though, is all accrued
7 back-due rent. Your point is because there's no
8 opportunity to relet, because the lease is no longer
9 in place. You're not reletting under the lease.

10 MR. WINIARSKY: That's correct.

11 JUDGE RIVERA: You are now entering a new
12 contractual - - -

13 MR. WINIARSKY: Exactly.

14 JUDGE RIVERA: - - - and leasehold
15 agreement with a new tenant.

16 MR. WINIARSKY: Right.

17 JUDGE RIVERA: That then the provisions of
18 the lease with your exis - - - with your other tenant
19 no longer apply. But I think with respect to Judge
20 Pigott's other question, which I don't know that you
21 answered, which is why - - - why have these
22 provisions? It looked to me when I read the lease
23 that what the landlord seeks to do is ensure that - -
24 - that they are getting the lease - - - the amount of
25 rent due under the lease - - - that may be in a

1 combination of the new tenant and this old tenant
2 that's been evicted - - - in addition to getting from
3 the old tenant that's been evicted the costs
4 associated with the litigation that resulted in their
5 eviction. That strikes me that's the purpose. I
6 mean in respon - - - unless you have a different
7 response.

8 MR. WINIARSKY: My - - -

9 JUDGE RIVERA: That strikes me as what
10 Judge Pigott is - - - is inquiring. Why do you have
11 this provision?

12 MR. WINIARSKY: Two things. In relation to
13 the first question you asked, what would have
14 happened if the lease expired, would the tenant still
15 owe the rent and additional rent? No, because the
16 lease expired. The rent - - - the tenant only owes
17 that rent if the lease didn't expire. And in D2 says
18 when you - - -

19 JUDGE RIVERA: Well, no there - - - and I'm
20 sorry. I - - - I - - - maybe I'm un - - -
21 misunderstanding what you've just said. But if I
22 enter a lease with my landlord and I don't pay five
23 months but the five months - - - at the end of the
24 five months, the lease expire - - - I owe those five
25 months.

1 MR. WINIARSKY: You still owe that five
2 months. That's correct.

3 JUDGE RIVERA: Right. That was my point.

4 MR. WINIARSKY: Right.

5 JUDGE RIVERA: That once it expires,
6 whatever outstanding rent is due, unless the landlord
7 has released me or there is a surrender and
8 acceptance, whatever it may be, I owe that money.
9 That's my contractual and - - -

10 MR. WINIARSKY: That's correct.

11 JUDGE RIVERA: - - - leasehold debt to the
12 landlord.

13 MR. WINIARSKY: But - - - and I think maybe
14 one of the con - - - maybe the confusion is that I
15 think we're looking at it as if the landlord inserted
16 this clause for the benefit of the landlord, but
17 that's not the case. The reletting provision - - -

18 JUDGE RIVERA: Well, this is the
19 disagreement with Judge Pigott. That's his question.

20 MR. WINIARSKY: Right.

21 JUDGE RIVERA: And there I cannot see where
22 you have an argument, because the landlord, under
23 this reletting provision, gets the monthly rent paid.
24 Again, it may be in combination of the rent that's
25 paid by the new tenant and the formerly evicted

1 tenant, but the landlord is getting that rent and
2 they're getting the amount of the - - - the
3 attorneys' fees that that landlord had to pay for
4 purposes of evicting the tenant.

5 MR. WINIARSKY: The landlord can never
6 recover, under these provisions, monies that would
7 otherwise be due, the rent and additional rent.

8 CHIEF JUDGE LIPPMAN: Then why do you have
9 the provision in there that says it - - - it - - - it
10 allows you to collect attorneys' fees?

11 MR. WINIARSKY: Well, let's say you have
12 five months left on the lease. And there - - - so
13 you have five months left on the lease at 1,000
14 dollars a month. So there's 5,000 dollars left and
15 now - - - now we're assuming a lease that didn't
16 expire, right? So the lease didn't expire. You have
17 five months' rent. The tenant - - - you relet for
18 two months. So you can technically take - - - so - -
19 - so now the tenant - - - the landlord can give back
20 3,000. But if he had expenses - - - attorneys' fees,
21 brokerage fees, whatever it is - - - if he had
22 100,000 dollars' worth of attorneys' fees, he can
23 only ass - - - take the 2,000 that was otherwise due.
24 He never collects the 100,000.

25 CHIEF JUDGE LIPPMAN: Then why - - - why do

1 you have the - - - what I don't understand is why do
2 you have the provision for?

3 MR. WINIARSKY: I think the provision - - -

4 CHIEF JUDGE LIPPMAN: If you can never do
5 it, so then why do you need the provision that says
6 I'm going to get attorneys' fees?

7 MR. WINIARSKY: You can do in the instances
8 where the lease didn't expire, and if we look at it
9 from the vantage point - - -

10 CHIEF JUDGE LIPPMAN: But aren't you
11 reading into something which has a broad obvious
12 purpose and you're trying to narrow a provision that
13 isn't narrowed in the plain words of it?

14 MR. WINIARSKY: From - - - from its
15 inception it says "may relet". And the reason it's
16 "may relet", the operative word being "may", is
17 because the landlord has no duty to mitigate in the
18 first instance so - - -

19 JUDGE RIVERA: Okay. But it sounds to me
20 like you're encouraging getting the new tenant,
21 making sure you get rent, because you've evicted the
22 other one, and you want the attorneys' fees. So I
23 just want to go back. Let - - - let's stay with
24 this. You created the hypothetical, so I just want
25 to go with this. The lease has five months

1 remaining.

2 MR. WINIARSKY: Right.

3 JUDGE RIVERA: You evict the tenant at the
4 top of these five months that are remaining. You
5 relet one month in, four months remaining - - -

6 MR. WINIARSKY: Okay.

7 JUDGE RIVERA: - - - of - - -

8 MR. WINIARSKY: So that's 4,000 dollars
9 rent.

10 JUDGE RIVERA: Now you - - - you are now
11 arguing, I thought, that under the agreement the
12 landlord has the opportunity to go and seek the
13 attorneys' fees from the tenant that was evicted.

14 MR. WINIARSKY: He can only recover a
15 maximum of five. The rent - - -

16 JUDGE RIVERA: I'm not talking about the
17 rent. I understand that. That is true regardless of
18 this agreement unless you release them. That tenant
19 is always obligated to that rent. I'm not talking
20 about that. I'm talking about you - - - the
21 agreement your client put into this lease that says I
22 get to request - - - if I relet, I get to request and
23 demand attorneys' fees from the evicted tenant. And
24 I'm not understanding how you're saying a land - - -
25 that your client doesn't have that opportunity under

1 this lease.

2 MR. WINIARSKY: The monies he's taking in,
3 which is on the - - -

4 JUDGE RIVERA: From the new tenant?

5 MR. WINIARSKY: From the new tenant.

6 JUDGE RIVERA: Yes.

7 MR. WINIARSKY: Which is on account of the
8 old tenant.

9 JUDGE RIVERA: Right. It's going towards
10 the rent that's due.

11 MR. WINIARSKY: Right. So if there was - -
12 - there's a 5,000 - - - a 5,000 cap - - -

13 JUDGE RIVERA: Yeah.

14 MR. WINIARSKY: And he - - - and he relet
15 one month, so there's 4,000 - - - not 4,000, the - -
16 - whatever fees he had - - -

17 JUDGE RIVERA: Yeah.

18 MR. WINIARSKY: - - - he can take those
19 money and apply it to the fees, but it can never
20 exceed what was due. So he nev - - - attorneys' fees
21 are in addition to what is otherwise due. And this
22 is - - -

23 JUDGE RIVERA: Can I ask where does it say
24 that in this lease? Where does it say exactly what
25 you said?

1 MR. WINIARSKY: In - - - in every instance
2 which the courts have interpreted this provision,
3 what - - - in terms of reletting, whether it's - - -
4 whether it's Underhill v. Collins, whether it's Holy
5 Properties v. Cross (sic), in the Cent - - - in the
6 Centurion Fourth Department case, it's always for the
7 benefit of the tenant.

8 JUDGE PIGOTT: Let me - - - let me ask you
9 this.

10 JUDGE READ: This is a standard lease?

11 JUDGE PIGOTT: Oh, I'm sorry.

12 JUDGE READ: This is a standard lease?

13 MR. WINIARSKY: These leases are in effect
14 all - - -

15 JUDGE READ: All over the city?

16 MR. WINIARSKY: These - - - these are
17 pretty standard. Yes.

18 JUDGE READ: Yeah. Okay.

19 JUDGE PIGOTT: The - - - the - - -

20 CHIEF JUDGE LIPPMAN: Judge Pigott.

21 JUDGE PIGOTT: The - - - the rent that you
22 received, four, five, whatever it is, according to
23 the lease, it goes first to pay the landlord's
24 expenses. Second, to pay any amounts the tenant owes
25 under the lease. So if you get 4,000 dollars, it

1 goes to pay the landlord's expenses first and then to
2 pay any amounts that the tenant owes under the lease,
3 right?

4 MR. WINIARSKY: Correct.

5 JUDGE PIGOTT: All right. Then you define
6 expenses as reasonable legal fees, broker's fees,
7 cleaning and repairing costs, and decorating costs.
8 So you get your attorneys' fees and then if you had
9 something left over, then it would go to pay amounts
10 the tenant owes under the lease. So you would use up
11 the 4,000 dollars, let's say, on attorneys' fees, and
12 say and by the way, you still owe me for the - - -
13 for the cleaning, you owe me for the - - - you know,
14 the re-carpeting, you owe me for all this other
15 stuff, right?

16 MR. WINIARSKY: Right. But D - - - well,
17 the pro - - - provision you're reading from, which is
18 D2 and D3, follows D1.

19 JUDGE PIGOTT: Right.

20 MR. WINIARSKY: D1 says what - - - the only
21 thing that's owed is the rent and additional rent.
22 But now if we're going to mitigate that amount, we
23 can make it - - -

24 JUDGE PIGOTT: No, but don't you - - - I -
25 - - I think what - - - maybe we're missing each other

1 on this is that we're looking at a cold lease before
2 anybody gets involved in all of this "yeah, butts" and
3 things like that. I - - - my lawyer did it for free
4 so you can't charge me, tenant, because I didn't get
5 any attorneys' fees. I think the point is that if
6 the - - - in the contract they agree that they're
7 going to pay your attorneys' fees, you - - - by an
8 applied covenant agreement, you're going to pay
9 theirs if they're successful.

10 MR. WINIARSKY: Understood.

11 JUDGE PIGOTT: So I think then - - - then
12 you get into all of this. But if they're successful,
13 they get attorneys' fees, because if you were
14 successful, you would get attorneys' fees.

15 MR. WINIARSKY: I under - - - I understand
16 Your Honor's position, but my position is from the
17 outset had we - - - had we prevailed and had we moved
18 for attorneys' fees, given the fact that the lease
19 had expired and there can be no reletting, there
20 would be - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
22 hear from your adversary.

23 MR. BIERMAN: Thank you. Good afternoon
24 Your Honors, Mark Bierman for the respondent.

25 CHIEF JUDGE LIPPMAN: What does that - - -

1 that term in the lease mean that we're all talking
2 about?

3 MR. BIERMAN: Well, I think - - - I think -
4 - -

5 CHIEF JUDGE LIPPMAN: Why - - - why does it
6 mean that if - - - that no matter what circumstances,
7 if they can get attorney fees, you get them if you
8 prevail? Is that what it means?

9 MR. BIERMAN: I think that it means that if
10 the landlord is successful in either - - - either - -
11 - eith - - - not only just in the litigation, but if
12 the lease is canceled, there's a - - - a number of -
13 - - of circumstances.

14 CHIEF JUDGE LIPPMAN: Yeah. But what about
15 his particular circumstance where he's alleging if
16 the lease expires, that changes the - - - the - - -
17 the whole dynamic of this attorneys' fees business?

18 MR. BIERMAN: Well, I don't think it's
19 accurate.

20 CHIEF JUDGE LIPPMAN: Why not?

21 MR. BIERMAN: First - - - first of all - -
22 -

23 CHIEF JUDGE LIPPMAN: Tell - - - tell us
24 why not.

25 MR. BIERMAN: Well, there's two - - - two

1 issues, Judge.

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MR. BIERMAN: I think first of all, it has
4 nothing to do with whether 234 is applicable. But
5 beyond that, I think that when you have a lease
6 provision here that has - - - it - - - it - - - it
7 has a definition of what the expenses are, which
8 include the attorneys' fees, it reserves to itself -
9 - - and in part 5, which I - - - for whatever, reason
10 they haven't addressed, it says, "If a landlord
11 relets the apartment, the fact that all or part of
12 the next tenant's rent is not collected does not
13 affect the tenant's liability. The landlord has no
14 duty to collect the next tenant's rent. The tenant
15 must continue to pay rent, damages, losses, and
16 expenses without offset.

17 CHIEF JUDGE LIPPMAN: But he says - - - he
18 says when you can't relet, then - - - then you can't
19 get anything, is his basic point.

20 MR. BIERMAN: Well, I - - - I - - - what it
21 really - - - what - - -

22 JUDGE RIVERA: What if he chooses not to
23 relet?

24 MR. BIERMAN: Or if chooses, right.

25 JUDGE RIVERA: Then he doesn't have to.

1 MR. BIERMAN: Which - - - which is not what
2 the statute said. The statute broadly says whenever
3 the lease contains a provision that the landlord may
4 recover. It doesn't ask the court to undertake an
5 exercise as to under what circumstances the landlord
6 will specifically be able to achieve a recovery under
7 the lease. It - - - it was not - - -

8 JUDGE ABDUS-SALAAM: Counsel, what is - - -

9 MR. BIERMAN: - - - intended for that
10 purpose. The intention was to create a - - - some
11 bargaining power on behalf of the tenant.

12 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

13 JUDGE ABDUS-SALAAM: What do you say - - -
14 counsel, what do you say about the landlord's
15 attorney's argument, the hypothetical that if there
16 are five months left on the lease - - - let's say the
17 lease hasn't expired. Five months left on the lease
18 and it takes - - - they relet in one month, but
19 they're capped at the five months, does that mean
20 that the - - - the - - - does that mean that the
21 tenant owes nothing other than the - - - the amount
22 that's capped, the five months, the 5,000 dollars?

23 MR. BIERMAN: Well, but I - - - I don't
24 think that's the case. Because I think that the
25 lease clearly provides that the landlord can bring an

1 action for those expenses, which include attorneys'
2 fees. So it doesn't limit that.

3 JUDGE ABDUS-SALAAM: So it's not over?

4 MR. BIERMAN: But I would suggest to the
5 court that if it - - - if it was 1,000 or 5,000, it
6 doesn't matter for the purposes of 234. 234 in no
7 way requires the court to - - - to undergo that
8 exercise. And what they're really arguing for is
9 some kind of an equitable defense to 234, which is -
10 - - is not in the statute. The statute - - - the - -
11 - the - - - the statute specifically says under any
12 circumstances that the landlord may recover. Any - -
13 - if - - - if they would recov - - - recover the
14 4,000 or the 5,000, that doesn't meant that 2 - - -
15 the reciprocal provisions of 234 are not - - -

16 JUDGE ABDUS-SALAAM: Well, what about - - -

17 MR. BIERMAN: - - - triggered.

18 JUDGE ABDUS-SALAAM: - - - what we said in
19 Gottlieb that statutes like this have to strictly
20 construed because they're taking this out of the - -
21 - you know, the normal course of things, the American
22 fee rule, things like that. That a statute like this
23 would have to be - - -

24 JUDGE RIVERA: Excuse me.

25 MR. BIERMAN: Yes. And I - - - I think

1 that the - - - what was at issue at Gottlieb was
2 very, very different. And in fact, as I discussed in
3 my brief, two years before Gottlieb, this court
4 decided Duell v. Condon, which specifically said that
5 - - - that the - - - the statute was to be broadly
6 interpreted to carry out its remedial purposes as
7 widely as possible. And the - - - the - - - the
8 distinction between this - - - this particular
9 statute and Gottlieb is that in this - - - in this
10 particular statute, there was a - - - it was
11 specifically intended to create a - - - an exception
12 to the common law rule. It was specifically designed
13 to say if - - - if - - - if - - - if - - - if the
14 lease has an attorneys' fees provision, now the
15 tenant has a right to attorneys' fees.

16 What was at issue at Gottlieb, you're
17 talking about what was essentially a minimum wage
18 stat - - - a minimum wage statute that had a
19 provision that if you sued under the minimum wage
20 statute, you would have the right to reco - - -
21 recover attorneys' fees. What was at issue at
22 Gottlieb was a private contract.

23 JUDGE ABDUS-SALAAM: Um-hum.

24 MR. BIERMAN: And the court specifically
25 said that, and in saying that made that - - - that -

1 - - that was a distinction, which is, I think, why
 2 two years later this court in - - - in - - - in Duell
 3 v. Condon didn't mention Gottlieb, because it was
 4 irrelevant to that discussion. And in fact, in the -
 5 - - the - - - the - - - there's a Court of Appeals
 6 case that I cite to going back to, like, 1916 that
 7 says where the express purpose of - - - of the
 8 statute is - - - is to provide for a right not
 9 accorded by common law under - - - under - - - and in
 10 - - - and in remedial fashion that - - - that it has
 11 to be interpreted broadly and to carry out the
 12 intention and purpose of the statute, which is
 13 specifically, exactly what this court held - - -

14 JUDGE ABDUS-SALAAM: So under that - - -
 15 under that - - - -

16 MR. BIERMAN: - - - in Duell.

17 JUDGE ABDUS-SALAAM: - - - broad
 18 interpretation where 234 says, "If, in a proceeding
 19 where the landlord may recover attorneys' fees and/or
 20 expenses", then whether they do or not and whether
 21 this provision of the lease says that the land - - -
 22 that the tenant has to pay directly or not, then 234
 23 applies and - - - and we should broadly construe it.
 24 Is that your position?

25 MR. BIERMAN: Yeah, I - - - I - - - I think

1 that if - - - if - - - if there is - - - there is a
2 provision that it - - - under any circumstances that
3 the landlord - - - which is the whenever portion of
4 the statute. If there's any circumstances the
5 landlord can recover its attorneys' fees, then that
6 reciprocal provision should - - - should apply.

7 And one of the reasons is is that most of
8 these cases don't go to trial. So what counsel is
9 saying is not really relevant. Most of these cases
10 end up settling in the hallways of the housing court.
11 And if the tenant knows at the beginning that there's
12 provision that's saying okay, the landlord can have
13 some recovery, I have a little more bargaining power
14 here. I can go for it. I can maybe get a - - - get
15 an attorney that will represent me because he may be
16 able to get some fees. That changes the dynamics and
17 that's exactly - - -

18 JUDGE RIVERA: Counsel.

19 MR. BIERMAN: - - - what - - - what was
20 intended.

21 JUDGE RIVERA: How common is this
22 provision?

23 MR. BIERMAN: It's very common.

24 JUDGE RIVERA: Very common.

25 MR. BIERMAN: It is. It's - - - it's in -

1 - - it's in - - - in - - - in many, many leases that
2 were at issue. I know that it's been an issue in a
3 number of cases that - - - that have addressed it.

4 JUDGE RIVERA: On the hypothetical, he's
5 basically taking the position that because the tenant
6 is capped at whatever's the outstanding rent, there's
7 no harm/no foul, because there's - - - all that can
8 happen is that tenant is benefited through a
9 reletting, because it might actually reduce some of
10 the outstanding rent.

11 MR. BIERMAN: Well, first of all, I would
12 say that's a pol - - -

13 JUDGE RIVERA: Why is that not the - - -

14 MR. BIERMAN: - - - that's a policy issue
15 for the legislature, because that's not what the
16 statute says. The statute - - - interesting, because
17 what - - - what counsel argues for is some kind of
18 reciprocity - - -

19 JUDGE RIVERA: Um-hum.

20 MR. BIERMAN: - - - equal - - - perfectly
21 equal reciprocity, and it's not what the statute
22 says. In fact, what the statute says is is once that
23 is invoked, the statute defines the scope and the
24 intent and the right - - - the - - - the right of the
25 - - - of the tenant to recover fees. That doesn't

1 matter what the lease says. It says once that
2 section is invoked, the tenant gets to recover its
3 fees in a successful defense or in an action arising
4 out of a claimed default under the lease by the
5 landlord. So the legislature never intended this
6 kind of - - - kind of exact equality that the
7 landlord is - - - is now talking about. That is - -
8 - is - - - is - - - is really - - - that was - - -
9 was not what - - - what the - - - what the statute
10 provides.

11 But I - - - I - - - I would also say that,
12 you know, it - - - the - - - the - - - the landlord
13 writes the lease. First of all, if they choose to
14 write the lease in such a way that this is - - - this
15 is some theoretical limitation that they may butt up
16 against, then they'd have to redraft their lease in
17 some other ways. But to come and say well, we can
18 only get some fees and not others. But again, I
19 think it ignored the provision - - -

20 JUDGE RIVERA: Does it incentivize - - -
21 does it incentivize doing something they don't have
22 to do, that is to mitigate through reletting the
23 apartment?

24 MR. BIERMAN: I'm sorry?

25 JUDGE RIVERA: Does it incentivize

1 landlords to meet - - - mitigate, which they're not
2 required to do, through the process of reletting?

3 MR. BIERMAN: The provision certainly gives
4 the landlord - - - that's - - - it's in their
5 interest because they may sue the tenant and not get
6 any money. So it would be in their interest to relet
7 and - - -

8 JUDGE RIVERA: Well, that's true at any
9 time.

10 MR. BIERMAN: Yes, that is true at any
11 time.

12 JUDGE RIVERA: That's true at any time.

13 MR. BIERMAN: But I - - - I again, I want
14 to point out here that what this lease provision
15 provides for, it reserves to the landlord the right
16 to bring an action to recover its expenses. So the
17 claim that the 4,000 dollars is all that they would
18 get is not accurate, because if the landlord gets the
19 4,000 dollars, whatever's left they're going to go
20 sue the tenant.

21 I mean, this lease couldn't be clearer
22 about that. It's - - - it's - - - it's - - - so it's
23 - - - it's not a - - - a mere offset provision. It -
24 - - it specifically says we don't have to - - - we
25 can sit back and do nothing and sue you and get our

1 attorneys' fees. And that's - - - that is well
2 within the scope of 234 and what 234 intended. I
3 mean, so this - - - so - - - I - - - I'm not - - - I
4 - - - I know the landlord has vociferously argued
5 that we only get a little bit of fees.

6 But first of all, it's not true. And
7 second of all, if it was true it's irrelevant for the
8 purposes of interpreting 234. Because whatever fees
9 - - - whenever the landlord can get fees as a result,
10 the - - - it's not a question of how much fees it
11 will ultimately get. The question is are there
12 circumstances under which the landlord may, and the
13 statute uses the term "may", recover attorneys' fees.
14 And clearly, counsel has already acknowledged, yes,
15 we may recover attorneys' fees. We can get 4,000
16 dollars.

17 So to ask each court to do an exercise to
18 say well, how much - - - how much will we get
19 exactly, and that's going to determine whether 234 is
20 invoked? I think that ignores the - - - the
21 statutory purpose.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.
23 Thanks.

24 MR. BIERMAN: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

1 MR. WINIARSKY: Yes.

2 CHIEF JUDGE LIPPMAN: Only one of you at a
3 time. Go ahead.

4 MR. WINIARSKY: Just briefly, Your Honor.
5 I think it - - - I think it's - - - I think it bears
6 notice to what - - - what are attorneys' fees? And
7 attorneys' fees are liabilities that otherwise do not
8 exist in the contract. So you have a liability that
9 exists in the contract, and the attorneys' fees are
10 something above and beyond that.

11 JUDGE ABDUS-SALAAM: Counsel, if your
12 hypothetical where the lease - - - or in this case,
13 not even hypothetically, the lease expired. So
14 you're saying you couldn't go after this tenant for
15 the fees, even though the lease had expired?

16 MR. WINIARSKY: Absolutely not, because the
17 lease expired and there's no reletting and - - - and
18 to - - -

19 JUDGE PIGOTT: When did it expire?

20 MR. WINIARSKY: It expired in 2005, two
21 years before the determination. And so when you
22 asked a question well, what happens if the landlord
23 never relet, so there's just rent and additional rent
24 outstanding. How do you - - - you can't recover your
25 attorneys' fees because whatever fees, expenses,

1 brokerage fees, whatever - - -

2 JUDGE ABDUS-SALAAM: Doesn't - - - doesn't
3 that depend on who's reading this lease and coming to
4 that conclusion about whether there's no reletting
5 and whether you can sue? I mean, can't you imagine
6 some landlord's attorney looking at this very
7 provision of the lease and going, I don't think I
8 read it that way. There's - - - there may be relet -
9 - - there's - - - there's no reletting but I can
10 still go after the fees.

11 MR. WINIARSKY: I think the incentive is to
12 make sure that you expedite the cases, because if
13 they take too long - - - I mean, some cases you can't
14 even bring until there's the expiration of the lease,
15 a non-permanent resident's case, an owner occupancy
16 case.

17 JUDGE PIGOTT: This one was - - -

18 JUDGE ABDUS-SALAAM: A holdover.

19 JUDGE PIGOTT: - - - was brought in 2007.
20 Are you - - - are you saying it was a month-to-month
21 tenancy at that time?

22 MR. WINIARSKY: No, there - - - it was - -
23 - there was - - - there was a tenancy in place in
24 2007 and the decision was rendered - - -

25 JUDGE PIGOTT: Well, I thought you said the

1 lease expired in '05.

2 MR. WINIARSKY: Yes. I think - - - yes.

3 The - - - the lease had already expired even prior to
4 the commen - - -

5 JUDGE PIGOTT: In '05. So - - -

6 MR. WINIARSKY: - - - the commencement of
7 the case.

8 JUDGE PIGOTT: - - - what were you - - -
9 what were you - - - what were you serving a notice to
10 terminate on in May of '07?

11 MR. WINIARSKY: I - - - when the - - - when
12 he originally - - - in this case, when they
13 originally brought the - - - brought the proceeding,
14 the landlord's position was it wasn't a rent-
15 stabilized tenancy. It went into HCR, and the HCR
16 then said it was a rent-stabilized tenancy in which
17 you have to serve renewal leases. And that was being
18 litigated at the time that this case was commenced.

19 But if I can - - - if I can just close with
20 even with Casamento, that's - - - that's Appellate
21 Division Second Department case, which they strongly
22 rely upon in their brief. Even in that case, they
23 say, "We interpret" - - - and this is in page 350 - -
24 - the end of 353 to 354. They say, "We interpret
25 this remedial scheme to permit the landlord to" recoo

1 - - - any - - - "recoup any attorneys' fees he occurs
2 in an eviction against the defaulting tenant under
3 circumstances in which the premises are relet prior
4 to the defaulting tenant's satisfaction of
5 outstanding rent." See even they say in those
6 circumstances where's there's a reletting, then we're
7 going to interpret the remedial scheme to allow for
8 attorneys' fees. But where you don't have the
9 possibility of reletting, then you can't recover the
10 fees because you never have the reletting in the
11 first place.

12 JUDGE RIVERA: So that's the example where
13 the tenant has abandoned or is otherwise out of
14 possession and you relet?

15 MR. WINIARSKY: It's in that one or if I
16 even bring, let's say, a non-payment case but the
17 lease expired by the time it reaches its fruition,
18 then there's no reletting at that point and any
19 expenses - - -

20 JUDGE RIVERA: No. I'm talking about the
21 example where you'd have the reletting and the lease
22 hasn't expired.

23 MR. WINIARSKY: If there is - - -

24 JUDGE RIVERA: It has to be the tenant's
25 out of possession?

1 MR. WINIARSKY: That's correct, right.

2 CHIEF JUDGE LIPPMAN: Okay. Thanks.

3 MR. WINIARSKY: Thank you kindly.

4 CHIEF JUDGE LIPPMAN: Thank you both.

5 Appreciate it.

6 (Court is adjourned)

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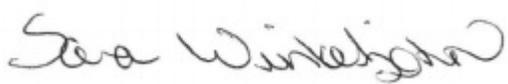
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Graham Court Owner's Corp. v. Kyle Taylor, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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