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COURT OF APPEALS

STATE OF NEW YORK

230 PARK AVENUE HOLDCO,

Appellant,

-against-

No. 50

KURZMAN KARELSEN & FRANK, LLP,

Respondent.

20 Eagle Street
Albany, New York 12207
June 01, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 JUDGE PIGOTT: Number 50, 230 Park Avenue
2 Holdco LLC v. Kurzman Karelsen & Frank, LLP.

3 Judge DiFiore has recused herself in this case,
4 so you have us.

5 Mr. Solomon, welcome.

6 MR. SOLOMON: Thank you, Judge Pigott.

7 May it please the court, I am Jay Solomon from
8 Klein & Solomon, we are the attorneys for the landlord in
9 this case, 230 Park Avenue Holdco.

10 The reason we have brought this appeal is
11 because the lower courts erred in their decision in
12 finding that there are - - - were rights and obligations
13 created by an innocuous clause, and in an otherwise
14 crystal clear concise stipulation of settlement.

15 JUDGE PIGOTT: Would you like any rebuttal
16 time?

17 MR. SOLOMON: Oh, I'm sorry. I'll take a
18 minute of rebuttal.

19 JUDGE PIGOTT: A minute, okay.

20 MR. SOLOMON: What the lower courts did is,
21 it ignored decades of jurisprudence from this court.
22 Admonitions that when we're dealing with real
23 property cases and contract construction, it is
24 important that the - - - the court emphasize the
25 special rule in real property transactions where

1 commercial certainty is of paramount concern, and
2 where instrument was negotiated between sophisticated
3 counsel business people negotiating at arm's length.

4 JUDGE STEIN: Okay. So - - -

5 JUDGE ABDUS-SALAAM: So what - - -

6 JUDGE STEIN: Go ahead.

7 JUDGE ABDUS-SALAAM: So what was the
8 purpose of the clause that allowed these tenants to
9 proffer, if they could find one - - - a potential
10 subtenant? And what did they - - - what was the
11 bargaining there, what did they give up, or what did
12 they get for that?

13 MR. SOLOMON: Okay. The stipulation itself
14 - - - clearly, the purpose was to terminate
15 possessory rights, terminate the lease, and turn over
16 the reversion to the landlord. Paragraph 8 of the
17 stipulation, which is the subject paragraph, that
18 paragraph has - - - essentially, it had three
19 sentences, and then the fourth was added.

20 The first sentence confirmed the right that the
21 tenant had no claims, or liens, or anything against the
22 property. The purpose of that; to make sure the reversion
23 to the landlord was clean.

24 The second sentence said that nobody other than
25 the tenant has acquired through or under the tenant any

1 rights for sublease assignment or otherwise in the
2 possession. Again, the purpose of that sentence is to
3 ensure that there is a clean reversion to the landlord.

4 JUDGE PIGOTT: Isn't - - - isn't the key
5 here reversion? Couldn't this be read to mean, we're
6 done. We're going our way; you're going yours - - -

7 MR. SOLOMON: Correct.

8 JUDGE PIGOTT: - - - and not - - - and not,
9 I mean, and so ends the rent requirement as well?

10 MR. SOLOMON: Well, not the rent
11 requirement; there is no surrender here by operation
12 of law.

13 JUDGE PIGOTT: No, but when you say
14 reversion, and when it - - - and when it says, "We
15 have a final judgment of possession in issuance of a
16 warrant of eviction, enforcement of the warrant was
17 stayed until September 1st." Why wouldn't - - - why
18 wouldn't somebody who would sign that thing - - -
19 we're done, we've agreed, you now can - - - because
20 you had - - - you had a tenant, right; you had
21 somebody that wanted their floor.

22 MR. SOLOMON: Well, no, no, no, no, the
23 idea that there was a tenant interested was a year
24 before this happened.

25 JUDGE PIGOTT: Okay.

1 MR. SOLOMON: So there was - - - at the
2 time there was nobody interested. And when I use the
3 word reversion, I use it loosely. Meaning, that
4 whatever is left under the lease is returned back to
5 the landlord.

6 JUDGE PIGOTT: Right, so you don't - - -

7 MR. SOLOMON: So the lease itself is - - -

8 JUDGE PIGOTT: - - - so you don't get paid.

9 MR. SOLOMON: Yeah. The lease - - - well,
10 we do, because there is a damage clause in the lease
11 that says, notwithstanding the termination, the
12 tenant is still liable for rent through the end of
13 the term. And that's what's critical here.

14 So getting back to Judge Abdus-Salaam's
15 question. The third sentence says, now, while that period
16 of time where you remain in possession, you can't sublet
17 or assign any rights to any third party. Why again?
18 Because this reversion interest, we want to make sure that
19 when you leave, we have the space back without any claims.
20 That's the purpose of the paragraph.

21 JUDGE STEIN: Well, what about the last
22 sentence?

23 MR. SOLOMON: Well, then the last sentence,
24 couns - - - Mr. Palella says to me, well, does that
25 mean we can, you know, can't we go look for a new

1 tenant? Can't we try to mitigate our own damages?
2 Of course, anybody - - - any tenant can do that.
3 Well, then put it in there, just for clarification,
4 we want to make sure that it's clear that - - - that
5 we - - - if we want to, or are motivated to do so, we
6 could find a tenant. Well, of course, knock yourself
7 out. Find a new tenant for the space; that's good
8 for us. If you find a financially worthy tenant to
9 take - - - enter into a new lease - - -

10 JUDGE RIVERA: Well, since you say any
11 tenant can do that, then - - - then it must mean
12 something else here.

13 MR. SOLOMON: Well, no, it doesn't have to
14 mean something else here. All it means is a
15 clarification from the previous sentence. The
16 previous sentence says, you cannot sublease or assign
17 the lease. Well, that doesn't mean you can - - -

18 JUDGE STEIN: Well, what does that mean?
19 Does that mean that you can prevent them from
20 bringing somebody forward, or finding somebody?

21 MR. SOLOMON: It means that they can't
22 peddle the lease.

23 JUDGE STEIN: Okay. But can you prevent
24 them from doing what you've said they have the right
25 to do?

1 MR. SOLOMON: Certain - - - well, that they
2 have the right to do - - - they have the power to do,
3 they can go out and find a new tenant. But we didn't
4 - - - but the landlord - - -

5 JUDGE RIVERA: (indiscernible) owner - - -

6 JUDGE STEIN: Can you prevent them from
7 doing that? Can you take actions or fail to take
8 actions which will prevent them from doing it?

9 MR. SOLOMON: Only to the extent that we
10 don't have to accept anybody that they offer to us.

11 JUDGE RIVERA: Well, that's understood.
12 Okay.

13 MR. SOLOMON: Um-hum.

14 JUDGE STEIN: But - - - but - - -

15 MR. SOLOMON: But the answer - - - the
16 answer is - - - is no, I don't know what the
17 motivation would be if - - -

18 JUDGE STEIN: So you can't. So - - - so we
19 have an affidavit from Unterman that says you did.
20 It may not be true, he may not be able to prove it,
21 but there is this affidavit that says that indeed,
22 you prevented them from doing what you said they
23 could do. So why is that not a question of fact?

24 MR. SOLOMON: Because just because he says
25 in an affidavit you prevented us from doing

1 something, that doesn't create an issue of fact.
2 This is summary judgment. They have an obligation to
3 lay bare their proof.

4 Well, what did the landlord do? What is
5 your proof that the landlord did anything to prevent
6 you from finding a new tenant? Well, he says, well,
7 you called up, or somebody from the landlord's agent
8 called up Costar, which is an independent listing
9 agency, and said, you know what, that old sublease
10 advertisement that they put up, that's no longer - -
11 -

12 JUDGE RIVERA: If - - - if that's true,
13 would that be in violation of Paragraph 8?

14 MR. SOLOMON: No, absolutely - - - no,
15 absolutely not. Because that - - - that
16 advertisement was for a sublease. And the one thing
17 that's clear in the stipulation, is that the tenant
18 can no longer peddle the lease.

19 JUDGE PIGOTT: That's the - - - that's - -
20 - when you were arguing earlier, I thought there's a
21 distinction that hadn't been made. You're saying
22 they can go out and find a new tenant. By that, you
23 mean, who will sign a new lease.

24 MR. SOLOMON: Right. Subject to the - - -

25 JUDGE PIGOTT: Not - - - not they can go

1 out and find someone to - - - to occupy the premises
2 through their lease.

3 MR. SOLOMON: Under - - - under their
4 former lease, absolutely not; and that's clear. The
5 stipulation of settlement terminated the lease,
6 terminated their occupancy rights. And - - -

7 JUDGE PIGOTT: Just - - - just so I'm clear
8 though, on the summary judgment, you said this a
9 summary - - - you brought the motion for summary
10 judgment.

11 MR. SOLOMON: We brought the motion for
12 summary - - -

13 JUDGE PIGOTT: So you had the initial
14 burden of proof.

15 MR. SOLOMON: Right.

16 JUDGE PIGOTT: Their affidavit can simply
17 raise an issue of fact.

18 MR. SOLOMON: Right. But it has to do so
19 with credible evidence. So they proffer two points.
20 They say, number one, you told Costar to remove a
21 sublease advertisement. We didn't deny it, the agent
22 apparently - - - you know, apparently occurred where
23 a phone call was made and said, it's no longer
24 appropriate to have a sublease advertisement up.

25 JUDGE RIVERA: So - - - so then you're

1 saying it is true?

2 MR. SOLOMON: My - - -

3 JUDGE RIVERA: It is true?

4 MR. SOLOMON: - - - my understanding is
5 that somebody from the managing agent called Costar
6 up and said, would you please. Now, they can't
7 order, Costar is an independent agency, they can't
8 order and do something; they asked them to.

9 JUDGE ABDUS-SALAAM: Well, even if they
10 asked them, but you're saying that that was regarding
11 a sublease which you said this stipulation would have
12 cut off anyway.

13 MR. SOLOMON: That's right. So the
14 sublease was no longer appropriate. As a matter
15 fact, it was false advertising. And there is a
16 reason the landlord would want to do that. They - -
17 - they don't want people out there looking for space,
18 thinking that - - -

19 JUDGE RIVERA: Okay. But - - - but you're
20 playing a little fast and loose with the language you
21 guys negotiated. If you read that sentence,
22 "Notwithstanding anything herein to the contrary,
23 nothing herein shall prohibit Respondent from
24 locating and/or offering to Petitioner a potential
25 tenant for the Premises, subject to" of course - - -

1 MR. SOLOMON: Petitioner's - - -

2 JUDGE RIVERA: - - - the prior's approval,
3 excuse me. So the fact that he may seek to advertise
4 it as sublease, and someone comes along, doesn't mean
5 that he has yet to come to you and say, I'm trying to
6 bring this person to you as a sub-lessee. He could
7 very well try and bring him as a tenant, or her.

8 MR. SOLOMON: But the landlord has an
9 interest in not having a - - -

10 JUDGE RIVERA: I understand - - -

11 MR. SOLOMON: - - - a tenant.

12 JUDGE RIVERA: - - - but there is nothing
13 that - - - but there's no one that they've presented
14 yet. They're simply trying to create a pool of
15 viable individuals that might be an appropriate
16 candidate to satisfy paragraph 8.

17 MR. SOLOMON: But - - -

18 JUDGE RIVERA: And as you say, it's to your
19 benefit too. You don't have to approve them, and if
20 they came to you and said, oh, we found a sub-lessee,
21 and you say, no, no, no, I told you no sub-lessee, I
22 told you only tenants; that could be a grounds for
23 rejecting him.

24 MR. SOLOMON: Well, we don't need any
25 grounds for rejecting, first of all. It's in our

1 unfettered discretion.

2 JUDGE RIVERA: I understand.

3 MR. SOLOMON: There is no reasonableness
4 standard - - -

5 JUDGE RIVERA: They were otherwise
6 appropriate to you, but they only wanted to be a sub-
7 lessee; you certainly could say, no.

8 MR. SOLOMON: But Judge Rivera - - - but
9 Judge Rivera, that's not what happened here. This is
10 the - - -

11 JUDGE RIVERA: Well, you admit that a phone
12 call was made.

13 MR. SOLOMON: - - - this is a sublease - -
14 - no, no, this was a sublease ad that was put up at a
15 time when the tenant was still in possession, and it
16 wasn't in default, it was a permitted sublease. What
17 had happened was once the lease was terminated, it
18 was no longer a permitted sublease. So in - - - in
19 effect, by the landlord knowing it's out there, it's
20 almost condoning - - -

21 JUDGE RIVERA: But they have no rights - -
22 -

23 MR. SOLOMON: - - - false advertising.

24 JUDGE RIVERA: Well, it may be false
25 advertising, but they have no rights or ability to

1 set up a sublease. All paragraph 8 says is they have
2 the ability, and nothing shall prohibit it to try and
3 develop a pool of potential tenants that they would
4 bring to your client to approve or not approve.

5 MR. SOLOMON: And the landlord telling a
6 listing agent to either remove a stale sublease
7 notice, is not a violation of that prohibition.

8 JUDGE STEIN: Does your duty of fair
9 dealing in good faith require you - - - they said,
10 you know, hey, what's going on, you - - - you
11 directed them to take this ad off; don't you think it
12 would have been appropriate to say, yeah, you were -
13 - - you were advertising it for sublease, you can't
14 do that.

15 MR. SOLOMON: A duty of fair - - - of good
16 faith and fair dealing only arises where there is an
17 underlying duty, a contractual obligation. Here,
18 there was no obligation, so there is no doctrine of
19 fairness - - -

20 JUDGE STEIN: Contractual obligation is to
21 allow them to bring somebody to you.

22 MR. SOLOMON: That - - - that - - - that's
23 implying here. That's exactly what - - - what the
24 Rowe case and the Vermont Teddy Bear cases have
25 admonished the lower courts not to do. Don't, by

1 implication, expand rights or create issue of facts,
2 when you're dealing with contracts involving real
3 property. That's what this court has repeatedly told
4 the lower courts. And that's what the lower - - -

5 JUDGE STEIN: If that's not their right,
6 what is their right?

7 MR. SOLOMON: This - - - this - - - this
8 provision did not create a right. No - - - pardon
9 the absurdity of the analogy, but if this provision
10 said nothing herein shall prevent the tenant from
11 selling cocaine, does not mean they have a right to
12 sell cocaine. Okay.

13 JUDGE PIGOTT: I think we have your - - -

14 MR. SOLOMON: It doesn't create a right.
15 All it does is acknowledge the fact that the
16 preceding sentence did not bar them, like anybody
17 else, from going out in the real world and trying to
18 mitigate their own damages, albeit subject entirely
19 to the landlord's discretion.

20 JUDGE PIGOTT: Let's hear from Mr. Palella.

21 Thank you, sir.

22 MR. PALELLA: May it please the court,
23 Charles Palella, for the respondent law firm, Kurzman
24 Karelsen & Frank, and the individual guarantors.

25 If I can just jump to that sublease issue. It's

1 not just what's in an affidavit. We have an e-mail here,
2 on page 219 of the record. And the e-mail from the
3 landlord to Costar says, "Please remove the 23rd floor - -
4 - "

5 JUDGE GARCIA: But counsel, assume you're
6 right, we'll accept this for summary judgment
7 purposes, I guess the issue then is how does that
8 violate the clause of this contract that you have
9 signed?

10 MR. PALELLA: Because they - - -

11 JUDGE GARCIA: Because could you advertise,
12 Space available, 230 Park, ten dollars a square foot?
13 It's not true, just like you don't have a right to
14 sublet it anymore, but that's interfering because
15 you'll get a lot of people interested in ten dollars
16 a square foot in 230 Park, and you get a good pool of
17 people, you could probably propose, because now it's,
18 you know, exponentially more than that actually. But
19 - - -

20 MR. PALELLA: Okay.

21 JUDGE GARCIA: - - - so what's the
22 difference?

23 MR. PALELLA: First - - - first of all,
24 they didn't say sublease here. That's - - -
25 contemporaneously, they never mentioned the problem

1 with sublease. They interfered - - - they could have
2 said - - - they said, no, it's not available now,
3 that's why we want you to take down the ad. They not
4 - - - didn't say because take - - - change the word
5 sublease and we'll be all right with that. And it's
6 not - - - that's not the only evidence. We also said
7 they refused our brokers good - - - reasonable
8 commercial attempts to show the premises.

9 JUDGE GARCIA: But again, how does that
10 violate what you've signed?

11 MR. PALELLA: Okay.

12 JUDGE GARCIA: Because to me, if you came
13 to them and said, you know, we're a law firm in this
14 building, we had clients who came through, one of
15 them is really interested in our space we had. You
16 could do that. I mean, it's not that, by not letting
17 you have rights to access the property that you've
18 given up, they've prevented you from ever being able
19 to do what you are authorized to do under the
20 contract you've signed.

21 MR. PALELLA: What we chose to do was to
22 hire a reputable commercial broker, CB Richard Ellis,
23 in fact, in the record it shows that that particular
24 broker had a relationship with the landlord.

25 JUDGE GARCIA: But that's all great, but

1 that doesn't mean they have to let you do that.

2 MR. PALELLA: Well, that - - - that's our
3 choice. And they prevented that broker from doing
4 his job.

5 JUDGE GARCIA: It's certainly your choice,
6 but it's not their obligation to let you do it if
7 they do not have an obligation under this contract.

8 MR. PALELLA: Well, may I say what their
9 obligation is, it's right in - - - in page 214 in the
10 record, in the critical sentence, "Nothing shall
11 prohibit Respondent Kurzman from locating or offering
12 to Petitioner a potential tenant for the Premises,
13 subject to Petitioner's approval."

14 Now, this court's jurisprudence on the duty of
15 good faith and fair dealing is totally apt. It says, "It
16 embraces a pledge that neither party shall do anything
17 which will have the effect of destroying or injuring the
18 right of the other party to receive the fruits of the
19 contract." Their obligation was not to interfere with our
20 chosen method to try to mitigate our damages.

21 JUDGE PIGOTT: When I - - - when I was - -
22 - Mr. Solomon - - - and I looked at, you know, it
23 says they have a final judgment of possession, they
24 have a warrant of eviction, the enforcement of the
25 warrant is dated until - - - only until September

1 1st, it says, or they say, they did not expressly
2 terminate your obligation to pay, and that you had to
3 vacate the premises timely.

4 Where does that give you any rights to do
5 anything other than, as Mr. Solomon is suggesting, if
6 you got a tenant, send them along.

7 MR. PALELLA: The rights in that sentence
8 that we're relying on; it's a contract, it's a
9 separate independent contract. This court's
10 jurisprudence says stipulates into settlement, our
11 independent contract shall be interpreted and
12 reviewed as independent contracts. That was a new
13 right and obligation, and there was consideration for
14 it. We agreed before - - - to vacate before they
15 brought the proceeding.

16 JUDGE ABDUS-SALAAM: What - - - what's your
17 response, counsel, to your adversary's hypothetical,
18 if you - - - if you advertise ten, or I think it may
19 have been Judge Garcia's ten dollars a square foot at
20 230 Park Avenue; do you have a right to do that, to
21 generate tenants even though you know that you're not
22 going to be able to - - - or they're not going to
23 rent to anyone at ten dollars a square foot.

24 MR. PALELLA: Well, that's not the
25 situation here. We did have quite low rent, and

1 that's why we believe we would have a good chance to
2 get a tenant at that rent. But - - -

3 JUDGE ABDUS-SALAAM: Well, that was as a
4 sublease - - -

5 JUDGE GARCIA: But you didn't have the
6 right to sublet.

7 JUDGE ABDUS-SALAAM: - - - a sublease,
8 right, not as a new tenant.

9 MR. PALELLA: After we signed the
10 stipulation, we were wanting to present a new tenant.
11 We wanted to pres - - - get the universe of tenants
12 who the landlord would accept. That's why we - - -
13 we chose this broker. And that's why - - -

14 JUDGE ABDUS-SALAAM: Except at the same
15 rent that they weren't going to renew for you?

16 MR. PALELLA: Whatever the rent would be,
17 the deal would be made between the new party that we
18 would - - - we could present somebody who wanted to
19 take several floors in the building; they prevented
20 us from doing anything like that. We weren't able to
21 advertise, and we weren't able to find somebody. And
22 if they were really - - -

23 JUDGE STEIN: In order to create an issue
24 of fact, you say, we weren't, you know, able to find
25 that they interfered with bringing people around, or

1 whatever, did you have to be more specific, or Mr.
2 Unterman in his affidavit need to be more specific?

3 MR. PALELLA: About which issue?

4 JUDGE STEIN: In order to raise a question
5 of fact to defeat the summary judgment motion.

6 MR. PALELLA: Absolute - - -

7 JUDGE STEIN: I mean, he - - - clearly
8 alleges interference. But there's not a lot of
9 detail in there.

10 MR. PALELLA: Well, the Costar is an e-mail
11 of their own.

12 JUDGE STEIN: Right. Well, that has to do
13 with the advertisement, which is, you know - - -

14 MR. PALELLA: Well, that was part of the -
15 - -

16 JUDGE STEIN: - - - which we're talking a
17 lot about.

18 MR. PALELLA: Okay.

19 JUDGE STEIN: But what - - - I'm wondering
20 what else is there in - - -

21 MR. PALELLA: He also said that there was
22 efforts to block the showing of the premises. They
23 didn't dispute that, this is summary judgment, they
24 had a burden of proof. Their moving affidavit is
25 meager; it hardly says anything at all. We spelled -

1 - -

2 JUDGE GARCIA: But even assuming that's
3 true, I think is the problem. Assuming they did,
4 they said you can't come in this space, you've given
5 the space up, you have no right to come in here
6 anymore; you can't do that. We assume that's true.

7 Why is that interfering with your right
8 under this contract? Could you have advertised, we
9 have a right to, you know, present and/or offer
10 potential tenants at 230 Park to the space. Could
11 you do that?

12 MR. PALELLA: I'm sorry, Judge.

13 JUDGE GARCIA: Could you say in an
14 advertisement, anyone interested, we have an - - - we
15 have an opportunity to present, you know, and offer
16 potential tenants to this space we formerly occupied
17 in 230 Park Avenue; you could advertise that, right?

18 MR. PALELLA: Yes. We relied on the broker
19 to use advertisement and other means as well. But he
20 can't get anywhere if he can't show the premises.

21 JUDGE PIGOTT: I was a little bit hung up
22 on the difference between sublet and lease. Am I
23 wrong to do that?

24 MR. PALELLA: Well, we agreed that - - -
25 actually, we had sublet rights before we vacated.

1 JUDGE PIGOTT: Right.

2 MR. PALELLA: And that's what we gave up.
3 That's why there was consideration here.

4 JUDGE FAHEY: That was the consideration,
5 you give up your sublet rights?

6 MR. PALELLA: Absolutely.

7 JUDGE FAHEY: And for what time period?

8 MR. PALELLA: Well, we gave up the sublet
9 rights starting August 22nd, when we signed the
10 stipulation.

11 JUDGE FAHEY: Um-hum.

12 MR. PALELLA: Okay. They wanted us out of
13 there before that. You know, a law firm - - -

14 JUDGE FAHEY: So - - - so - - - so how long
15 would those rights then, to be able to provide a
16 universe of tenants to them last; how long did it
17 last?

18 MR. PALELLA: Well, if - - -

19 JUDGE FAHEY: For the full length of the
20 lease or for just - - - or for - - - until you were
21 supposed to vacate, which was like a month later?

22 MR. PALELLA: No. For the full length of
23 the lease. We would have the right to sublease.

24 JUDGE FAHEY: So - - - so you're saying, it
25 was December of the next year?

1 MR. PALELLA: December of 2012, correct.

2 JUDGE FAHEY: Okay.

3 MR. PALELLA: That's what we give up.

4 JUDGE FAHEY: So you're saying you had the
5 right - - - you had bargained for the right to do
6 this for fourteen months?

7 MR. PALELLA: We had that in our lease. It
8 was in the lease.

9 JUDGE FAHEY: Um-hum.

10 MR. PALELLA: In the record that the tenant
11 can sub - - - could ask to sublet, the landlord would
12 - - - could then decide to take back the premises and
13 terminate the lease, or if they didn't want to take
14 back the premises, then the consent would not be
15 unreasonably withheld for a subtenant. So in oth - -
16 -

17 JUDGE ABDUS-SALAAM: Unless they took
18 backed the premises, where you turned them over to
19 them, then what was - - -

20 MR. PALELLA: Well, then that would
21 terminate any further rent liability, and this case
22 would be moot, because that's what they are suing
23 for.

24 JUDGE ABDUS-SALAAM: No, what - - - I'm
25 asking about your ability to sublet.

1 MR. PALELLA: I - - - I'm not following
2 you.

3 JUDGE ABDUS-SALAAM: You said that the
4 landlord, if you decided to turn over the premises to
5 the landlord, then are you saying you would still
6 have the right to sublet?

7 MR. PALELLA: No, under the structure in
8 the lease, we turn it over, no further sublet, but
9 the lease is terminated, and no further liability.
10 That's the way the section was written.

11 JUDGE ABDUS-SALAAM: So your adversary says
12 there was a damages clause that says that's not the
13 way it was going to go.

14 MR. PALELLA: That would be superseded if
15 they took back the premises pursuant to the sublease
16 provision of the lease. And that's - - - that's in
17 the record; that's just the way the sublease
18 provision was written.

19 The damages after the term is if - - - if you
20 leave early and - - - and then they claim you left for
21 improper reasons.

22 JUDGE FAHEY: So if you had sublet, let's
23 say you hadn't entered into this stipulation
24 agreement, if you had sublet to somebody, which you
25 had a right to do in the prior agreement; is that

1 right?

2 MR. PALELLA: Yes.

3 JUDGE FAHEY: All right. So - - - so that
4 would have meant that for that year and some four
5 months, that some other person would have occ - - -
6 could have occupied the space, and they could have
7 done it at the substantially reduced rental rate.

8 MR. PALELLA: Correct.

9 JUDGE FAHEY: So it had economic value then
10 to 230.

11 MR. PALELLA: It did, because they - - -

12 JUDGE FAHEY: How much?

13 MR. PALELLA: Well, I think in the record
14 it was 600,000 dollars, something like that, per
15 year. And that they would benefit from not having
16 this encumbered by our very good lease.

17 JUDGE RIVERA: That of course, that would
18 reduce your damages too.

19 MR. PALELLA: Correct.

20 JUDGE FAHEY: Got it.

21 JUDGE PIGOTT: Was it your understanding
22 that when you signed the - - - the stip, that once
23 you paid the holdover amount, because there was an
24 amount that formed the basis of the holdover
25 proceeding, that once you paid that amount, and

1 vacated the premises, you were done?

2 MR. PALELLA: We reserved all our rights to
3 raise defenses to their claim. They weren't claiming
4 we were done; they were saying - - -

5 JUDGE PIGOTT: Oh, you understood that. I
6 thought - - - I thought at some point, you're walking
7 out saying, well, that takes care of that, they get
8 their premises back, we don't have to pay them any
9 more rent.

10 MR. PALELLA: No, we understood that it was
11 a mutual reservation of - - - of rights on both
12 sides.

13 JUDGE PIGOTT: Mutual rights. Okay.

14 MR. PALELLA: And defenses and claims were
15 all reserved, and that's - - -

16 JUDGE RIVERA: Just to clarify, when you
17 walked out the door, were you still paying anything
18 to them after that?

19 MR. PALELLA: We - - - we paid when we left
20 - - -

21 JUDGE RIVERA: Yes.

22 MR. PALELLA: - - - a significant amount to
23 catch up to that point to make them whole up to that
24 date.

25 JUDGE RIVERA: Okay. Yes.

1 MR. PALELLA: And after that, we did not.

2 JUDGE RIVERA: You did not pay anything - -

3 -

4 MR. PALELLA: We did not.

5 JUDGE RIVERA: - - - because pursuant to

6 the - - - pursuant to the stip, you did not owe

7 anything?

8 MR. PALELLA: Our - - -

9 JUDGE RIVERA: - - - because you had - - -

10 well, he says it's not a surrender, but because you

11 had - - -

12 MR. PALELLA: Well, we claimed there was a

13 surrender, that's why we weren't paying at that

14 point, and we still have a little bit of rights to

15 bring that up later in this proceeding. We put that

16 in a footnote. But - - -

17 JUDGE RIVERA: Okay.

18 MR. PALELLA: If there's no further

19 questions, I will rely on the brief.

20 JUDGE PIGOTT: Thank you, Mr. Palella.

21 Mr. Solomon.

22 MR. SOLOMON: There is a very important

23 point to clarify here. There was no consideration

24 under that stipulation where this tenant giving up

25 sublet rights.

1 As of August, it was in default in paying
2 real estate taxes, it actually owed the whole half of
3 the year pursuant to the lease. As a compromise, we
4 only took August and reserved the right. But they
5 were in default of paying rent as of August. As of
6 September 1st, they were in default of paying rent
7 for September, and they had abandoned the premises;
8 those are three defaults.

9 Under paragraph 4 of the sublet provision
10 in the lease, they have no right to sublet if they
11 are in default of the lease, if an event of default
12 has occurred. So - - -

13 JUDGE RIVERA: So what benefit are they
14 getting from the stip? Because you're basically
15 saying they left, they still owe me money, I'm going
16 to sue them to keep paying, what - - - what did they
17 get from the stip?

18 MR. SOLOMON: The benefit they got was the
19 termination of the L&T case hanging over their head,
20 the fact that we were pushing it to trial, and that
21 they - - -

22 JUDGE RIVERA: With the outstanding debt on
23 the rent - - -

24 MR. SOLOMON: On - - - right, it was a
25 nonpayment, we were pushing it to trial, they would

1 be liable for the rent, they would be liable for all
2 of our attorneys' fees, and they weren't necessarily
3 going to be out on the 1st.

4 They reserved their rights to extend that -
5 - - that vacate period for a few weeks, in case their
6 new space wasn't ready. So they wanted the certainty
7 of knowing that they can stay for whatever period of
8 time they needed to stay, without the harassment of a
9 summary proceeding hanging over their head. That was
10 the - - - that was their consideration and the reason
11 why they were willing to enter into the stipulation.

12 And they negotiated reduction of those
13 real estate taxes owed at the time, and only paid - -
14 -

15 JUDGE RIVERA: So - - - so - - -

16 MR. SOLOMON: - - - for the month of
17 August, July and August.

18 JUDGE RIVERA: So then you're saying that
19 paragraph - - - if I'm understanding you correctly,
20 you'll me know otherwise, that paragraph 8, the
21 prohibition on the subless - - - the opportunity to
22 sublet or assign only applied during this period of -
23 - - of the nonpayment proceeding?

24 MR. SOLOMON: Oh no, it applied
25 indefinitely. From here on after, because it was

1 clear that what was happening under that stipulation
2 is the lease was being terminated, the warrant was
3 being issued.

4 JUDGE RIVERA: Throughout - - - it says,
5 "Throughout the stay of the warrant of eviction
6 hereunder."

7 MR. SOLOMON: Right. Because once the
8 warrant is effective, by operation of law under 741,
9 the lease is terminated; so they have no rights to
10 sublease further.

11 JUDGE RIVERA: Well, I'm sorry. So I'm
12 completely misunderstanding you, because I thought
13 you said that what they got from the stip was the end
14 of that nonpayment action.

15 MR. SOLOMON: What they got - - - right,
16 what they got was knowing with certainty that they
17 can stay for as long as they needed to stay, without
18 the nonpayment hanging over their head.

19 JUDGE RIVERA: But, so - - - but the stay
20 of the warrant would stay in place; is that what you
21 mean?

22 MR. SOLOMON: Right. So we would be
23 entitled to get our warrant, we just wouldn't enforce
24 it under the terms of the stipulation. Because - - -
25 because that was the benefit they were getting, the

1 certainty of knowing that they could stay in the
2 space until their new space was ready for them to
3 move. So they wouldn't be moving under the guise of
4 a marshal - - - a city marshal locking them out of
5 the space.

6 JUDGE PIGOTT: Thank you, Mr. Solomon.

7 MR. SOLOMON: Thank you, Your Honors.

8 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of 230 Park Avenue Holdco v. Kurzman Karelsen & Frank, LLP, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: June 2, 2016