COURT OF APPEALS

STATE OF NEW YORK

KASOWITZ BENSON,

Respondent,

-against-

NO. 99

JPMORGAN CHASE,

Appellant.

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20 Eagle Street
Albany, New York
October 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE ANDREW G. CERESIA

Appearances:

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CHIEF JUDGE WILSON: Last case on this afternoon's calendar is Kasowitz Benson v. JPMorgan Chase. And we're delighted to be joined by our colleague Justice Ceresia for this appeal.

Counsel?

MR. SCHOENFELD: Good afternoon, Your Honor. May it please the Court. The Appellate Division gave three reasons why JPMorgan could not challenge the basis for the Dakota's claimed attorney's fee lien. All of them are indefensibly wrong under this court's precedent and Supreme Court precedent. And this court should vacate and remand for a decision on the merits. First, the court held that JPMorgan was precluded because it was in privity with Fletcher as the assignee of his shares in The Dakota. But this court made entirely clear in Gramatan, consistent with centuries of case law from every court to have addressed the issue, that an assignee is bound only by a judgment entered prior to the assignment. Chase obtained its assignment from Fletcher seven years before the fee judgment was entered.

JUDGE RIVERA: Can we discuss the nature of that agreement, please? Because he raises questions about the nature of this agreement.

MR. SCHOENFELD: So I think, Your Honor, you're asking about the recognition agreement?

JUDGE RIVERA: Yes, correct.

MR. SCHOENFELD: So I don't think the recognition agreement has anything to do with the assignment. The recognition agreement is a three-party agreement between the Dakota, JPMorgan, and Fletcher. And all it does is it acknowledges that there's a lien in place as of the time of the assignment in 2008. Under Gramatan, that has nothing to do with whether JPMorgan is bound as the assignee.

JUDGE RIVERA: But doesn't Chase understand that The Dakota has a superior position on the debts and it has an inferior position. And that that is what this - - - that agreement and the assignment that is part of that, that they understand that they are inferior to that?

MR. SCHOENFELD: With respect to the lien, any lien that existed at that point in time. Gramatan is entirely - - -

JUDGE RIVERA: Why does it have to already have existed?

MR. SCHOENFELD: Because what - - -

JUDGE RIVERA: That's my point. I'm not sure I'm reading Gramatan the way you do, because if you understand that if there is a debt, Dakota has a superior position; that's moving forward. Now, if you want to argue that they didn't have notice of it, I'm happy to hear that. But I'm having a little bit of difficulty with the argument that

even though they understand this superior, inferior status, that they had to know already about every single debt that had already been incurred.

MR. SCHOENFELD: They do have to know about the debt that's incurred because you take property standing in the shoes of the assignor. And if there's no debt - - -

JUDGE RIVERA: Yes, but they're not like a - - - it's not a pure assignment in that sense, an assignment where Fletcher walks away, right? Fletcher still has an interest, right?

MR. SCHOENFELD: Right, that - - - that certainly - - -

JUDGE RIVERA: So they are - - - they have co interests.

MR. SCHOENFELD: So that certainly doesn't matter. And let me make two points.

JUDGE RIVERA: Why doesn't that matter?

MR. SCHOENFELD: Well, can I address the first part of the question?

JUDGE RIVERA: Sure. Of course.

MR. SCHOENFELD: So I think the recognition agreement only matters with respect to contractual privity and not - - - not nonparty privity. There's - - -

JUDGE HALLIGAN: Why is that?

MR. SCHOENFELD: Because there's nothing about

the recognition agreement that contravenes or countermands the rule that an assignee only takes - - - is only bound by pre-assignment estoppel. So Gramatan speaks very explicitly about what matters is the dispute. The dispute giving rise to the liability has to attach before the assignment. It's not simply the existence of some hypothetical lien or even a lien that exists at that point in time.

JUDGE RIVERA: Yes, but that makes sense, if, again, the assignor is indeed assigning all of their interest.

MR. SCHOENFELD: So - - -

JUDGE RIVERA: It makes complete sense.

MR. SCHOENFELD: - - - Your Honor, we cite plenty of case law, including the restatement which this court has adopted, the Restatement of Judgments on Privity, which says that even where you have a shared property interest, so mortgage mortgage, mortgage or mortgagee, tenant lessee, it doesn't matter to the question of whether a nonparty can be bound under estoppel principles as a matter of nonparty preclusion. So even when the interest is something less than a full and complete assignment, it still doesn't matter.

JUDGE RIVERA: But that does involve a situation where you have parties that by the UCC The Dakota has a

superior status?

MR. SCHOENFELD: Absolutely, I don't think it matters at all whether you have a mortgage or mortgagee that has a recognized statutory superior interest, has nothing to do with whether as a matter of due process principles, an assignee can be bound by a post assignment judgment against the assignor. And that is true, again, and we cite all of these - - - the treatises and also the case law in our reply brief. That is true regardless of the nature of the property interest, even if there's a shared interest, even if they are contemporaneous holders of the same property with respect to the security interest, the same due process principles apply with respect to nonparty privity. So the - - - as I noted - - -

JUDGE RIVERA: Why don't you address whether or not Chase had notice of the Fletcher action?

MR. SCHOENFELD: So I think Chase was aware of the Fletcher action. The Fletcher action was filed in 2011, I believe. And then the proceedings with respect to the fee claim were in 2015, but it didn't have notice of until the fee judgment was entered, and recall that the Article 52 proceedings were already going on as of 2015. It had no notice that the Dakota was going to use this fee judgment to prime the lien and the Article 52 proceedings. There was one email where counsel for the Dakota sent as a

courtesy, upon request from Chase's notice, a copy of papers asking for entry of the fee judgment. But that said nothing about the fact that they were going to attempt to use that fee judgment to enter - - - to essentially prime the lien and the Article 52 proceedings. And in any event, it doesn't matter. I mean, Taylor v. Sturgell is quite clear that mere notice of other proceedings is not a sufficient basis to bind a nonparty through preclusion principles.

JUDGE RIVERA: It does seem that the actual merits issue has been addressed by more than one judge. Why is it you're not actually seeking more than one bite at this apple?

MR. SCHOENFELD: We're entitled to unencumbered appellate review of that question, and we've never gotten it. We didn't get - - -

JUDGE RIVERA: And you think the - - - I'm sorry, on the motion to vacate and to intervene that somehow that is encumbered; you won't be able to get to the merits - - -

MR. SCHOENFELD: Precisely.

JUDGE RIVERA: - - - even though the judge did.

MR. SCHOENFELD: Precisely. I mean - - -

JUDGE RIVERA: Why is that?

MR. SCHOENFELD: Because there's nothing obligating the Appellate Division in that second appeal

from not deciding - - - the intervention and motion to vacate were denied in their entirety. The appellate - - -

JUDGE RIVERA: After going through the merits. Not on a timeliness issue, not - - - not for any reason.

MR. SCHOENFELD: Correct. But the motion - - - the motion was denied. And so there's nothing stopping the Appellate Division in this currently pending not fully yet briefed appeal from saying, no, we deny it; intervention was untimely. No, we deny it; you don't meet the standard for 5015.

JUDGE RIVERA: You don't think the prior panel indicating that that was your path would be enough to do - - - to send that signal to bind - - -

MR. SCHOENFELD: I don't - - -

JUDGE RIVERA: - - - law of the case?

MR. SCHOENFELD: I don't, Your Honor. But I - - - I would also say that I think we would be satisfied with a judgment from this court that essentially directed the Appellate Division in the subsequent proceedings to address that question in the first instance, unencumbered by any of the procedural barriers. All we're asking for here is one unfettered chance at appellate review of a question, which I think is, at the very least, a closed question. I mean, I won't get into the merits unless the court's interested, but the reading of the plain language of the statute,

particularly in light of the explanatory note which is contemporaneous - - - which was presented contemporaneously and contiguously to the voters on The Dakota shares, makes very clear exactly what The Dakota meant.

That's all we're asking for. One clean shot to persuade the Appellate Division, that and possibly this court, that were right on that. And we've just been denied that. And I think the critical point is there is nothing in the Appellate Division's decision depriving us of that opportunity that is defensible under New York or Supreme Court case law. It gave three reasons, each one is flatly inconsistent with New York and Supreme Court case law. I mentioned the first, which is that JPMorgan was precluded because it's in privity with Fletcher. I think that's entirely clearly wrong under Gramatan. And I think for all of the reasons that The Dakota gives in its answering brief, we address them in our reply brief. There's simply nothing that gives an exception in these circumstances, from what is a pretty categorical rule that an assignee only takes - - -

JUDGE RIVERA: Let me ask you, if Chase actually knew early enough that it could have done something - - - I take your point that they really didn't know. Okay. Would that matter at all?

MR. SCHOENFELD: It doesn't. And I think that's

clear from Taylor v. Sturgell. The Supreme Court directly addresses - - -

JUDGE RIVERA: That notice insufficient?

MR. SCHOENFELD: I'm sorry?

JUDGE RIVERA: That notice on its own is insufficient.

MR. SCHOENFELD: Absolutely, notice on its own is insufficient. The Supreme Court and Taylor discusses - - -

JUDGE RIVERA: Even in a shared interest situation?

MR. SCHOENFELD: Absolutely. I think the shared - - - to answer your question very clearly, I think the shared interest question is immaterial. And I don't think you can aggregate a sort of quasi privity notion of a shared security interest with what is a constitutionally indefensible - - - what the Supreme Court calls a virtual representation theory, that merely because you had notice of ongoing proceedings, that you are somehow bound by that judgment. And the Supreme Court discusses the due process principles behind that in Sturgell. It discusses the Supreme Court's prior decision in the Alabama case, which is a state supreme court case, and it makes clear that that's insufficient to bind a nonparty.

JUDGE RIVERA: I take it there's - - - I take it there's nothing in the record that indicates that when

Chase and Fletcher entered their agreement, that Chase required that Fletcher advise them of any kind of action that might incur a debt that they would have to pay off to Dakota?

MR. SCHOENFELD: I don't know the answer to that question. The security interest that JPMorgan obtained from Fletcher was in 2008. He didn't file the discrimination case until 2011. I honestly don't know when the attempted purchase of the additional shares that gave rise to the 2011 case occurred, so I just don't know it would have been feasible. And to the extent you're asking whether there's some evergreen notice provision, I'm not aware of one.

I also don't think it - - - it would matter. I think The Dakota actually acknowledges in their answering papers that there is no legal requirement that JPMorgan had to intervene in the prior proceedings. They say that JPMorgan could have intervened if it wanted to, but there's no legal requirement that JPMorgan was obligated to intervene, which I think brings us to the second basis for the Appellate Division's decision, which is it held that JPMorgan was required to intervene in the underlying case in order to protect it from some application of preclusion principles as a nonparty. But The Dakota concedes in its brief that it's - - -

JUDGE RIVERA: I don't know that I read it, that it said required, other than noting that you could have. That doesn't necessarily mean that - - - I get your point. It's a compelling point that that doesn't mean you had to. Let me ask you this. Were you - - - is there a joinder issue? Should you have been joined in that action as a necessary party?

MR. SCHOENFELD: Yeah. I want to get to your reading of the Appellate Division's decision. But to answer your question, we could have been joined. And certainly if the Dakota wanted to secure its rights in this asserted superior loan as to JPMorgan Chase, it could have joined us under 1010. There was nothing stopping them from doing that. And that would have been a much cleaner way to ensure that JPMorgan was bound by the same judgment. But to get this judgment against Fletcher and then to wield it in parallel proceedings against JPMorgan and assert that JPMorgan cannot, in those proceedings, challenge the basis for that judgment, I think, is wrong. So certainly there were tools that The Dakota's disposal if they wanted to make sure that the judgment they were obtaining would bind JPMorgan as the assignee of Fletcher.

JUDGE HALLIGAN: On that - - - on that front and the three way agreement, do you think due process would preclude an assignor and an assignee from agreeing that

each would be bound in the future? I don't see anything along those lines in the three way agreement.

MR. SCHOENFELD: Yeah.

JUDGE HALLIGAN: Maybe your adversary has a different view, but under basic freedom of contract principles, could you agree to contract around what you articulate as the due process rule?

MR. SCHOENFELD: It's an interesting question. I don't know why you couldn't. Certainly, well - - -

JUDGE HALLIGAN: So if Dakota wanted to, you were just offering one route, which was joinder, right? I think that Dakota could have brought Chase in. I assume also, if there was an interest in binding Chase going forward, that could have been agreed to in the three-way agreement and due process wouldn't preclude that?

MR. SCHOENFELD: Yeah. I can't think of any reason why it wouldn't, but obviously that agreement was signed against common law principles of preclusion and estoppel, which are then backstopped by due process principles. So I - - - it's hard for me standing here to think of a reason why the parties couldn't have contracted to that, but that's certainly not what they did. I also realized that I didn't ask for rebuttal time. So if I could belatedly or - - - how much I talked.

CHIEF JUDGE WILSON: How much would you like to

reserve?

MR. SCHOENFELD: Four minutes, if it's okay with the court.

CHIEF JUDGE WILSON: If you haven't used that yet, we can allow that.

MR. SCHOENFELD: Thank you. And so third, you know, the Appellate Division held that chase in the Article 52 proceeding seeks to destroy the underlying judgment. Chase seeks no such thing. The Dakota is free to wield that judgment against Fletcher however it wants. The only question is whether JPMorgan is bound in these Article 52 proceedings by a judgment that was essentially obtained as a default, with no real adversity between The Dakota and Fletcher, and whether it's precluded from challenging that in a proceeding where the Dakota is trying to wield that lien to subordinate JPMorgan's interest in the property. And I think I'm happy to answer any questions about mootness, but I think there's no real question that this appeal is not moot.

I think for the reasons I was going back and forth with you, Judge Rivera, there's an obvious encumbrance to our appellate rights currently pending. It's clear from the first Appellate Division decision that they viewed these insupportable procedural barriers as precluding plenary review of the merits question. And

right now, what we are confronting in the Appellate Division is the very real probability that we will never get a decision on the merits, because there are multiple procedural vehicles available to them to avoid ruling on the merits at all.

CHIEF JUDGE WILSON: Thank you.

MR. SCHOENFELD: Thank you, Your Honor.

MR. VAN DER TUIN: Good afternoon, Your Honors, John Van Der Tuin, Smith Gambrell and Russell, for respondent, The Dakota. And I'm puzzled by one thing, I guess. My adversary talks about the collateral estoppel issues and wanting one clean shot. They've had one clean shot. Indeed, they've had two clean shots. The order that's on appeal here is the order of Justice Lubell in the Supreme Court, which, after lengthy proceedings, found on the merits in favor of The Dakota without applying any collateral estoppel or preclusion barrier to the proofs or the claims of Chase. At the trial court, in this case, there were pleadings. They had notice before the pleadings were even filed of the specific nature of The Dakota's claim. Contrary to what my colleague stated, if you look at the record - - -

JUDGE CANNATARO: Well, counsel, even if Supreme Court decided the issue on the merits, and I agree with you that it sure looks like they decided, Judge Justice Lubell

decided the issue on the merits. Does that guarantee Chase merits appellate review? I mean, because what I hear him to say, his last statement before he sat down is there are too many non-merits-based off ramps that the Appellate Division could take to resolve this appeal against them. And what he wants is not just a clean shot, he wants a clean shot at merits-based appellate review.

MR. VAN DER TUIN: And he had a clean shot at merits-based appellate review already in the First Department. How did that happen? The appeal in the First Department was the appeal of Justice Lubell's decision, which was on the merits, not a collateral estoppel decision, not a preclusion decision, but a decision on the merits of all of the attacks that Chase chose to make against our claim.

JUDGE RIVERA: Well, I thought the panel was very clear that it said, you can't attempt to unwind that judgment by challenging the - - - whatever it is, paragraph 15 or 16, whatever it is - - - in this action. You have a different path that's available to you, and you had a path in the past that was available to you that you didn't take. So I didn't - - -

MR. VAN DER TUIN: They did say - - -

JUDGE RIVERA: I didn't read the - - - there is one merits part of the decision. You're correct in that

way. But not about this issue, not about this challenge.

MR. VAN DER TUIN: They - - - all of the merits issues were briefed in the Appellate Division.

JUDGE RIVERA: Yeah.

MR. VAN DER TUIN: If you look at the briefs that are included in the record here, and - - -

JUDGE RIVERA: Well, no doubt, but the question is whether or not they actually ruled on the merits.

MR. VAN DER TUIN: They - - -

JUDGE RIVERA: I don't think you can read the AD that way.

MR. VAN DER TUIN: They affirmed the order of Justice Lubell that was on the merits. They didn't modify it. They didn't reverse it. They didn't - - -

JUDGE RIVERA: But then why would they say you couldn't go seek to vacate? Why would they say that?

MR. VAN DER TUIN: I think they threw my adversary a bone there even though they were affirming on the merits, Justice Lubell. If this court were to disagree with the First Department in terms of its holding or its reasoning with respect to 5015 and decided that the First Department was wrong on that, it would still need to affirm Justice Lubell's decision and order, which is what's on appeal here.

CHIEF JUDGE WILSON: Well, why would why couldn't

we reverse that if you're right? That is if you're saying they in this appeal, what we have is Supreme Court decision Justice Lubell on the merits, the merits being the interpretation of The Dakotas agreement, right? And the Appellate Division decided that or had it in front of it, decided something else, but that was raised there. Are you saying that really their clear chance of appellate review is for us to reach the merits here?

MR. VAN DER TUIN: If you look at what they - - -

CHIEF JUDGE WILSON: Can we do that?

MR. VAN DER TUIN: No, you cannot. On the briefs and on the question that they have presented to this court, their question presented to this court in their brief, and their introduction in their brief, was solely with respect to the collateral estoppel preclusion rationale of the First Department.

JUDGE HALLIGAN: You mean before us?

MR. VAN DER TUIN: Before you. Their brief before their - - - in their briefs to us. They did not - - - they did not raise, they did not attack, they did not raise an issue with respect to the

JUDGE HALLIGAN: But - - -

MR. VAN DER TUIN: - - - merits decision of Justice Lubell - - -

JUDGE HALLIGAN: But - - -

MR. VAN DER TUIN: - - -that was affirmed. I'm sorry, Justice - - - Judge Halligan.

JUDGE HALLIGAN: No, not at all. But isn't that because - - - maybe I'm missing something? But it seems to me that what the Appellate Division says is that Chase argues what they argue about, about their interpretation of paragraph 15. But the App Div says this is an impermissible collateral attack on The Dakota's judgment. So I don't see how the Appellate Division is reaching the merits of the question of how to read paragraph 15. Do you disagree?

MR. VAN DER TUIN: I disagree because they affirmed Justice Lubell's order.

JUDGE HALLIGAN: They affirm, did they not, on the grounds that - - -

JUDGE CANNATARO: Yeah, I'm sorry.

JUDGE HALLIGAN: No, go ahead.

JUDGE CANNATARO: It's with respect to the priority of the - - - of the liens in the case.

JUDGE CANNATARO: And the other - - -

JUDGE HALLIGAN: But just - - - I just want to pin this down if I can. Where in the App Div's opinion, do you see the Appellate Division ruling on the merits of the question of what paragraph 15 means?

MR. VAN DER TUIN: I would say two places.

JUDGE HALLIGAN: Okay.

MR. VAN DER TUIN: One is that, you know, and I know it's kind of a technical, procedural appellate issue. But Justice Lubell - - - Justice Lubell's order was on the merits. The Appellate Division affirmed - - -

JUDGE HALLIGAN: They're affirming, are they not, on the alternative ground that it's an impermissible collateral attack?

MR. VAN DER TUIN: They didn't - - - they didn't say that; they didn't modify - - -

JUDGE HALLIGAN: You're saying however it's an impermissible - - -

MR. VAN DER TUIN: And in addition - - -

JUDGE HALLIGAN: Go ahead.

MR. VAN DER TUIN: I'm sorry; I don't mean to step on your sentences.

And in addition, I believe I'm quoting it correctly. But the Appellate Division decision says unless the Article 2, 15th, doesn't mean what it clearly says, the Dakota was entitled to its fees here.

JUDGE CANNATARO: Counsel, if you could just back this conversation up a little, because I was under the impression, I saw those words too, from the Appellate Division, that that this claim was an impermissible collateral attack on the - - - on the Fletcher judgment. I

took that to be a collateral estoppel bar. And I think I hear you saying, that's not at all what it is. So can you tell me what it is?

MR. VAN DER TUIN: I think that the First Department viewed there being a bar, but that it did not disagree with Justice Lubell's decision on the merits of every issue that Chase raised with respect to - - -

JUDGE HALLIGAN: I mean, aren't those mutually - - - aren't those mutually exclusive, counsel? I mean, if I'm barred from reaching the merits, then I can't also, I think, lay down a holding on the merits.

MR. VAN DER TUIN: But the Appellate Division did address, as Judge Rivera noted, certain aspects of the merits. They didn't view it as being a total bar. They affirmed Justice Lubell, and then said could have also been barred and should have gone to 5015. Now, if one goes to the collateral estoppel issue on the merits - - - the other issue I want to note is that this court does not review the constitutional issues that were not raised below. There was no litigation of the due process issues below. This was first surfaced in - - - on this appeal. So to the extent that there are due process issues, that they're not properly before this court for review.

JUDGE RIVERA: Wouldn't that be because it doesn't arise until the Appellate Division says you're

foreclosed?

MR. VAN DER TUIN: No, because - - -

JUDGE RIVERA: Here from trying to address the merits.

MR. VAN DER TUIN: Because - - -

JUDGE RIVERA: Let's say we disagree with your reading of the Appellate Division, and we think they did not address the merit - - - because I think they addressed the merits on a different claim, not this claim. So on this claim, if we disagree with you and say they didn't address the merits, isn't now their opportunity to argue, oh, having said that, having rendered that decision, that would violate my due process rights. It would raise that to us.

MR. VAN DER TUIN: The issue of collateral estoppel - - -

JUDGE RIVERA: Yes.

MR. VAN DER TUIN: - - - was litigated before Justice Lubell, but Justice Lubell did not base his decision on it. They did not say at that time that application of collateral estoppel would be a due process violation. So it was - - - you know, it was not raised either before Justice Lubell or in the First Department. It was only raised to this court.

JUDGE RIVERA: By the way, if you're correct in

your reading about the Appellate Division decision here, why is Justice Bluth, in the motion to vacate and to intervene, addressing it anew? Wouldn't she be bound by the merits decision?

MR. VAN DER TUIN: We suggested that she should be in our opposition to their belated 5015 application last year. She did not rule on that basis, and she instead again addressed the merits.

JUDGE RIVERA: And can I ask you, what is your view of counsel's claim that even though Justice Bluth addressed the merits and denied their motion, that on appeal, I know that state, on appeal, the Appellate Division could very well decide that she should not have addressed the merits, and then they'll never have a decision on the merits. Again, assume, for the purposes of this question, that we disagree with your reading of the Appellate Division decision, or to here regarding whether or not it addressed the merits.

MR. VAN DER TUIN: That might then make it ripe to decide that issue as to whether the Appellate Division was correct with respect to that, if they reversed her and said, you shouldn't have decided this, it's barred by the prior proceedings or the other decision. But to anticipate that now and try to speculate on that, I think, would be error for this court, or a mistake for this court.

JUDGE RIVERA: So you're saying we should affirm here, let that proceed. If then the Appellate Division doesn't address the merits, they can appeal that and argue to us that that violates their due process?

MR. VAN DER TUIN: They can. But let's - - - let's recall, though, that they want - - - they claim they want one - - - they want to be heard on the merits of their claim.

JUDGE RIVERA: Yes. At the appellate level. That's their issue.

MR. VAN DER TUIN: So they are being heard on the merits of their claim at the appellate level by this court. I don't believe that the court needs to reach that issue for the reasons I've discussed, but let's talk - - - let me address why they're wrong on the estoppel issue. Okay. And I say that with the prefatory statement that they've had one, if not two, full hearings on the merits. I mean, in this proceeding below, there were pleadings, there was extensive discovery, there was substantive motion practice, and there was a decision in the Dakotas favor which should be affirmed. On appeal, they're wrong with respect to the estoppel issue as well, I believe.

And with apologies - - - apologies to the professor. I'm going to get a little academic, and let's talk a minute about what this court's prior decisions with

respect to preclusion and estoppel have said. And on that, I'm going to call the court's attention to the Gilberg and Barbieri case, the Gramatan case that they cite, and the Biondi case. The purposes and limits and the principles of preclusion or estoppel, this court has said previously, is based on general notions of fairness with few immutable rules, and when collateral estoppel is an issue, the question as to whether a party had a full and fair opportunity to litigate a prior determination involves a practical inquiry into the realities of litigation.

That's this court in the Gilberg case, and in the Gramatan case which they rely on. They said that estoppel must be limited to ensure that a party is not precluded from obtaining at least one full hearing on his or her claim, which they've had here. They've had two. They want a third one. And the Biondi case likewise said it is not fair to permit a party to relitigate an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point. They've had their full, fair opportunity.

Now, Justice Judge Rivera, you were asking about some of the factual issues that relate to the estoppel here. And those factual issues distinguish this case from the cases that they rely on.

JUDGE RIVERA: Well, actually, if you would,

because I don't know how much more time you have, but I assume the white light is going to go on soon. If you could address this question of the agreement - - -

MR. VAN DER TUIN: Yes.

JUDGE RIVERA: - - - and how that effects, if it does, all the appointments.

MR. VAN DER TUIN: It does effect it.

JUDGE RIVERA: You heard my line of questioning initially to counsel. I would like to see what your view is.

MR. VAN DER TUIN: It does effect it because in that agreement, which was between the two creditors, Chase and - - - and The Dakota, with respect to the asset owned by Fletcher, they agreed as to the priority. They recognized that The Dakota got paid first out of the proceeds of any sale or from the apartment if there was a dispute. Dakota had the prior lien. The other facts that bear on this, and that are distinguishing factors - - -

JUDGE RIVERA: But his point is that's different from a situation where when there's an assignment, you know what the debt is as opposed to the debt being something that is incurred post the assignment. Could you address that?

MR. VAN DER TUIN: Yes. But you know at that time - - -

JUDGE RIVERA: What's the at that time? I'm sorry.

MR. VAN DER TUIN: At the time the agreement was made in 2008 here.

JUDGE RIVERA: Okay.

MR. VAN DER TUIN: You know you are agreeing to a priority of debt that may include such things as attorney's fees or other obligations that arise under the proprietary lease or the bylaws in the future. You know that you're agreeing - - -

CHIEF JUDGE WILSON: But that's the underlying question here is whether they do arise under the proprietary lease or not. And the question is whether you can bind the bank to that without their participation?

MR. VAN DER TUIN: Well, there are - - - you've identified two questions. One is do they arise under the lease. And every judge that has looked at it below has said yes it does.

CHIEF JUDGE WILSON: And what they - - - what they want is, as I understand counsel, a clean appellate review of that question.

MR. VAN DER TUIN: And that appellate review took place at the First Department. First Department in this case - - -

CHIEF JUDGE WILSON: In this case you say, and

that could have been reviewed here had they asked us to review it and they didn't.

MR. VAN DER TUIN: And - - -

That's your position?

MR. VAN DER TUIN: Yes. And it is before this court now. And it is before - - -

CHIEF JUDGE WILSON: Well, except you say it's before this court now, except because they didn't brief it it's actually not before the court.

MR. VAN DER TUIN: Well, I would say that because they didn't brief it it's not before this court. They waived it.

CHIEF JUDGE WILSON: Right.

MR. VAN DER TUIN: It was their choice.

CHIEF JUDGE WILSON: That's - - - I understand that's your position.

MR. VAN DER TUIN: But if - - - but if I'm incorrect on that, and it is before this court, this court gives them a clean appellate review of it. The other factors that enter into that analysis, Judge Rivera, are that they were - - - that Chase was on clear notice of the underlying Fletcher action and the claims as to fees that The Dakota was making in it and The Dakota's claims that its fee claim was superior to the Chase mortgage lien under the lease. How did they know that? On August 27th, 2015,

which was a month after this proceeding was commenced - - -

JUDGE TROUTMAN: So are you arguing that they had the - - - they were required to intervene if they wanted to have a say?

MR. VAN DER TUIN: If they wanted - - - if they wanted to have a say, they had two - - - they had two routes. They could have intervened at that time or they could have taken advantage of this legislative opening created by CPLR 5015.

CHIEF JUDGE WILSON: But why is the knowledge of the priority in the agreement any different from the knowledge of the general rule that first, a judgment recovers first?

MR. VAN DER TUIN: I'm sorry, Judge; I didn't - - -

CHIEF JUDGE WILSON: Why is their knowledge of the contractual priority in the recognition agreement different from anybody's knowledge that first to judgment recovers first? I mean, you seem to be imposing the rule I think you want - - - is that to protect your rights, you need to intervene rather than to bind a third party, you need to get that third party joined.

MR. VAN DER TUIN: You need to intervene, or if you see that there has been a judgment or an order in that action that adversely affects your interests, you could

move within a year pursuant to 5015 to have that judgment modified or vacated.

CHIEF JUDGE WILSON: So you would like a general rule that seems to me to be different from Gramatan?

MR. VAN DER TUIN: It would be different from Gramatan because the circumstances of Gramatan are different.

CHIEF JUDGE WILSON: But that's what I'm trying to get. I don't understand why the priority, whether the priority is set up contractually among the parties, or the priority is one that simply operates by - - - by normal operation of law, first to judgment to recover first, why that circumstance is different.

MR. VAN DER TUIN: The circumstances are different. And again, I hark back to this court's prior discussion of the need to attune estoppel and preclusion issues without regard to a fixed rule, and taking into consideration fairness and the practicalities of the litigation. And in this case is different than Gramatan. Gramatan correctly decided, okay, party there had no notice. There was no three-party agreement. In this case, at the outset of this litigation, they had knowledge of the details of - - - of the Dakota's claim and that it was - - - they claim priority. When - - -

JUDGE RIVERA: So is it your point that because

of - - - because of this agreement - - -

MR. VAN DER TUIN: Because of the agreement.

JUDGE RIVERA: Because of the agreement, and otherwise without the agreement, they wouldn't have this. But because of the agreement, there is a - - - a duty and obligation on them to protect their interests by doing one of the two things you have identified, intervening or waiting for the judgment, because maybe it'll all work out, and filing a 5015 motion to vacate.

MR. VAN DER TUIN: I would say because of the agreement and because they were on notice of the fee application.

JUDGE RIVERA: Yeah.

MR. VAN DER TUIN: He concedes I sent a Chase's - - - Chase's counsel was following the Fletcher action. He emailed me. The emails were in the record. He emailed me and say, what's you know, what's your motion about here? And I emailed back and said, it's our fee application. You want a copy? Here's a copy. Let me know if you have questions.

JUDGE RIVERA: Why isn't he right, and why isn't as the Chief Judge suggests there was the option to join. Why not just join them?

MR. VAN DER TUIN: If I, again - - -

JUDGE RIVERA: I mean, you're in this email back

and forth, why not just join them?

MR. VAN DER TUIN: The practicalities of the litigation at that point, if I move to join them, I've got joinder motion practice. If I'm successful in their join, they're going to say, let's go back - - - I didn't have any of the discovery. Let's dig back into discovery. Let's have a dismissal motion with respect to your claim.

CHIEF JUDGE WILSON: Though, in hindsight, you probably had more motion practice and other litigation.

MR. SCHOENFELD: We have an appeal now.

MR. VAN DER TUIN: I've been involved in this case since 2011, Judge. You know, there's a lot of things I might do in hindsight, but my point - - -

JUDGE RIVERA: It may go even longer.

MR. VAN DER TUIN: But my point, though, to continue my answer to Judge Rivera - - -

JUDGE RIVERA: Yes, yes.

MR. VAN DER TUIN: - - - is that there was the three-party agreement. There was the notice of the details of the nature of the priority of The Dakota's claim that was given to Chase's counsel, both, you know, before the fee motion was heard or decided. I gave them notice in June. They had been following it. They got a copy of the papers in June. It got argued in October, I believe, and decided in December. They had ample opportunity if they

felt they had an interest. And apparently they think they've got an interest. We've been litigating it for the last nine years. They had ample opportunity at that time to make an application under 5015 or to move to intervene.

I don't say they had to move to intervene, but if they thought they had an interest that was being affected, they had the obligation to do one of those two things where they were on notice of the details of it, where they had a prior agreement as to the relative priorities that distinguishes this case from Gramatan, where there was no notice, where it was, as Judge Rivera pointed out, a clean assignment, if you will, whereas opposed - - - in this case, where Fletcher and Chase had a continuing joint interest in this asset, the shares, and Fletcher had an interest parallel to Chase's to defend against the fee claim, because it was going to be a judgment against him and against his asset. So there was a - - -

CHIEF JUDGE WILSON: Well, that maybe isn't entirely clear because he was - - - he probably wasn't able to pay the judgment, right? So he didn't much care. The sale of the apartment was going to result in less than what was owed to the two in combination. So I'm not sure he had the same interest.

MR. VAN DER TUIN: Fletcher, it's not in the record - - -

CHIEF JUDGE WILSON: Right.

MR. VAN DER TUIN: Fletcher was at least at one point a wealthy guy.

CHIEF JUDGE WILSON: At one point.

MR. VAN DER TUIN: Okay. Chase was chasing a lot of his other assets as well. He had a castle up in Connecticut. He, you know, had a bunch of stuff.

CHIEF JUDGE WILSON: Yeah.

MR. VAN DER TUIN: So I don't think that that really is a matter - - -

CHIEF JUDGE WILSON: Fair enough.

MR. VAN DER TUIN: - - - of relevance to the decision in this case. And so what we're faced with here is the rule that they want to apply here, it's simple. It's easy to apply. You know, pre-assignment, you know, a post-assignment judgment. We're done. Okay. But I don't think that is consistent with this court's preclusion and estoppel analysis which says that one has to be fair. And what's fair here? Is it fair that The Dakota has had no repose in its judgment that it obtained in 2017?

JUDGE RIVERA: Let me ask you this on the fairness.

MR. VAN DER TUIN: Intervening for seven years?

JUDGE RIVERA: Let me ask you this on the fairness. And your red light is off. So I assume this may

be the end of this. If we disagree with you on the Appellate Division's decision here that it did not reach, right - - - we don't agree with you about having reached the merits. We don't think it's reached the merits. Is it then fair that they not have their one appellate consideration of the merits?

MR. VAN DER TUIN: No. If this court disagreed - - -

JUDGE RIVERA: Yes.

MR. VAN DER TUIN: - - - with the Appellate Division's analysis - - -

JUDGE RIVERA: Yes.

MR. VAN DER TUIN: - - - what would be fair is to address the merits that Justice Lubell addressed. That's the decision that you're reviewing. His decision was correct on the merits, and they haven't challenged it on the merits. But to address that and issue an order, a decision, that affirms - - -

JUDGE RIVERA: But we don't usually do that, right? If we - - - if we think the merits should be addressed, it wouldn't be fair. Otherwise, wouldn't we send it back to the panel and say, address the merits. You should have addressed it here.

MR. VAN DER TUIN: You - - - - that could be done, but what you might do is - - -

CHIEF JUDGE WILSON: But are the merits just a pure question of law. Sorry. Right in front of you. Are the merits just a pure question of law? Is there any fact finding required?

MR. VAN DER TUIN: Well, yeah, there was fact finding involved by - - -

CHIEF JUDGE WILSON: Right.

MR. VAN DER TUIN: - - - Justice Lubell on the summary judgment, you had to make findings of lack of a material factual dispute, but you would affirm the order while rejecting the Appellate Division's rationale, if you will, in holding and affirm for the reasons stated on the order below, you know, with whatever analysis of those reasons that this court chose to include. That's what would be fair. That's what would put an end to this litigation. Otherwise, you know, we'll see it in a year after the - - - after we take another trip to the First Department. Thank you, Judges.

MR. SCHOENFELD: Thanks, Your Honor, and I'm very happy to keep this short. Judge Rivera, on the reading of Gramatan, I would just direct the court to - - - I only have the northeast reporter citations. It's 386 Northeastern Reporter second at 1332. It makes very clear that an assignee is deemed to be in privity with the assignor, where the action against the assignor is

commenced before there was an assignment. In other words, it's not some preexisting abstract contractual arrangement. It has to be a dispute about the particular encumbrance on the security interest. With respect to the colloquy Your Honor was having with The Dakota's counsel, I think it reads a lot into the court's judgment to find that it affirmed on any basis other than collateral estoppel, which is itself a judgment on the merits. I don't think there's any way to read the Appellate Division's order as vindicating Justice Lubell's reading of paragraph 15 with respect to this particular issue, which is the entitlement to attorney's fees.

And finally, with respect to the question of the due process issues, just to be clear, and I think it's clear for the court, we're not raising a freestanding constitutional argument here. I think what Justice Ginsburg said in Taylor v. Sturgell is the due process principles animate and set boundaries on common law collateral estoppel principles. And that's merely all we're saying here, that you need to understand the operation of collateral estoppel against these background principles, which make very clear that ordinarily, a nonparty is not bound and precluded from making its own argument as to a judgment that's going to bind us. There are exceptions to it, and none of them applies here, and

certainly the ones the Appellate Division identified are incorrectly applied in this case.

JUDGE HALLIGAN: You agree there's a finding on whether it's by the Appellate Division and whether it's incident to ownership as distinct from whether default is required.

MR. SCHOENFELD: Correct.

JUDGE HALLIGAN: Okay.

MR. SCHOENFELD: I think that there is - - - if you assume the predicate that they are entitled to the fees at all under paragraph 15, I think the Appellate Division decided the priority question, but it did not reach the underlying question, which of course is the one that we're looking for a merits determination on.

JUDGE RIVERA: Correct. But can you just address what he described as the other two alternatives? I'll call them alternative. One is we should just get to the merits of that issue in this case, see what your thoughts are on that, or make it clear in the writing that the Appellate Division in the action decided by Bluth, a motion to vacate and to intervene, should not be disposed of for reasons of untimeliness, but rather they should also get to the merits.

MR. SCHOENFELD: So if we could take the second one first. Again, just to be very clear, we're just

looking for one clean shot. So if there were some decretal language the court could formulate that made clear to the Appellate Division in a different appeal that doesn't, of course, arise from the same index number, which may be an issue. That's all we're looking for. Shorn of these inappropriate procedural hurdles that have been thrown in our way as a result of the original Appellate Division decision, all we want is a merit determination.

As to your first question, I think that's an issue for the court's discretion. We offered in our reply brief to provide supplemental briefing on the underlying merits question, which we're, of course, happy to do. But if the court believes that it can decide the issue in the first instance, that's obviously the court's prerogative. I think the ordinary course is to have at least the Appellate Division decide that issue on plenary briefing on the merits, which is what happened the first time around. They just didn't reach the issue. Thank you very much.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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

I, Raven Wood, certify that the foregoing transcript of proceedings in the Court of Appeals of Kasowitz Benson v. JPMorgan Chase, No. 99 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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