

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

JF CAPITAL ADVISORS, LLC,

Appellant,

-against-

No. 112

THE LIGHTSTONE GROUP, LLC,

Respondent.

20 Eagle Street
Albany, New York 12207
June 3, 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
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

JASON A. STERN, ESQ.
WEBER LAW GROUP LLP
Attorneys for Appellant
290 Broadhollow Road
Suite 200E
Melville, NY 11747

ELIZABETH S. SAYLOR, ESQ.
EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys for Respondent
600 Fifth Avenue
10th Floor
New York, NY 10020

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 112.

2 Counselor, you want any rebuttal time?

3 MR. STERN: Yes, Your Honor, two minutes,
4 please.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MR. STERN: May it please the court, Jason
8 Stern, Weber Law Group, counsel for plaintiff-
9 appellant JF Capital Advisors. Your Honors, in this
10 case, the statute of frauds has been taken too far.
11 The section of the statute of frauds that we're
12 looking at - - -

13 CHIEF JUDGE LIPPMAN: Statute - - - counsel
14 - - -

15 MR. STERN: Yes.

16 CHIEF JUDGE LIPPMAN: What - - - what
17 injustice has been done to you here? What - - - what
18 is the - - - in terms of a policy perspective, what
19 happened to you in this business relationship that
20 you had?

21 MR. STERN: We were taken advantage of,
22 Your Honor.

23 CHIEF JUDGE LIPPMAN: How so? Go ahead.

24 MR. STERN: We were - - - we were asked to
25 provide services. We provided those services - - -

1 1,400 hours of services rendered to the defendant in
2 this case, and the defendant comes back and says, ah-
3 hah, statute of frauds; we don't have to pay you.
4 And from a policy perspective, it's just not fair.
5 But our argument isn't just limited to the policy;
6 it's about the statute that we're talk - - -

7 CHIEF JUDGE LIPPMAN: Well, does your
8 complaint lay out what you did and how, in your mind,
9 it does not fit within the statute of frauds?

10 MR. STERN: Yes, Your Honor, it does. And
11 - - - and let's talk about that statute.

12 CHIEF JUDGE LIPPMAN: Sure, go ahead.

13 MR. STERN: General Obligations Law
14 5-701(a)(10): "A contract for services rendered in
15 negotiating the purchase, sale, exchange of a
16 business opportunity must be in writing". And the
17 relevant section, the one the Appellate Division
18 talks about - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. STERN: - - - the negotiating part
21 "Negotiating includes procuring an introduction to a
22 party to the transaction or assisting in the
23 negotiation or consummation of the transaction."

24 CHIEF JUDGE LIPPMAN: Did you do any - - -
25 any of that work?

1 MR. STERN: No, we did not, Your Honor.

2 And I think more - - -

3 CHIEF JUDGE LIPPMAN: What - - - what - - -
4 what's the distinction between the kind of work
5 that's under the statute and what you did?

6 MR. STERN: That's a great question, Your
7 Honor. The statute is designed to deal with business
8 brokers. An entity that takes a buyer and seller, or
9 claims to do that, and claims that they brought them
10 together, and then the broker comes in and says,
11 ah-hah, I caused that to happen; I - - - I made that
12 - - - that acquisition and I want a commission; I
13 want a share of that value. That's the classic
14 brokerage case that this statute is designed to
15 prevent without a signed writing.

16 CHIEF JUDGE LIPPMAN: So what do you do
17 that doesn't come under that?

18 MR. STERN: We - - - we do investment
19 analysis. We do it without passion. We're not
20 trying to bring a buyer and seller together. We're
21 not brokers. We're not finders. We do analy - - -
22 analysis of investments and in this particular case -
23 - -

24 JUDGE RIVERA: You're saying it doesn't
25 matter to you - - - to you if a business deal

1 actually comes out of this analysis.

2 MR. STERN: That's exactly right, Judge
3 Rivera. That's exactly right. It's dispassionate.
4 We're not - - - and we're not - - - we're certainly
5 not looking for a commission. We're looking to
6 perform services in a - - - in a neutral way and
7 render advice to our clients.

8 And in this case - - - in this case - - -
9 those - - - those acquisitions or those investments
10 were all identified by Lightstone. Lightstone comes
11 to JF Capital and says, tell us about this
12 investment; tell us about that investment. Sometimes
13 they ask us on one-day's notice or one-minute's
14 notice. Sometimes they tell us specifically what
15 they want us to look at. They say look at this hotel
16 - - -

17 JUDGE ABDUS-SALAAM: Counsel, you - - -

18 MR. STERN: Yes, Your Honor.

19 JUDGE ABDUS-SALAAM: Are these services
20 that you're now seeking payment for different from
21 the services that you first provided to Lightstone
22 and that you had a contract for, or the second
23 contract - - - how - - - how are the services the
24 same or different than the ones that you did under
25 contract?

1 MR. STERN: Judge Abdus-Salaam, they're the
2 same services. They're all part of investment
3 analysis. The difference here, obviously, is that
4 under the first course of conduct, we had that signed
5 writing. We don't have it after that and - - -

6 JUDGE STEIN: Can anything be inferred from
7 that or does it matter?

8 MR. STERN: Well, you may - - - you may
9 infer that the beginning of our relationship was
10 something that we weren't comfortable with, so we had
11 to get a writing, but - - -

12 JUDGE STEIN: So those two contracts came
13 before the rest of the services that you're now
14 requesting to be compensated for?

15 MR. STERN: That's correct, Judge Stein.

16 JUDGE READ: You were negotiating
17 something, though? Didn't you - - - weren't you - -
18 - you were hoping to have another longer - - - to
19 have another contract while you were performing these
20 services?

21 MR. STERN: That's exactly right. So we
22 had agreements in place for the beginning of our
23 relationship. We became comfortable working with the
24 - - - with the defendant. We started rendering these
25 services and the payments were made pursuant to those

1 written agreements, and then we started talking about
2 a longer-term agreement, and we said, oh, terrific.
3 We're going to get a longer-term deal; let's continue
4 to render services. We had back-and-forth
5 communications - - - 7,000 e-mails, we have them.
6 They're not in the record, because - - -

7 JUDGE ABDUS-SALAAM: So essentially you
8 were working on your own to bring you and Lightstone
9 together.

10 MR. STERN: Well, I don't - - - I don't
11 think that's correct, Your Honor. You know, we're
12 not trying to cause a transaction here. We're
13 operating under a good-faith basis to render services
14 at their request, and yes, with the eventual hope
15 that there would be an agreement, but nevertheless,
16 in this case we provided them with value. We
17 provided them with service, and that's the essence of
18 our claim.

19 JUDGE READ: Well how do we know you're
20 just not doing that to - - - you know, to try to get
21 this additional business? That you're just not - - -
22 you know, doing that, kind of as a freebie, to try to
23 get the additional business, the additional contract?

24 MR. STERN: Well, admittedly - - -

25 JUDGE READ: Why can't that be inferred

1 from the context, because you did have an agreement
2 initially?

3 MR. STERN: Well - - - admittedly, part of
4 the reason we were performing those services was to
5 show that we're good-service providers - - -

6 JUDGE READ: Right.

7 MR. STERN: - - - and to get a longer-term
8 contract. There's no dispute that this is quantum
9 meruit. We rendered services to this party. They
10 benefited from those services, and we have not been
11 compensated from - - -

12 JUDGE READ: But wasn't that a choice on
13 your part, I guess is what I'm saying?

14 MR. STERN: I'm sorry?

15 JUDGE READ: Wasn't that a choice on your
16 part to render these services on the hope and
17 expectation that you were going to get this longer-
18 term contract eventually?

19 MR. STERN: That was - - - that was part of
20 it, Your Honor, but we did have an understanding that
21 we were going to be compensated for our services
22 that's set forth in our complaint. And I understand
23 that in the context of this appeal, Lightstone is
24 disputing the truth of our allegations. They say - -
25 - they say in this - - - we're at the Appellate level

1 now - - - they say in their papers, we did not expect
2 to be compensated, and that's their argument, that
3 there wasn't an expectation of compensation. But on
4 - - -

5 JUDGE STEIN: There's been no discovery
6 here yet or anything? This is all pre - - - this is
7 a motion to dismiss under 3211? Is that right?

8 MR. STERN: Yes, Judge Stein, that's
9 exactly right. And that's my point, and maybe I'm
10 not articulating it well.

11 JUDGE RIVERA: The facial sufficiency of
12 the complaint.

13 MR. STERN: Yes - - - yes, Judge Rivera.
14 We - - - we have a complaint that says both parties
15 understood and expected that JF Capital would be
16 compensated for these services. They're not
17 gratuitous. That's our - - - that's our complaint.

18 JUDGE FAHEY: Yeah, we understand that.
19 But - - - but the Supreme Court - - - forget the
20 Appellate Division for a second - - - the Supreme
21 Court broke out the projects differently. They - - -
22 I think - - - 2, 5, and 8, they basically said you
23 had - - - you had - - - you had made the proper
24 allegations. The know-how versus the know-who type
25 of allegations was the way they broke them out

1 analytically.

2 Going back to that, are you seeking to
3 reinstatement of your causes of action against all -
4 - - in all nine projects, or in - - - back to the
5 Supreme Court determination, I guess, that three of
6 the projects would be eligible?

7 MR. STERN: Well, I - - - it's eighteen
8 projects, Your Honor. And yes, the trial - - -

9 JUDGE FAHEY: Okay, I have - - - well, I
10 have them broken down as nine, but okay.

11 MR. STERN: And the - - - and the trial
12 court did break them out in that way. And yes, we're
13 seeking to go back to the trial court for a
14 determination and - - - and for allow - - - allowing
15 us to proceed on all those projects. We disagree
16 with the trial court and we appealed, in our cross-
17 appeal, the trial court's ruling in that regard. We
18 think that this statute's been taken too far. We
19 didn't - - - we didn't provide the kind of services
20 contemplated by the statute. We didn't bring buyers
21 and sellers together. We brought - - -

22 JUDGE ABDUS-SALAAM: Well, what discovery
23 do you need, counsel? That's what - - - you - - -
24 you provided the services; they accepted the
25 services. So what exactly - - - what is the

1 discovery that you're trying to get from them about
2 the services that you provided?

3 MR. STERN: That's a great question, Judge
4 Abdus-Salaam. So in their Appellate papers, they're
5 disputing some of our allegations, and again, as
6 Judge Stein pointed out, it's not really appropriate
7 on a motion to dismiss to challenge the truth of our
8 allegations of the complaint.

9 So among their challenges are that we did
10 not expect to be compensated, that we were rendering
11 these services gratuitously, that they were freebies.
12 That's what they're saying in their papers, but we
13 should have a chance to challenge those defenses.
14 You can't just have a lawyer's brief in an Appellate
15 Court saying, well, you didn't expect compensation,
16 which is all they've got. There's no evidence.

17 JUDGE ABDUS-SALAAM: But what discovery - -
18 - I'm - - - I'm trying to figure out practically what
19 discovery do you need to refute those allegations?

20 MR. STERN: And I - - - I apologize if I
21 didn't answer that. If they've alleged in their
22 papers - - - in their Appellate papers - - - that we
23 didn't expect compensation, we need to be able to
24 defend that allegation. And whatever evidence they
25 have - - - they may have testimony, may have

1 documents that they think support that defense, we
2 should have the right to get discovery so we can
3 challenge it. Not on a CPLR 3211 motion to dismiss,
4 where they just dispute the truth of our allegations.
5 It's not appropriate.

6 JUDGE ABDUS-SALAAM: So you're - - - you're
7 hoping to find in discovery some kind of document
8 that they have, maybe internally, that said, yeah, we
9 expect to pay JF Capital for these services. Is that
10 - - - is that the type of thing that you're ask - - -
11 you're asking them for?

12 MR. STERN: In part - - - in part. They're
13 defending this lawsuit by challenging the truth of
14 our allegations.

15 JUDGE READ: Well, you do have that e-mail,
16 I guess, right?

17 MR. STERN: I'm sorry?

18 JUDGE READ: You do have that e-mail - - -

19 MR. STERN: Well, there - - - there are - - -
20 -

21 JUDGE READ: - - - that - - - the e-mail
22 that you - - - that you - - - that's in the record.

23 MR. STERN: Well, there are two - - - there
24 are two e-mails that we - - - that we're talking
25 about, and I'm not sure of which one you're referring

1 to, but the one that we've relied on is this - - -

2 JUDGE READ: Yeah, the one that you relied
3 on.

4 MR. STERN: - - - is a series of e-mails,
5 and that goes to my second point. I mean, our first
6 point is clearly, the statute of frauds does not
7 apply. These are not the kinds of services to be
8 covered by the statute of frauds.

9 But our second point is that there was an
10 e-mail exchange between the parties where the
11 defendant acknowledged plaintiff's services, and
12 under Morris Cohon, which this court decided in 1969,
13 on a quantum meruit claim, which is what we're
14 claiming here, the standard for statute of frauds is
15 lowered. You don't need a writing that shows all the
16 material terms of the agreement. You need a writing
17 that acknowledges plaintiff's performance and they
18 have that here. They've done that here.

19 And one - - - one further point, and I'm
20 sorry, Judge Abdus-Salaam, I didn't mention this, in
21 terms of discovery. In Morris Cohon and the cases
22 that follow it, the defendant had writings with third
23 parties that the plaintiff wasn't privy to, and in
24 those writings, the plaintiff - - - I'm sorry, the
25 defendant acknowledges the plaintiff's services. And

1 we think those documents, in addition to what we just
2 talked about, would also be relevant to - - - to our
3 case.

4 And I - - - I see my - - - my time has
5 expired, but I would like to - - - like to add, we're
6 on a CPLR 3211 motion to dismiss. All we're seeking
7 is our day in court. We want to get past go and move
8 past the starting line - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. STERN: - - - so we can have discovery.

11 CHIEF JUDGE LIPPMAN: Thanks.

12 MR. STERN: Thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: You'll have your
14 rebuttal.

15 MR. STERN: Thank you.

16 CHIEF JUDGE LIPPMAN: Counsel?

17 MS. SAYLOR: Good afternoon, Your Honor.
18 Elizabeth Saylor for the defendants, Lightstone.

19 CHIEF JUDGE LIPPMAN: Counsel, did you
20 think they did this work for free?

21 MS. SAYLOR: I think they did. In fact,
22 they allege in their initial complaint - - -

23 CHIEF JUDGE LIPPMAN: All those hours were
24 for free?

25 MS. SAYLOR: Well, first of all, Your

1 Honor, they were paid 370,000 dollars for the six-
2 months of work, under two written contracts. These
3 are sophisticated parties that knew how to write - -
4 -

5 CHIEF JUDGE LIPPMAN: Yeah, but they're
6 alleging a great number of hours beyond that, aren't
7 they?

8 MS. SAYLOR: And the court in the first - -
9 -

10 CHIEF JUDGE LIPPMAN: Are - - - aren't
11 they?

12 MS. SAYLOR: They are, Your Honor.

13 CHIEF JUDGE LIPPMAN: And do you think all
14 that was for free?

15 MS. SAYLOR: Yes, Your Honor.

16 CHIEF JUDGE LIPPMAN: They came to work in
17 your offices and they did all those hours for nothing
18 and - - - and - - - even though the quoted e-mail
19 where you - - - where your person says, we don't - -
20 - we don't expect you're doing it for free, all of
21 that, you still contend they did it for nothing?

22 MS. SAYLOR: Yes, Your Honor, they
23 contended in their actual complaint, they stated and,
24 in fact, it was on 66 to 67 of the record, they state
25 that they performed this work in the hopes of

1 entering into a grander plan with Lightstone, where
2 they would be able to manage their property and get a
3 large percentage.

4 CHIEF JUDGE LIPPMAN: Yeah, but didn't - -
5 - isn't the - - - and again, this is a 3211 motion -
6 - - isn't - - - isn't your side quoted as saying
7 that, you know, yeah, no contract, but we don't
8 expect you to do the work for free?

9 MS. SAYLOR: Your Honor, if you actually
10 look at their allegations - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MS. SAYLOR: - - - regarding the expect to
13 be free - - - first I'll note that they did not raise
14 this in the trial court. They didn't raise it in the
15 trial - - - in the appeal, until the reply brief - -
16 -

17 JUDGE STEIN: But we're looking at - - -

18 MS. SAYLOR: - - - and there's a reason.

19 JUDGE STEIN: - - - but we're looking at
20 the complaint. We - - - we can look at the
21 complaint, right?

22 MS. SAYLOR: Yes, Your Honor, and actually
23 I would say if you look to page 62 of the record in
24 the complaint, and look at the way that they discuss
25 the e-mail, you will see that it's not the

1 unequivocal promise to pay that's required under the
2 law.

3 CHIEF JUDGE LIPPMAN: Can we tell that - -
4 -

5 MS. SAYLOR: They're about - - -

6 CHIEF JUDGE LIPPMAN: Can we tell that on
7 the 3211 motion?

8 MS. SAYLOR: Yes, Your Honor. If you - - -

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MS. SAYLOR: If you look at page - - - page
11 62 of the record, paragraph 36, it says "Scully
12 replied that he did not understand the magnitude and
13 amount of work JF Capital was performing for
14 Lightstone, but that clearly no one expected to work
15 for free. Scully stated that, as a new member of
16 Lightstone, he had no idea what JF Capital was
17 doing." This is a new member of the Lightstone team
18 that wasn't around when the work was performed. He
19 was told, you know, we did all this work; will you
20 pay us? And he says, no one expects you to work for
21 free.

22 JUDGE STEIN: Wouldn't that go to - - -

23 MS. SAYLOR: But they didn't work for free
24 - - -

25 JUDGE STEIN: Wouldn't that go to how much

1 telling the truth?

2 MS. SAYLOR: The statute of fraud requires
3 much more than just an expectation for payment. The
4 statute of fraud requires a writing. This is the
5 real estate industry, where there are large risks.
6 There are high upsides, high downsides. Work is very
7 frequently done on speculation.

8 JUDGE STEIN: Yeah, but what does the
9 writing have to show?

10 MS. SAYLOR: This work was on speculation.

11 JUDGE STEIN: What does the writing have to
12 show? It has to show what - - - the services that
13 were performed and something that shows that there
14 was an expectation of payment.

15 MS. SAYLOR: Yes, Your Honor, but is - - -
16 as you read this part of the complaint, paragraph 62,
17 it's not ref - - - there's not identified what
18 services we're talking about.

19 JUDGE STEIN: Well, not in this particular
20 e-mail perhaps, but - - - but - - -

21 MS. SAYLOR: In - - - in - - -

22 JUDGE STEIN: - - - that's not the only
23 allegation of - - -

24 MS. SAYLOR: Well, it's actually - - -
25 while they say they had an expectation to - - - for

1 payment, they nowhere say there was ever an oral
2 promise for payment of - - - for this work. They
3 have - - - they have the e-mails. They were
4 involved. They just have a general allegation that
5 no one expects you to work for free and that they had
6 an expectation of payment.

7 Yet, they cannot come up with one time when
8 anyone told them that they would be paid for this.
9 They don't allege that they were ever to be paid.
10 Again on page - - -

11 CHIEF JUDGE LIPPMAN: You mean, they - - -
12 they came into your offices for all that time, and
13 they did - - - assume they did all that hours of
14 work, and they thought that they were doing it for
15 nothing, just that that would be their ticket to get
16 a written contract?

17 MS. SAYLOR: Yes, Your - - -

18 CHIEF JUDGE LIPPMAN: And we should
19 determine that based on - - - on a 3211 motion - - -
20 on that complaint, we should say that you're right,
21 and clearly they came in there just to try and get a
22 written contract?

23 MS. SAYLOR: Yes, Your Honor. This was an
24 investment decision they made that they thought they
25 could get this two-million-dollar large contract if

1 they showed that they did good work.

2 JUDGE PIGOTT: Did everybody know that?
3 Did you guys know that too?

4 MS. SAYLOR: We - - - we knew that they
5 wanted to enter into that contract and we were - - -

6 JUDGE PIGOTT: No, when - - - when they
7 were coming in and doing all of this work, did you
8 say, oh, I understand that you're - - - you're hoping
9 that, you know, ways down that road, you're going to
10 get a big contract with us, is that why you're doing
11 it? And they would say yes, and - - - and we're
12 willing to do it for free because the consideration
13 is that, you know, we're going to get this big
14 contract, and you'd say that's fine. Or you'd say,
15 well, don't - - - don't delude yourself, pal; we're
16 not giving you any kind of a contract, and all this
17 work is just helping us out.

18 MS. SAYLOR: Well, Your Honor, in response
19 to the first motion to dismiss, most of these e-mails
20 were reviewed by the court, because they were
21 incorporated into the complaint. The court reviewed
22 them and said that there was no reasonable
23 expectation - - -

24 JUDGE PIGOTT: Let's assume you're right.

25 MS. SAYLOR: - - - to be paid.

1 JUDGE PIGOTT: I'm just - - - I just look
2 at this, and I'm thinking, what's going on? I mean,
3 is - - - why would somebody put - - - pour all this
4 time and money and effort into somebody else's
5 business, and - - - and your thought is what, that
6 they're stupid?

7 MS. SAYLOR: Your Honor, I will - - - what
8 - - - the - - - in the same exact e-mail that we
9 would have brought in had they raised it, they refer
10 to this as "freebies". They say in that same e-mail,
11 these are freebies that we performed, hoping that you
12 would enter into this long-term contract. Now that
13 the contract wasn't entered into, we want to go - - -
14 we want to go back and be paid for this work that we
15 did and they describe as "freebies". It's - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but aren't you
17 showing that there is a dispute here as to what's
18 going on by - - - by giving us something outside the
19 record, that talks about freebies? You guys are
20 fighting about this. Why in a 3211 motion are we
21 determining all of this?

22 And I ask you the same question I asked
23 your adversary. From a policy perspective, why in
24 the world are you right that these people are putting
25 all of these hours in and - - - and - - - and from a

1 policy perspective, you're telling us, just throw
2 them out; they're clearly doing the work for free?
3 Does that - - - that sound right? Fair?

4 MS. SAYLOR: Well, Your - - - Your Honor, I
5 think there are two main questions there. In
6 response to one, the legislature - - -

7 CHIEF JUDGE LIPPMAN: Was that yes - - -
8 yes, it's fair?

9 MS. SAYLOR: It is what the legislature
10 decided. The legislature decided - - -

11 CHIEF JUDGE LIPPMAN: But I asked you if it
12 was fair.

13 MS. SAYLOR: I think it is fair, because
14 this is the real estate industry where you can get
15 huge amounts of money. Most work is done on
16 speculation on the hopes that a deal is going to go
17 through. Lots of time that work doesn't pan out - - -
18 -

19 JUDGE STEIN: What deal? What deals were
20 involved in - - - in - - - in the vast majority of
21 these?

22 MS. SAYLOR: Here they were trying to enter
23 into a deal to manage their properties - - -

24 JUDGE STEIN: Well, yeah, that deal. But I
25 - - - but - - - but that's not what they were

1 amended the statute to say quantum meruit must also
2 be covered. And then this court in the Minichiello
3 case in 1966 said that it's very important that
4 quantum meruit be covered because these claims - - -

5 JUDGE STEIN: But that's only if we're
6 talking about transactions that fit within the
7 statute of frauds statute.

8 MS. SAYLOR: Right. They admit - - - and
9 they have admitted throughout and their complaint is
10 full of it, that everything they did with - - - was
11 respect to business opportunities. There's no
12 question here, like in many of their cases that the -
13 - -

14 JUDGE STEIN: But it doesn't say anything -
15 - - any services related to possible business
16 opportunities. That's not what the statute says.

17 MS. SAYLOR: It says - - - the statute says
18 a writing is recovered for procuring an introduction
19 to pate - - - a party to the track - - - transaction
20 or assisting in the negotiation of a business
21 opportunity.

22 JUDGE STEIN: All right. Well, what - - -
23 what business opportunities were being negotiated?

24 MS. SAYLOR: These were for large hotel - -
25 - hotel chains and - - -

1 JUDGE STEIN: But - - - but there was - - -

2 MS. SAYLOR: - - - for water park parks.

3 JUDGE STEIN: What they were - - - they
4 were deciding whether to even negotiate. Isn't that
5 what they were helping you do?

6 MS. SAYLOR: They - - - all of these deals
7 were negotiated, but they were - - - they were
8 helping decide. They were doing the due diligence.
9 And this court and the other courts have found in the
10 - - -

11 JUDGE RIVERA: I guess, the - - -

12 MS. SAYLOR: - - - Snyder case - - -

13 JUDGE RIVERA: - - - the - - - I think the
14 point that's being asked about is, is it doesn't
15 appear - - - at least from these allegations - - -
16 that there's a deal in play. This is preliminary to
17 the deal in play. And his argument seems to be the
18 statute's about deals that are in play.

19 MS. SAYLOR: Your Honor - - -

20 JUDGE RIVERA: You might be at the very
21 early stage of that. But they have to be in play.
22 And you've got nothing on that.

23 MS. SAYLOR: If the statute only covered
24 face-to-face negotiations of the deals in play - - -

25 JUDGE RIVERA: No, no, no. It doesn't have

1 to be - - -

2 MS. SAYLOR: - - - it would gut it.

3 JUDGE RIVERA: - - - face-to-face
4 negotiations. It just have to - - - has to be
5 something that's in play - - -

6 MS. SAYLOR: These were all - - -

7 JUDGE RIVERA: - - - other than I'm
8 dreaming of something.

9 MS. SAYLOR: These were all specific deals
10 in play where they were looking into the finances of
11 the deal, what should be done, is there - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but they're not
13 - - -

14 MS. SAYLOR: - - - is this a good - - -

15 CHIEF JUDGE LIPPMAN: - - - they're not
16 doing the deal for you. They're giving you research
17 information.

18 MS. SAYLOR: Well, actually they talk about
19 in their complaint - - -

20 CHIEF JUDGE LIPPMAN: But - - - and again,
21 these are - - - these are allegations in the
22 complaint. And as you go on with the lawsuit we'll
23 see who's right and who's wrong and what you're, you
24 know, disputing. But - - -

25 MS. SAYLOR: Your Honor - - -

1 CHIEF JUDGE LIPPMAN: - - - but they're
2 saying they don't come - - - their complaint does not
3 come within the statute. They're saying they're not
4 making the deal; they're not brokering it. They're
5 not, you know, getting you someone to make a deal
6 with. So what's the problem? Let them continue
7 their lawsuit.

8 MS. SAYLOR: Your Honor, if you read their
9 complaint on paragraph 107, page 33, they say they're
10 "adding credibility and access to potential
11 opportunities". They admit that they made
12 introductions, that they conducted negotiations.
13 They - - - JF Capital is the quintessential type of
14 party that's covered by the statute of frauds - - -

15 JUDGE PIGOTT: Well, look at 43 - - -
16 paragraph 43.

17 MS. SAYLOR: I'm sorry. 43 of - - -

18 JUDGE PIGOTT: "Lightstone, in order to
19 gain credibility on the back - - - back of JF
20 Capital's reputation, requested permission to present
21 JF Capital as their financial advisor, verbally and
22 in writing, to the other parties to the deal." So is
23 there a writing there?

24 MS. SAYLOR: There - - - there may be
25 writings where they were told that they could, you

1 know, present themselves to someone. They would - -
2 - that section there says it was to add credibility.
3 They were trying to help them gain access to these
4 businesses. They allege that. If you read their
5 first complaint and their amended complaint, it's
6 very clear, and they admit and have never claimed
7 otherwise that they're not involved in bringing deals
8 together.

9 JUDGE PIGOTT: But what I didn't understand
10 when I - - - when I read that, is that it sounds like
11 to - - - to somebody you said, you know, JF Capital
12 is working with us on this deal.

13 MS. SAYLOR: Yes, and we paid them, you
14 know, 370,000 dollars for much of that work.

15 JUDGE PIGOTT: Oh, this - - - this one was
16 already paid for?

17 MS. SAYLOR: Much of the work was. But
18 Your Honor, the Enfeld case and the Sny - - - and the
19 Snyder case, both were cases decided by this court,
20 where it was before the deal. There's no discussion
21 in either of those cases that any negotiation ever
22 occurred, both Enfeld, Snyder, many of the other
23 cases, because in this industry, ninety-eight percent
24 of the work is before the face-to-face - - -

25 JUDGE PIGOTT: Is it?

1 MS. SAYLOR: - - - negotiation.

2 JUDGE PIGOTT: I - - - I think we get on -
3 - - at least I think I understand what you're saying
4 there. I get focused as Judge Stein has on - - - on
5 3211, where you assume everything they say is true,
6 and you say regardless of whether it's true or not,
7 we're entitled to judgment.

8 And so when I read - - - read this, for
9 example, and I said, well, there is writings. And -
10 - - and - - - and your opponent is making the
11 argument that maybe there isn't a writing between the
12 two of us, but there's a writing where you held out
13 that these guys were working for you.

14 MS. SAYLOR: Well, the statute of fraud
15 requires more. It requires that there be an
16 unequivocal promise to pay about a specific subject
17 matter. And the statute of fraud is to prevent this
18 type of case. If we have to do discovery, it'll cost
19 hundreds of thousands of dollars for discovery. They
20 did not allege anything that raises a claim. And
21 again, these were all claims that were brought for
22 the first time on reply in the Appellate Division - -
23 -

24 JUDGE RIVERA: So - - - so - - - so - - -
25 we're talking about the 3211. So what - - - what is

1 the language that's missing? What would be the magic
2 sentence or paragraph here?

3 MS. SAYLOR: In what - - - what they needed
4 - - -

5 JUDGE RIVERA: Them, yes.

6 MS. SAYLOR: - - - to allege?

7 JUDGE RIVERA: Yes.

8 MS. SAYLOR: They would need to have a - -
9 - an e-mail that says, for example in - - -

10 JUDGE RIVERA: To reference in their
11 complaint, I'm saying.

12 MS. SAYLOR: They - - - yeah, in their
13 complaint, they'd need an e-mail - - -

14 JUDGE RIVERA: Because we're talking about
15 sufficiency of his complaint. What would he have to
16 say?

17 MS. SAYLOR: In some of the cases, there
18 were e-mails, for example, that said, you know, I - -
19 - the - - - the plaintiff would say I'd like to be
20 paid for this and the defendants - - - and they name
21 X service. And the defendant writes back and says,
22 you will - - - you will be paid for this. But the
23 amount of compensation hasn't been decided yet.

24 JUDGE STEIN: But again, that's assuming
25 that the statute of fraud applies to every one of

1 these transactions - - -

2 MS. SAYLOR: Right.

3 JUDGE STEIN: - - - right?

4 MS. SAYLOR: And Your Honor, they have
5 acknowledged that the statute - - - that this is all
6 business opportunities. This is all - - - nothing is
7 an ongoing business. What they're trying to claim is
8 that their subjective purpose matters in some way
9 with their secret motivation but in - - -

10 CHIEF JUDGE LIPPMAN: Counsel - - -

11 MS. SAYLOR: - - - in the Zeising court
12 they said that was not relevant.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 Thanks.

15 MS. SAYLOR: Thank you.

16 CHIEF JUDGE LIPPMAN: Let's give rebuttal
17 time.

18 Counsel?

19 MR. STERN: Yes, a few points. First, to
20 correct something. Judge Pigott, you asked about - -
21 - we were talking about paragraph 43 in the complaint
22 about Lightstone's representation as to other parties
23 about our work. And I believe my adversary said that
24 that was something that we'd already been compensated
25 for, but that's - - - that's not accurate. The - - -

1 that allegation is with respect to the Innkeepers'
2 project, for which we received no compensation for.
3 Just to be clear.

4 JUDGE PIGOTT: But your argument is, we
5 don't - - - it makes no difference. The fact of the
6 matter is that - - - that you don't fall within the
7 statute of frauds at all. And so what - - - they can
8 say, paid/not paid; they can say e-mails/not e-mails.
9 You're not in the frauds - - - the statute of frauds.

10 MR. STERN: That's my first point, yes,
11 Your Honor.

12 JUDGE PIGOTT: Well, if we make that - - -
13 if as a matter of law you are, then this case is
14 over, right?

15 MR. STERN: Well, actually, I - - - I
16 disagree. So we've got two points. Point one is we
17 don't fall within this statute of frauds. Point two
18 is even we do - - - we don't think we do, but even if
19 we do - - - we satisfy the statute of frauds of the
20 quantum meruit standard, the lower standard, because
21 there are writings that evidence an acknowledgement -
22 - - an acknowledgement - - - by the defendant of our
23 services.

24 And - - - and that's the Morris Cohon case
25 and the line of cases that say, you don't need all

1 the elements ordinarily you need for a statute of
2 frauds, the material terms of the contract - - - you
3 don't need them on quantum meruit - - -

4 JUDGE ABDUS-SALAAM: Writing - - -

5 MR. STERN: - - - which is all that we are
6 alleging.

7 JUDGE ABDUS-SALAAM: Well, the - - - the
8 writing or the e-mail that you're talking about is
9 the one from the new CIO of Lightstone that says we
10 don't expect you to work for free. That's it? Or
11 you're hoping maybe to find some others?

12 MR. STERN: It's both, Your Honor. It's
13 that e-mail from the CIO of Lightstone that - - - and
14 - - - and yes, the quote is short, and I think that's
15 maybe what Your Honor was referencing in talking
16 about it, but that quote is an admitted
17 acknowledgement of the performance of our services
18 and it's reference to both parties, identified to
19 both - - -

20 JUDGE ABDUS-SALAAM: I just - - - I have
21 another question, though, regarding, you know, the -
22 - - the reason that you and Lightstone are working
23 together. This is not Lightstone's - - - the
24 hospitality industry - - - hotel industry, this is
25 not something they did on a usual basis, is it? That

1 wasn't their normal business. Is that why they
2 brought you in to do the due diligence - - -

3 MR. STERN: Yes, Judge Abdus-Salaam, that -
4 - -

5 JUDGE ABDUS-SALAAM: - - - about hotels and
6 so on?

7 MR. STERN: That's exactly right.

8 JUDGE ABDUS-SALAAM: Okay, so - - - so un -
9 - -

10 MR. STERN: - - - That's not their area of
11 expertise. It's ours.

12 JUDGE ABDUS-SALAAM: In our Freedman case,
13 we said that the statute of frauds covers services
14 that put together the know-how and the know-who. So
15 would you agree that you had the know-how in this
16 industry that they didn't?

17 MR. STERN: What I would say, Your Honor,
18 is when the - - - when the court said that in the
19 Freedman case, their talking about the bringing
20 together of parties through know-how and know-who.
21 You got to know the right players, so to speak. But
22 what we bring is institutional knowledge, which I
23 think is distinguishable.

24 And - - - and I think more importantly,
25 when - - - when you look at Freedman and you look at

1 Snyder, you look at those cases, you look at the
2 essence of what's going on, what - - - what were
3 those plaintiffs doing. Those plaintiffs were
4 creating deals, and - - - and helping move along
5 deals and completing deals.

6 Here we've got - - - we don't even know if
7 these deals have been completed, all we have are the
8 allegations of our complaint that we did investment
9 analysis with - - - with respect to these potential
10 investment opportunities. We're not far enough along
11 in the spectrum, as Judge - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. STERN: - - - Rivera referenced.

14 JUDGE READ: One - - - I have one - - -

15 CHIEF JUDGE LIPPMAN: Sure, Judge Read.

16 JUDGE READ: - - - one quest - - - just one
17 question.

18 MR. STERN: Yes.

19 JUDGE READ: So are you - - - are you still
20 challenging what Judge Schweitzer did to the three
21 that - - - the three that he said - - -

22 MR. STERN: Yes, Your Honor.

23 JUDGE READ: So it's all of them in a - - -

24 CHIEF JUDGE LIPPMAN: You want to do all
25 the claims?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. STERN: Yes, yes.

JUDGE READ: All right, thank you.

CHIEF JUDGE LIPPMAN: You want - - - okay,
good. Thank you - - -

MR. STERN: Thank you, thank you.

CHIEF JUDGE LIPPMAN: - - - thank you both.

(Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals JF Capital Advisors, LLC v. The Lightstone Group, LLC, No. 112, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: June 10, 2015