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COURT OF APPEALS

STATE OF NEW YORK

EUJOY REALTY CORP.,

Respondent,

-against-

No. 179

VAN WAGNER COMMUNICATIONS, LLC,

Appellant.

20 Eagle Street
Albany, New York 12207
October 08, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

VICTOR P. MUSKIN, ESQ.
SCHEICHET & DAVIS, P.C.
Attorneys for Appellant
767 Third Avenue
24th Floor
New York, NY 10017

JOHN C. SCHNAUFER, ESQ.
SCHNAUFER & METIS, LLP
Attorneys for Respondent
280 North Central Avenue
Suite 200
Hartsdale, NY 10530

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Good afternoon.
2 We're going to start with number 179, because the
3 attorneys on the first case, some of them are late
4 and are stuck on the train. So we'll go to 179,
5 Enjou (sic) - - - or Eujoy, I should say. Okay.

6 So counselor, would you like any rebuttal
7 time?

8 MR. MUSKIN: Yes, Your Honor, I would like
9 to reserve three minutes.

10 THE COURT: Okay, three minutes. You have
11 it.

12 MR. MUSKIN: Thank you.

13 THE COURT: Go ahead, counsel.

14 MR. MUSKIN: Thank you. Good afternoon,
15 Your Honors, I'm Victor Muskin, for Van Wagner
16 Communications. Van Wagner Communications is an
17 outdoor advertising company. You may have seen some
18 of their billboards. They are in the business of
19 leasing billboards from property owners, posting
20 space - - - advertising space on there for their
21 customers.

22 And this case involves just such a
23 situation in which Van Wagner leased a billboard from
24 Eujoy Realty in Queens, overlooking the Long Island
25 Expressway. The lease was signed in 2000 - - -

1 CHIEF JUDGE LIPPMAN: Counselor, under what
2 - - -

3 MR. MUSKIN: - - - for fifteen years.

4 CHIEF JUDGE LIPPMAN: - - - conditions were
5 you entitled to terminate the lease?

6 MR. MUSKIN: The lease contained a
7 termination clause - - -

8 CHIEF JUDGE LIPPMAN: Right.

9 MR. MUSKIN: - - - clause 53, which
10 entitled the tenant, Van Wagner, to terminate in case
11 of a visual obstruction that - - - that blocked the
12 view of the sign from the Long Island Expressway.

13 CHIEF JUDGE LIPPMAN: And I take it that
14 you felt that was the case here. So how did you go
15 about exercising your rights to terminate?

16 MR. MUSKIN: There was no question that
17 this was the case here, because everybody saw the
18 building going up. And what happened here - - -

19 CHIEF JUDGE LIPPMAN: Right. But what did
20 you do?

21 MR. MUSKIN: Van Wagner first had
22 conversations with the landlord. They told them
23 exactly what was going to happen, that they would
24 have to terminate, that they - - -

25 JUDGE GRAFFEO: If you terminated a week

1 earlier, you wouldn't be here, would you?

2 MR. MUSKIN: This was before the end of
3 '06. And - - - and there was no objection to
4 termination. They - - - and they knew that this was
5 going to come. And - - -

6 CHIEF JUDGE LIPPMAN: So what did you - - -

7 MR. MUSKIN: - - - eventually - - -

8 CHIEF JUDGE LIPPMAN: - - - do - - - what
9 did you do exactly? You - - - you expressed your - -
10 - your intention to do so?

11 MR. MUSKIN: Yes.

12 CHIEF JUDGE LIPPMAN: And - - - and what
13 did you do?

14 MR. MUSKIN: Well, as I said, in addition
15 to verbally - - -

16 CHIEF JUDGE LIPPMAN: Yes.

17 MR. MUSKIN: - - - in addition - - -

18 CHIEF JUDGE LIPPMAN: In addition to
19 verbally.

20 MR. MUSKIN: - - - to verbally there was a
21 writing that confirmed the prior discussions and the
22 termination. The writing was on January 16th of
23 2007.

24 JUDGE READ: That's after you'd already
25 left, right? Or that's after - - - that's after

1 you'd already left?

2 MR. MUSKIN: Yes. They - - -

3 JUDGE READ: Yes, since January - - -

4 MR. MUSKIN: - - - vacated - - -

5 JUDGE READ: - - - 8th was the - - -

6 MR. MUSKIN: - - - they vacated on January
7 8th. On January 16th, they wrote a letter confirming
8 that they had vacated on January 8th. And that had
9 been followed up by a telephone conversation - - -

10 JUDGE SMITH: What - - - what effect do you
11 give to the - - -

12 MR. MUSKIN: - - - and that was involved -
13 - - all recited in the letter of January 16th.

14 CHIEF JUDGE LIPPMAN: Right.

15 JUDGE SMITH: What effect do you give to
16 the clause in - - - what effect do you give to the
17 clause in the lease that says that you can terminate
18 - - - you don't get your money back if you terminate,
19 unless you terminate under three named sections, and
20 this isn't one of them?

21 MR. MUSKIN: They - - - I think you're
22 referring, Your Honor, to clause C of the rent
23 schedule - - - Schedule A. And that clause said that
24 if there is a termination pursuant to the obstruction
25 clause, any rent that's been paid in advance does not

1 get refunded. But - - -

2 JUDGE SMITH: And you - - - and you were
3 required to pay the rent in advance?

4 MR. MUSKIN: There was a clause that - - -
5 that said the advance rent was due on the 1st of the
6 month.

7 JUDGE SMITH: But if you - - - if you
8 hadn't - - - and you say you didn't pay it, and maybe
9 you're right. But if you had paid it, you couldn't
10 get it back, right?

11 MR. MUSKIN: If the rent had been paid, and
12 if it had been paid by accident, I think because in
13 this case they knew a termination was coming, I think
14 we would have had a restitution claim to get it back.
15 And we've identified the cases within our brief.

16 JUDGE SMITH: Why - - - isn't that the
17 opposite of what the lease says? The lease says you
18 don't get it back.

19 MR. MUSKIN: The lease said you don't get
20 it back. But I think in the case of a mistake, there
21 would have been a restitution claim. In this case -
22 - -

23 JUDGE SMITH: Well, what was in the - - -

24 MR. MUSKIN: - - - the communication was -
25 - -

1 JUDGE SMITH: Why would it have been a
2 mistake?

3 MR. MUSKIN: - - - a mistake.

4 JUDGE SMITH: Well, it was probably a
5 mistake to wait until after the 1st of the year. But
6 is that - - - are you - - - aren't they entitled to
7 exploit that mistake when you make it?

8 MR. MUSKIN: I think not, Your Honor. And
9 they're not entitled to exploit the mistake, because
10 first of all, they knew this was coming. They had
11 made arrangements that foresaw this event. This - -
12 - that foresaw this event happening - - -

13 JUDGE GRAFFEO: Don't we have to apply the
14 plain language? I mean, generally, we apply a plain
15 language rule for interpretation of leases. Are you
16 claiming this was an ambiguity that - - -

17 MR. MUSKIN: The plain language says that
18 if advance rent is paid, it doesn't get returned, but
19 if it's not paid, then the implication of that is
20 that there's no claim for it and that's what the - -
21 -

22 JUDGE GRAFFEO: I thought there's - - -

23 MR. MUSKIN: - - - Supreme Court held.

24 JUDGE GRAFFEO: - - - I thought there's no
25 return of basic rent. Wasn't this part of the

1 scheduled rental payments?

2 MR. MUSKIN: That's what it said. Now, the

3 - - -

4 JUDGE GRAFFEO: I'm trying to understand
5 why the lease wasn't terminated by December 31st so
6 that you wouldn't be in this predicament - - -

7 MR. MUSKIN: Yeah - - -

8 JUDGE GRAFFEO: - - - since that's pretty
9 clear under the - - - under the terms of the lease.

10 MR. MUSKIN: That's because - - - that's
11 because, as set forth very clearly in the affidavit
12 of Van Wagner's EVP, that went in our summary
13 judgment, Mr. Schaps, that they had conversations
14 about this, that they knew this was going to happen,
15 and Van Wagner agreed with Eujoy - - - they had good
16 relations with them, that we'll - - - we'll keep the
17 sign there as long as we can collect from our
18 customers, but when we have to move, we have to move;
19 there will be no further rent.

20 JUDGE RIVERA: But so you say - - -

21 MR. MUSKIN: - - - and we'll pay through -
22 - - through the date of termination.

23 JUDGE RIVERA: - - - do you say it's an
24 oral modification of the lease - - - excuse - - - I'm
25 sorry, counsel. So let me just ask you. The lease

1 is a term of years for fifteen years, correct?

2 MR. MUSKIN: I'm sorry, Your Honor?

3 JUDGE RIVERA: The lease is a term of years
4 for fifteen years - - -

5 MR. MUSKIN: Yes.

6 JUDGE RIVERA: - - - is that correct?
7 Okay. So upon termination, under article 53, aren't
8 you - - - is there some provision that says you're
9 not liable for the rest of it all the way through
10 2015?

11 MR. MUSKIN: I didn't hear your question.
12 I'm sorry.

13 JUDGE RIVERA: I'm sorry. Upon your
14 termination, under article 53, what - - - what in the
15 lease of absolves you of your duty and obligation for
16 the rest of the rent, going all the way through 2015,
17 if the - - - if the lease is through 2015?

18 MR. MUSKIN: Oh, the lease - - - Article 53
19 made it very clear that it could be terminated in
20 case of a visual obstruction. And once it's
21 terminated, that terminates the lease, it terminates
22 the rent obligation.

23 JUDGE RIVERA: But - - -

24 MR. MUSKIN: And we think that the dissent
25 was very clear that once they accepted this

1 termination, they accepted the termination of the
2 rent obligation. Van Wagner couldn't go back and put
3 more advertising up after they terminated.

4 JUDGE RIVERA: But - - -

5 MR. MUSKIN: They got nothing for this
6 claim of - - - of the rest of the - - -

7 JUDGE RIVERA: But in article - - - in
8 article 53, where it says you can terminate, is there
9 any language that says you then are absolved of any
10 duty and obligation for the remaining rent for the
11 rest of the term that goes through 2015?

12 MR. MUSKIN: Specifically, no. But by the
13 same token, there's nothing in article 15 that preser
14 - - - 53, rather, that preserves a right to rent
15 post-termination. In other words, they could have
16 put in a rent survival clause, but they didn't.
17 There were plenty of other changes and plenty of
18 other riders that they put in here. They could have
19 put in a survival clause that allowed the rent to
20 continue or obligate - - -

21 CHIEF JUDGE LIPPMAN: Okay cou - - -

22 MR. MUSKIN: - - - them for the rest of the
23 year.

24 CHIEF JUDGE LIPPMAN: - - - okay,
25 counselor. You'll have rebuttal time.

1 MR. MUSKIN: Yeah, yeah.

2 CHIEF JUDGE LIPPMAN: Thank you.

3 MR. MUSKIN: Yeah. They could have put
4 that in. So - - -

5 CHIEF JUDGE LIPPMAN: No, thank you,
6 counselor. You'll have rebuttal time. Your time is
7 up. Thank you.

8 MR. MUSKIN: Yes. Can I -- can I just sum
9 up - - -

10 CHIEF JUDGE LIPPMAN: No, no, you'll have
11 your time at the end. Thanks, counsel.

12 MR. SCHNAUFER: Good afternoon, Your
13 Honors.

14 CHIEF JUDGE LIPPMAN: Counsel, why can't
15 there be a - - - a oral modification here pursuant to
16 the statute of frauds?

17 MR. SCHNAUFER: There cannot be an oral
18 modification - - -

19 CHIEF JUDGE LIPPMAN: Why not?

20 MR. SCHNAUFER: - - - because the lease
21 says that oral agreements are prohibited - - -

22 CHIEF JUDGE LIPPMAN: There's - - -

23 MR. SCHNAUFER: - - - unless signed by the
24 parties to be - - -

25 CHIEF JUDGE LIPPMAN: - - - there's no

1 provisions in the statute of frauds that would let
2 there be an oral modification - - -

3 MR. SCHNAUFER: There must be a part
4 performance that is unequivocally related to - - -

5 CHIEF JUDGE LIPPMAN: Why - - - why is that
6 not what happened here?

7 MR. SCHNAUFER: Because everything the
8 landlord did was in accordance with the lease. The
9 landlord - - - they argued that acceptance of the
10 surrender was in accordance with that oral agreement.
11 It was in accordance with the lease.

12 JUDGE GRAFFEO: Then why have those
13 conversations with them, kind of leading them on to
14 think - - -

15 MR. SCHNAUFER: The conversations - - -

16 JUDGE GRAFFEO: - - - that there was an
17 obstruction?

18 MR. SCHNAUFER: That is their claim that
19 there were conversations that led them on. My client
20 denied having any conversations with them. In fact,
21 the letter that was referred to in the oral argument,
22 terminating the lease, referred to none of those oral
23 conversations. It just said we're terminating the
24 lease as of January 8, here's rent for eight days.

25 JUDGE SMITH: Why isn't that an issue of

1 fact?

2 MR. SCHNAUFER: It's not an issue of fact
3 because you've got to have either a part performance
4 in - - - that's directly - - -

5 JUDGE SMITH: I - - - if I understand it,
6 you're saying that even if you did have the con - - -
7 you deny that you had them.

8 MR. SCHNAUFER: Correct.

9 THE COURT: And you're saying, even if you
10 had them, and even if you did lead them on, and even
11 if this - - - and even though you're getting - - -
12 you're essentially getting a year's rent for a
13 month's use - - - for a week's use of the space,
14 you're saying that's - - - that's okay, because
15 that's what the lease says?

16 MR. SCHNAUFER: That is - - - that is
17 correct. And there was not an agreement. There were
18 not acts or an agreement that would remove this
19 alleged oral conversation from the statute of frauds.
20 There were not acts done by the landlord that were
21 unequivocally related to what the - - - the tenant
22 claimed was an oral agreement. Everything the
23 landlord did was - - -

24 JUDGE GRAFFEO: Are you claiming your
25 client was unaware of the - - - the building being

1 constructed?

2 MR. SCHNAUFER: I'm not claiming that, no,
3 I'm not. I'm not. There's no claim that the client
4 was unaware.

5 JUDGE GRAFFEO: So doesn't that factor into
6 this equation?

7 MR. SCHNAUFER: I don't think it factors
8 into the equation at all. I think the lease had to
9 be terminated before January 1 of 2007 in order - - -

10 CHIEF JUDGE LIPPMAN: And you don't think
11 there are factual issues as to whether there was an
12 oral modification here?

13 MR. SCHNAUFER: I do not think there were -
14 - -

15 CHIEF JUDGE LIPPMAN: Therefore - - -

16 MR. SCHNAUFER: - - - there are factual - -
17 -

18 CHIEF JUDGE LIPPMAN: - - - whether it
19 comes within the statute of frauds exception?

20 MR. SCHNAUFER: I - - - I do not think
21 anything here comes within the statute of frauds
22 exception. There was no inducement for the tenant to
23 remain on. Even if you took the oral agreement
24 that's alleged at face value - - -

25 CHIEF JUDGE LIPPMAN: And they relied on

1 it. Say they relied on it?

2 MR. SCHNAUFER: Even - - - even if they
3 relied on it, they said we'll continue to pay you
4 rent as long as we get rent for the sign. Well, the
5 rent for the full year became due on January 1 - - -

6 CHIEF JUDGE LIPPMAN: Why did - - - why did
7 you wait so long to sue on this thing?

8 MR. SCHNAUFER: It's a contract claim. We
9 had six years to sue for - - - for this.

10 CHIEF JUDGE LIPPMAN: Why did you wait the
11 number of months that you did to sue?

12 MR. SCHNAUFER: We waited until - - -

13 CHIEF JUDGE LIPPMAN: Did you try and rent
14 it in between?

15 MR. SCHNAUFER: No. We - - - we did not
16 try and rent it in between. The time - - - the wait
17 was basically a counsel delay, not a client delay.

18 JUDGE RIVERA: Is your interpretation of
19 article 53 his, that that article allows him to
20 terminate - - - the client to terminate - - - doesn't
21 owe anything else through 2015? You're only arguing
22 for 2007. Is that because that's your client's - - -

23 MR. SCHNAUFER: That's correct.

24 JUDGE RIVERA: - - - interpretation?

25 MR. SCHNAUFER: Once - - - once the tenant

1 terminated - - -

2 JUDGE RIVERA: Terminated.

3 MR. SCHNAUFER: - - - any rent that became
4 due in 2008 and thereafter was over. There's no
5 claim.

6 JUDGE RIVERA: It's over.

7 MR. SCHNAUFER: There's no claim for that,
8 and we make no claim for that. It's only 2007.
9 That's at - - -

10 JUDGE RIVERA: Okay.

11 MR. SCHNAUFER: - - - at issue.

12 JUDGE PIGOTT: The - - - it occurs to me,
13 whatever - - - whatever we decide on this case may
14 have an effect on a number of cases similar to this
15 in terms of contracts and landlords and tenants. And
16 your - - - your argument, of course, is, as you
17 indicated, that's what the writing says. If the - -
18 - if the tenant here lived in Florida, and he didn't
19 know this building was going up, and you did, would
20 the - - - would the facts be the same?

21 MR. SCHNAUFER: I think they would be the
22 same, Your Honor. I don't know that the landlord
23 would have had an obligation to tell the tenant
24 there's a building that's going up. I think the
25 tenant's got an obligation to know what its premises

1 are and what its rights are.

2 JUDGE PIGOTT: And that would be based on
3 the fact that he's getting rent - - - or it's getting
4 rent from whoever it's - - -

5 MR. SCHNAUFER: It's a business deal - - -

6 JUDGE PIGOTT: Right.

7 MR. SCHNAUFER: Both parties should be
8 aware of - - - of what's going on.

9 CHIEF JUDGE LIPPMAN: Okay. Anything else,
10 counselor?

11 MR. SCHNAUFER: That's it.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. SCHNAUFER: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you.

15 Counselor, rebuttal?

16 MR. MUSKIN: Yes, thank you.

17 Your Honor, my learned adversary has
18 suggested here that there's just an allegation that
19 there were conversations beforehand. But I would
20 like to refer the court to the very last page of his
21 brief, in which he says that the facts set forth in
22 the Schaps affidavit, as you'll see in the record, at
23 66, are not contested.

24 JUDGE PIGOTT: How big - - - how big a door
25 are we opening if we're - - - if we find what you

1 want us to find, which is, even though the contract
2 says X, Y, and Z, we don't think X should apply, we
3 think we ought to be able to bring in parol evidence;
4 we don't think Y should apply, I mean, even though we
5 paid it, we stopped payment on the check and that is
6 - - - you know, that can be looked at as well.

7 I mean, how much damage are we doing to
8 contract law here if we find in your favor?

9 MR. MUSKIN: I didn't understand the last
10 part of your question. Sorry.

11 JUDGE PIGOTT: How much damage are we doing
12 to the contract law of the State of New York, if we
13 find in your favor?

14 MR. MUSKIN: Oh, you're doing no damage to
15 the contract law. As far as we're - - - as far as we
16 can see, the contract specifically says they're not
17 entitled to rent if it's not - - - advance rent, if
18 it's not paid before termination. That's clause C of
19 Schedule A.

20 In addition, we didn't discuss - - -

21 JUDGE SMITH: Or are you saying - - -

22 MR. MUSKIN: - - - at all - - -

23 JUDGE SMITH: - - - you benefit from your
24 own default in not paying the rent when it's due?

25 MR. MUSKIN: That's exactly what I was

1 going to address. There was no default. The
2 defaults are defined in clause 43 of the lease. It
3 requires a ten-day notice, an opportunity to cure.

4 JUDGE SMITH: Well, maybe - - - maybe I
5 used - - -

6 MR. MUSKIN: There was no default - - -

7 JUDGE SMITH: - - - maybe I used the wrong
8 word. Are you benefiting from your own breach of
9 your obligation to pay the rent when it's due?

10 MR. MUSKIN: Not at all. Because the
11 parties had discussed this in advance. Those
12 conversations are now conceded by virtue of the
13 answering brief.

14 JUDGE PIGOTT: Well, that's - - -

15 MR. MUSKIN: As set forth in - - -

16 JUDGE PIGOTT: - - - your fallback - - -

17 MR. MUSKIN: - - - the Schaps - - - they
18 knew this was coming.

19 JUDGE PIGOTT: If your - - - if instead of
20 stopping payment, you had just bounced that check,
21 you would then say, gee, I didn't know, but lucky me;
22 my check bounced. Therefore I didn't pay the rent,
23 therefore I don't have to pay it?

24 MR. MUSKIN: Hypothetically speaking, if
25 the rent wasn't paid, if there was no advance

1 payment, then that lease clause would apply and they
2 could have written it differently, but that's the way
3 it was written.

4 JUDGE PIGOTT: Okay.

5 MR. MUSKIN: Now, taking it a step further,
6 on the facts set forth in the Schaps affidavit, which
7 are now conceded, it's very clear that based on what
8 happened before the 1st of January, Van Wagner was
9 led to stay over on the assumption that they would be
10 able to pay through the date of termination but not
11 past the date of termination. It is exactly what
12 happened here. What happened in this case is exactly
13 what was foreseen in the contract. What happened
14 here at the Appellate Division, we believe, was a
15 totally unjustified windfall for the landlord of
16 fifty-one out of fifty-two weeks of this year for no
17 consideration whatsoever after the lease was
18 terminated.

19 JUDGE RIVERA: Is - - - can I ask you - - -

20 CHIEF JUDGE LIPPMAN: Judge Rivera?

21 JUDGE RIVERA: Counsel? Is there anything
22 that prevented you from terminating and then
23 negotiating a month-to-month lease?

24 MR. MUSKIN: You mean prior to the end of
25 the year?

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JUDGE RIVERA: Correct.

MR. MUSKIN: They certainly could have done that, but they had a different set of conversations on which they relied.

JUDGE RIVERA: Thank you.

CHIEF JUDGE LIPPMAN: Okay, counselor.
Thank you. Thank you both.

MR. MUSKIN: Thank you.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Eujoy Realty Corp. v. Van Wagner Communications, LLC, No. 179 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

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

Date: October 13, 2013