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COURT OF APPEALS

STATE OF NEW YORK

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172 VAN DUZER REALTY CORP.,

Appellant,

-against-

No. 228

GLOBE ALUMNI STUDENT ASSISTANCE  
ASSOCIATION, INC.,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
November 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
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:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 228, 172 Van  
2 Duzer Realty Corp.

3 Counsel, would you like any rebuttal time?

4 MS. BROWN: I'd like four minutes, please.

5 CHIEF JUDGE LIPPMAN: Four minutes. Four  
6 minutes of your ten?

7 MS. BROWN: Yes.

8 CHIEF JUDGE LIPPMAN: Correct?

9 MS. BROWN: Yes.

10 CHIEF JUDGE LIPPMAN: Okay, go. You're on.

11 MS. BROWN: Okay, my name's Linda Brown.  
12 I'm with Herzfeld & Rubin. I represent Globe and the  
13 Association. This - - - we're - - - we're not  
14 requesting a - - -

15 CHIEF JUDGE LIPPMAN: Was there an  
16 acceleration clause in this contract?

17 MS. BROWN: Yes, yes, and - - -

18 CHIEF JUDGE LIPPMAN: So why - - - why  
19 couldn't they use that clause to require the payment  
20 of all the - - - the rent over the years of the - - -  
21 the lease?

22 MS. BROWN: Because this court's precedent  
23 in Fifty States says that they can't. The - - -

24 CHIEF JUDGE LIPPMAN: Well, what does it  
25 say in Fifty States?

1 MS. BROWN: It says an acceleration clause  
2 is permissible as - - - as long as a condition - - -  
3 there's a condition precedent that the tenant remain  
4 in possession of the premises.

5 CHIEF JUDGE LIPPMAN: Is that the rule if  
6 it's - - - if - - - as to whether or not the tenant  
7 is - - - is in possession is dispositive?

8 MS. BROWN: Yes, because in Fifty States  
9 this court said it three times that - - -

10 JUDGE SMITH: I - - - I thought - - - I - -  
11 - I thought they said that as long as the tenant is  
12 entitled to possession.

13 MS. BROWN: Yes, well, in this case, the -  
14 - -

15 JUDGE SMITH: You - - - you - - - your  
16 client didn't - - - didn't want and couldn't use the  
17 premises; isn't that correct?

18 MS. BROWN: The - - - the plaintiff went so  
19 far as to obtain a judgment of possession and a  
20 warrant of eviction of - - - of the tenant. So in  
21 that case, he - - - the - - - the landlord  
22 affirmatively terminated the lease. And there - - -  
23 and so there is no right of possession now.

24 JUDGE SMITH: Well, but if you had - - - I  
25 mean you - - - I - - - obviously, you didn't come in

1 with the money in your hands and tender it to him and  
2 say, give me back the - - - the space. Could you  
3 have done that?

4 MS. BROWN: There - - - there - - - under  
5 Fifty States, the - - - the law is clear. It's been  
6 the law of this state since 1979. Once there is an  
7 eviction - - - there's - - - there's no - - - the - -  
8 - the effect of the eviction is onerous because there  
9 - - - the - - - the tenant no longer has possession  
10 of the property. He cannot make any money from the -  
11 - -

12 CHIEF JUDGE LIPPMAN: So that's it?  
13 There's no - - - there's - - - there's nothing that  
14 the - - - the tenant could be ruled responsible for  
15 once they're out of the - - - the space?

16 MS. BROWN: Yes, the ten - - - the - - -

17 CHIEF JUDGE LIPPMAN: Is that - - - is - -  
18 -

19 MS. BROWN: - - - landlord made the choice  
20 to - - -

21 CHIEF JUDGE LIPPMAN: Yes, so in - - - if  
22 the tenant is out, the tenant's responsibilities are  
23 over?

24 MS. BROWN: In a - - -

25 CHIEF JUDGE LIPPMAN: Certainly, going - -

1 - going forward?

2 MS. BROWN: In a differently drawn - - - in  
3 a differently drawn lease, which is not the case  
4 here, it - - - it - - - there could have been a  
5 survival clause where the - - - the landlord could  
6 have sued - - -

7 JUDGE PIGOTT: If we stick - - -

8 MS. BROWN: - - - as the rent became due.

9 JUDGE PIGOTT: If we stick with this one,  
10 you're - - - if - - - if you take your argument to  
11 the logical conclusion, you're saying we - - - we  
12 didn't pay our rent, but he had - - - he should - - -  
13 he had a choice. He either could leave us there not  
14 paying the rent, and we would do whatever we were  
15 going to do for the rest of the lease; that's - - -  
16 that's up to him, even though we're not paying. But  
17 if he chooses to - - - to move us out and perhaps  
18 prepare the - - - the property for another tenant or  
19 anything else, he's giving up any rights he's got  
20 against you?

21 MS. BROWN: Yes, for the accelerated rent.

22 JUDGE PIGOTT: Does that make sense to you?

23 MS. BROWN: Yes - - -

24 JUDGE PIGOTT: I assumed it would.

25 MS. BROWN: - - - because the - - - the

1 liquidated - - - the acceleration clause, it's a  
2 liquidated damages clause. And it - - - and it's - -  
3 - it can only be enforced when it - - - it doesn't  
4 violate the principle of just compensation. And this  
5 acceleration clause gives the - - - gives the  
6 landlord a bonanza.

7 JUDGE PIGOTT: Well, this - - -

8 JUDGE ABDUS-SALAAM: It's - - -

9 MS. BROWN: It's - - -

10 JUDGE PIGOTT: I'm sorry, go ahead.

11 JUDGE ABDUS-SALAAM: I was just - - -  
12 counsel, you said it twice, you said, accelerated  
13 clause and a liquidated damages clause. And aren't  
14 we really dealing with a liquidated damages clause?

15 MS. BROWN: Yes, yes.

16 JUDGE ABDUS-SALAAM: But not an  
17 acceleration clause?

18 MS. BROWN: It is an acceleration clause,  
19 because it asks the - - - it - - - it would require  
20 the tenant to pay all of the rent to the end of the  
21 lease now. This - - - this lease went to - - - goes  
22 to 2016.

23 JUDGE SMITH: You - - - you - - -

24 JUDGE ABDUS-SALAAM: But the difference, as  
25 you keep pointing out, is that the liquidated damages

1 clause only goes into effect once the tenant has left  
2 the premises, either through eviction or abandonment,  
3 which in my understanding is what happened here.

4 That - - - that the tenant abandoned the premises.

5 MS. BROWN: There is a difference between -  
6 - - you can put in a lease that the obligation to pay  
7 rent will continue after termination of the lease,  
8 and then the landlord would have the right to sue as  
9 the - - - as the rent accrued. That's different than  
10 - - -

11 JUDGE PIGOTT: Right, but you're - - - what  
12 - - -

13 MS. BROWN: - - - having - - -

14 JUDGE PIGOTT: Let's assume for a minute  
15 you have a school and - - - and - - - and the  
16 building is a - - - is a - - - is a dormitory. And  
17 you sell the school and say, you know, but we really  
18 don't want to get stuck with this dormitory. So  
19 we'll sell all the assets over here. Now we don't  
20 have any assets. And the landlord is stuck with a  
21 building that used to be a dorm that's no longer  
22 associated with a school. And he's got to do  
23 something with it, and all he can do is sit there and  
24 let it rot until the - - - until the tenancy's over,  
25 and then we might pay him the - - - the amount that's

1 due on the rent. Does that make sense?

2 MS. BROWN: That's not - - -

3 JUDGE PIGOTT: It's a hypothetical.

4 MS. BROWN: You can have a clause which  
5 allows you to sue as - - -

6 JUDGE PIGOTT: Monthly.

7 MS. BROWN: - - - as the - - - as the rent  
8 accrues.

9 JUDGE PIGOTT: You're saying his remedy was  
10 to go into - - - to - - - to go in monthly?

11 MS. BROWN: Right, but not to - - - not - -  
12 - like - - - like - - - it's like almost - - -

13 JUDGE PIGOTT: All right.

14 MS. BROWN: - - - a decade's worth of - - -  
15 of rent that has to be paid immediately. And that's  
16 - - -

17 JUDGE SMITH: I mean, let me - - -

18 JUDGE RIVERA: Okay, I'm sorry. What - - -  
19 what is this - - - what is this, then - - - this  
20 language in the lease mean? "In the event of lease  
21 termination, tenant shall continue to be obligated to  
22 pay rent and additional rent for the entire term as  
23 though this lease had not been terminated." Isn't  
24 that exactly what you were talking about?

25 MS. BROWN: Yes, that the - - - that the -

1 - -

2 JUDGE SMITH: You - - - you're saying  
3 that's invalid?

4 MS. BROWN: - - - obligation to pay rent on  
5 a monthly basis would continue. It does not - - -  
6 that does not - - - that's - - - it's different than  
7 demanding immediately - - -

8 JUDGE SMITH: Hold on. Are you - - - are  
9 you saying - - - are you disputing what the lease  
10 means, or are you saying that that clause is an  
11 invalid penalty?

12 MS. BROWN: The clause that - - - that - -  
13 - that says that the tenant is obligated to pay all  
14 rents due for the remainder of the lease immediately,  
15 that's - - - that's void.

16 JUDGE RIVERA: So the acceleration part?

17 MS. BROWN: That's unacceptable.

18 JUDGE RIVERA: You're saying that, but what  
19 I just read - - - I'm asking you about what I just  
20 read in the lease.

21 MS. BROWN: There's - - - yeah, it's a  
22 difficult - - -

23 JUDGE RIVERA: I thought - - - I thought -  
24 - - I thought you were saying that the acceleration  
25 requirement is invalid, but that if they had had this

1 kind of language in the lease, your client would be  
2 bound. So as far as I know, this is in the lease.  
3 Maybe I'm wrong. You tell me otherwise.

4 MS. BROWN: But it just - - - yes, it is.  
5 The terminology is confusing, because some - - - the  
6 - - - there's - - - the situation in which you are  
7 discussing, some people call that an acceleration  
8 clause.

9 JUDGE RIVERA: Um-hum.

10 MS. BROWN: What we are saying - - - what  
11 we are saying, that the clause that purports to  
12 require the tenant to pay a decade's worth of - - -  
13 of rent immediately, that is an acceleration clause.

14 JUDGE RIVERA: Yes, I understand, but - - -

15 MS. BROWN: That's the terminology.

16 JUDGE RIVERA: - - - but this - - - this  
17 language says, "Due for the entire term as though  
18 this lease had not been terminated," which would mean  
19 that you don't owe it immediately. I mean it means -  
20 - -

21 MS. BROWN: They're going to - - -

22 JUDGE RIVERA: - - - your obligation - - -  
23 I'm asking you. Can't you read that to mean your  
24 obligation continues as if the lease was still in  
25 effect, which is not about the acceleration, because

1           you abandoned, and now I'm unable to get any money  
2           for this so you've got to pay me the eight years  
3           upfront?

4                       MS. BROWN:  You're saying does that lease  
5           provision allow the landlord to go to court as the  
6           rent accrues?

7                       JUDGE RIVERA:  Correct.

8                       MS. BROWN:  Is that - - -

9                       JUDGE RIVERA:  That's what I'm asking.

10                      MS. BROWN:  Well, it doesn't specifically  
11           say that.  Some leases will say - - -

12                      JUDGE RIVERA:  Um-hum.

13                      MS. BROWN:  - - - that the - - - the  
14           landlord will - - - will sue for the accrued rent as  
15           it - - - as - - - as it accrues - - - accrued.  But  
16           this particular lease does not make that clear.

17                      CHIEF JUDGE LIPPMAN:  Okay, counsel.  
18           You'll - - -I'm sorry, Judge Smith.

19                      JUDGE SMITH:  Yeah, go ahead.  I'll - - -  
20           I'll - - - I'll wait.

21                      CHIEF JUDGE LIPPMAN:  We'll - - - we'll ask  
22           you more questions on the rebuttal.  Let's hear from  
23           your adversary.

24                      MR. POTTER:  Thank you.  May it please the  
25           court, Noah Potter of Cox Padmore Skolnik & Shakarchy

1 for the respondent, 172 Van Duzer Realty Corp.

2 CHIEF JUDGE LIPPMAN: Coun - - - counsel,  
3 why isn't this a penalty, this charging him for the  
4 length - - - length of the - - - of the lease? Why -  
5 - - why is it enforceable, in your mind?

6 MR. POTTER: This court has consistently -  
7 - -

8 CHIEF JUDGE LIPPMAN: Is it a penalty - - -

9 MR. POTTER: No.

10 CHIEF JUDGE LIPPMAN: - - - and is it  
11 enforceable?

12 MR. POTTER: It's - - - it's not a penalty,  
13 and it is enforceable. This court has consistent - -  
14 -

15 CHIEF JUDGE LIPPMAN: Why is it  
16 enforceable?

17 MR. POTTER: This court has consistently  
18 held a - - - there's a simple test to distinguish a  
19 liquidated damages clause in - - - measured as the  
20 amount of future rent due, which is what this  
21 situation is. It is not an acceleration clause as  
22 used in Fifty States.

23 JUDGE SMITH: Well, did it - - - did it - -  
24 - did it accelerate or not?

25 MR. POTTER: The - - - unfortunately,

1           there's somewhat ambiguous language that's floating  
2           around in the case so - - -

3                       JUDGE SMITH:   But you - - - but you're - -  
4           - you're looking for a judgment.  I guess you've got  
5           a judgment.

6                       MR. POTTER:   We have a judgment, yes.

7                       JUDGE SMITH:   For the whole rent?

8                       MR. POTTER:   That's - - - we have a  
9           judgment, that's right.

10                      JUDGE SMITH:   You - - - you - - - you got  
11           acceleration, whether it's in the lease or not.

12                      MR. POTTER:   We - - - well, we got it  
13           because it's in the lease.

14                      JUDGE SMITH:   Okay.

15                      MR. POTTER:   It's a - - - it's a lease  
16           term.  Of course it's in the lease.

17                      JUDGE SMITH:   So - - - so - - - I mean, so  
18           your answer - - - I mean, so Judge Rivera a minute  
19           ago read some language that seemed to say that they  
20           have to pay as though the lease had not been  
21           terminated, which means monthly.  You don't read it  
22           that way?

23                      MR. POTTER:   I - - - absolutely not.  
24           Number one, that matter was never - - - was never  
25           addressed below.  It's an entirely new lease

1 construction. And I certainly take the point, and  
2 there is ambiguity as to that. It has always been  
3 understood - - -

4 JUDGE SMITH: But that - - - that  
5 ambiguity's been resolved in your favor.

6 MR. POTTER: That's - - - that's correct.

7 JUDGE SMITH: Or it's - - - it's in your  
8 favor as long as the lease is valid. Otherwise, it  
9 would have been resolved against you.

10 MR. POTTER: Well, it's - - - it's been  
11 resolved in - - - in respondent's favor. So the  
12 question as to whether it's a - - - a right to sue  
13 periodically, that was - - - that's an alternative  
14 construction; at least, it could have been addressed  
15 below.

16 JUDGE SMITH: Okay, so let - - - let me - -  
17 - I mean, let's - - - let's assume that it is - - -  
18 whether it's an acceleration clause or not, it sure  
19 did accelerate. I mean, it got - - - got you a  
20 judgment for ten years' rent today. And under Fifty  
21 States, you're clearly entitled to that if the tenant  
22 still has the right to - - - to possession, right?

23 MS. BROWN: If Fifty States were applicable  
24 here. And I'd like to clarify. Fifty States came  
25 into this case, I'll concede, through respondent's

1 initial briefing of this. As the - - - as the case -  
2 - - as the - - - the briefing continued and it became  
3 clear that certain language of - - - of Fifty States  
4 was relevant in terms of the - - - the general  
5 enforceability of - - - of clauses for the remainder  
6 of the rent due. It - - - it's really limited to  
7 that. And actually, the applicable precedent is  
8 Truck-Rent-a-Center, through JMD, through Bates, in  
9 which it's - - -

10 JUDGE PIGOTT: What about Ross and  
11 Benderson?

12 MR. POTTER: Excuse me? Ross and  
13 Benderson, we maintain, are simply infirm. As far as  
14 I - - - as far as they can be understood, they seem  
15 to rest on the premise that one-to-one  
16 proportionality of a liquidated damages clause is  
17 necessarily unconscionable, is - - -

18 JUDGE PIGOTT: Well, there seemed to be a  
19 more general statement that if - - - if you're going  
20 to take an accelerated rent, you owe the - - - you  
21 owe the tenant, the former tenant, mitigation. And  
22 so in other words, if two years from now you were  
23 able to rent this and get some money back, ab - - -  
24 absent that, then it's a penalty and it shouldn't be  
25 enforced, right?

1 MR. POTTER: I believe that's - - - I  
2 believe that that is the reading. There's no support  
3 anywhere in the - - - in - - - in this court's  
4 jurisdiction, jurisprudence - - -

5 JUDGE PIGOTT: You think that's bad law?

6 MR. POTTER: Excuse me?

7 JUDGE PIGOTT: You think that's bad law?

8 MR. POTTER: We think that's bad - - - we  
9 actually do think that's bad law.

10 JUDGE READ: It is Appellate Division law,  
11 too, right?

12 MR. POTTER: It's - - - actually, the 2004  
13 Ross is - - - is Appellate Term. And in each case -  
14 - - Benderson was decided prior to Holy Properties,  
15 and Ross was decided prior to both JMD and Bates.

16 CHIEF JUDGE LIPPMAN: Counsel, does this  
17 strike you as fair?

18 MS. BROWN: Absolutely.

19 CHIEF JUDGE LIPPMAN: That with such a long  
20 period of time remaining - - -

21 MR. POTTER: Absolutely.

22 CHIEF JUDGE LIPPMAN: - - - nine years - -  
23 -

24 MR. POTTER: Absolutely.

25 CHIEF JUDGE LIPPMAN: - - - that - - - that

1 this is - - - this is a fair result?

2 MR. POTTER: Well, first of all - - -

3 CHIEF JUDGE LIPPMAN: Tell us why, from a  
4 policy perspective.

5 MR. POTTER: First of all - - - well,  
6 initially as a - - - as a fact matter, this was a  
7 judgment rendered in 2011, okay. There were five  
8 years - - - just for the - - - so that we're all  
9 clear on that one.

10 JUDGE SMITH: But - - - but would the case  
11 be the same, in your view, if it were twenty?

12 MR. POTTER: I - - - I think it would be,  
13 but let's look at the prevailing test.

14 CHIEF JUDGE LIPPMAN: But - - - but talk  
15 about why it's - - - why, from a fairness  
16 perspective, this is the right result. How are you  
17 damaged for the remaining nine years of this lease?

18 MR. POTTER: This case is an exemplar of  
19 when a liquidated damages clause measured as future  
20 rent should be enforced.

21 CHIEF JUDGE LIPPMAN: Why?

22 MR. POTTER: This is within the scope of  
23 Truck-Rent-a-Center. Certainly this court noted that  
24 the - - - that the - - - the plaintiff in that case  
25 had limited its ability to use - - - to use his

1 property.

2 CHIEF JUDGE LIPPMAN: Is that the main  
3 reason, because of this dorm use? Is that what - - -  
4 what - - -

5 MR. POTTER: That's a - - -

6 CHIEF JUDGE LIPPMAN: - - - makes this a -  
7 - -

8 MR. POTTER: That is all the more so. This  
9 court has - - -

10 JUDGE RIVERA: Did you seek relief from  
11 that requirement?

12 MR. POTTER: Excuse me?

13 JUDGE RIVERA: Did you seek relief from  
14 that requirement?

15 MR. POTTER: Well - - -

16 JUDGE RIVERA: So that you could use it in  
17 another way?

18 MR. POTTER: Well, as a fact matter - - -  
19 this is certainly outside the record, but as a - - -  
20 as a fact matter it is entirely unreasonable to  
21 request that a landlord who has taken on,  
22 essentially, a deed restriction for the specific  
23 benefit of the tenant then go about to remove that  
24 restriction.

25 JUDGE SMITH: But isn't - - - I mean, isn't

1           - - - isn't there some - - - you got - - - you got  
2           ten years' rent - - - or five years' rent or one, I -  
3           - - I don't care how many you got - - - X-years'  
4           rent payable day one and you get the property back.  
5           Now, you say you're - - - having the property back  
6           isn't that great because I got this restrict - - -  
7           restriction maybe I can or can't get rid of. But is  
8           - - - still, isn't that - - - isn't - - - haven't you  
9           clearly gotten more than any damages you could  
10          conceivably have suffered? You've got every dime  
11          that they owe you up front, without interest, and the  
12          property.

13                       MR. POTTER: Number - - - number - - - as  
14          an initial matter, this is one-to-one proportionality  
15          of the - - - of the relief to the - - - to the amount  
16          that would come due if the tenant had fully  
17          performed. Let's go - - -

18                       JUDGE SMITH: Yeah, if - - - if - - - if  
19          you forget about the interest factor, which in - - -  
20          in - - - in - - - which in Fifty States we said you  
21          could.

22                       MR. POTTER: Leaving as - - - leaving that  
23          aside, let's look at the test. Let's look at the  
24          straightforward, plain, simple, and suitable test  
25          consistently applied of under Truck since

1 synthesizing prior law. One, the damages cannot be  
2 readily ascertainable at the time of lease execution,  
3 and the - - - the projected - - - the damages  
4 liquidated are not, are reasonable. They're not  
5 conspicuously disproportionate to the foreseeable  
6 loss at - - -

7 JUDGE SMITH: Well, what - - - first of  
8 all, just for - - - forgetting about possession, and  
9 admittedly, I'm - - - I'm - - - I'm flying in the  
10 face of Fifty States here, but why isn't ten years' -  
11 - - a ten years' income with - - - a ten years'  
12 income today without discounted grossly  
13 disproportionate to ten years' income paid over ten  
14 years? I - - - I don't get it.

15 MR. POTTER: The matter - - - the matter of  
16 the discount, the court will do what it sees fit.  
17 The matter of the discount has no bearing as to  
18 whether the - - - as to whether the premise of - - -

19 JUDGE SMITH: Well, it has - - - it has to  
20 do with the factual matter with whether it's  
21 disproportionate or not. I mean, you're - - - you're  
22 - - - you're essentially - - - you're getting your  
23 loan paid - - - you give a ten - - - you give a ten-  
24 year loan, and you get it paid back with interest on  
25 - - - on day one.

1 MR. POTTER: Let - - - let me address - - -

2 JUDGE SMITH: That's disproportionate,

3 isn't it?

4 MR. POTTER: Let me - - - let me address

5 that by addressing what appellants have said here.

6 Appellants have said we don't need to follow the

7 Truck-Rent-a-Center test. We want this court to

8 import an entirely different test, to switch the

9 burden of proof, to greatly expand the scope of

10 discovery so the parties essentially can't contract

11 out of that.

12 JUDGE SMITH: I'm not hearing why the

13 relief you got isn't grossly disproportionate to the

14 damages you could have suffered.

15 MR. POTTER: This is a freely contracted

16 clause between - - -

17 JUDGE SMITH: Yeah, they all are.

18 MR. POTTER: - - - two - - -

19 JUDGE SMITH: They all are and maybe - - -

20 and maybe penalty clauses shouldn't be against the

21 law. But I'm still asking the factual question why

22 didn't you get relief that's grossly disproportionate

23 to what - - - to - - - to your damages?

24 MR. POTTER: In another case, perhaps we

25 would have a disproportionality. In this case, under

1 the facts of this case, absolutely, we seek to be  
2 made whole, and it's the - - - the restricted - - -

3 CHIEF JUDGE LIPPMAN: By getting ten years  
4 up front you're being made whole?

5 MR. POTTER: Yes, because the - - -

6 JUDGE PIGOTT: Well, present value wasn't -  
7 - - wasn't argued, that I remember, in any of this.  
8 And I - - - I - - - I was curious myself as to what  
9 you do with a dormitory. I mean, I - - - I mean, you  
10 may have to retrofit it. You may have do things  
11 that, you know - - - I mean we just don't know the -  
12 - -

13 MR. POTTER: You look for another school.  
14 You hope. And this goes to the failure of the  
15 appellants to make the proper argument. In many  
16 ways, this case reduces to a burden of proof on  
17 summary judgment.

18 JUDGE ABDUS-SALAAM: Counsel - - -

19 MR. POTTER: Appellants essentially - - -

20 JUDGE ABDUS-SALAAM: Counsel, I see your  
21 light is on. A question about the amount of the  
22 judgment and the rent that you might have been able  
23 to get in the civil court and - - - and this goes to  
24 res judicata, the res judicata issue. There was a  
25 discount on the judgment from whatever you asked for

1 in the stipulation that you agreed to with - - - with  
2 - - - so does - - - does that - - - was the - - -  
3 does - - - does that have anything to do with the  
4 rent that was - - - you could have gotten in civil  
5 court or not?

6 MR. POTTER: No, it doesn't. And actually,  
7 that's - - - that's - - - thank you. That's an  
8 excellent point because let's - - - I want to look at  
9 something that's implicit in the appellant's papers.  
10 If you look carefully at the order, the parties were  
11 sent out to a referee to calculate the damages.  
12 Justice Edmead at the - - - at the motion court sent  
13 - - - sent the parties out for - - - it said it was  
14 unclear whether the property's been re-rented.

15 There were actually two stages to this.  
16 Clearly, there was a liability phase in which it was  
17 incumbent upon the appellants to make the proper  
18 argument on the Truck - - - on the Truck-Rent-a-  
19 Center test. They did not do so, which is why they  
20 lost the - - -

21 JUDGE SMITH: You're - - - you're making  
22 essentially a preservation point?

23 MR. POTTER: It's something of a  
24 preservation point, because they had the opportunity  
25 to take discovery. And - - -

1                   JUDGE SMITH:  And even - - - even though  
2                   you're out of time, would you do me a favor.  I'd ask  
3                   you to just - - - just talk for one minute about the  
4                   mitigation issue.

5                   MR. POTTER:  The mitigation - - - the  
6                   mitigation issue in terms of there was - - -

7                   JUDGE SMITH:  Do - - - do you have a duty  
8                   to mitigate?

9                   MR. POTTER:  No, we do not.  The law of  
10                  this state, unless the court seeks to undo this - - -

11                  CHIEF JUDGE LIPPMAN:  You can just sit on  
12                  this property for the ten years?

13                  MR. POTTER:  You know, we could sit on this  
14                  property, but we're not going to sit on this  
15                  property.  We're going to sit on this property and  
16                  not collect rent?  I mean that makes - - - that makes  
17                  no sense.

18                  JUDGE SMITH:  You're - - - you're - - -  
19                  you're saying you don't need a legal duty to  
20                  mitigate.  Your self-interest is sufficient?

21                  MR. POTTER:  Our - - - our self-interest is  
22                  sufficient.  And just to get to the issue of the - -  
23                  - of the damages phase, the appellants had the  
24                  opportunity to take - - - to - - - to take discovery,  
25                  - - - take full discovery and - - -

1                   JUDGE ABDUS-SALAAM: Well, I still don't  
2 know that I heard the answer to my question earlier,  
3 though. Are you saying there was no - - - the  
4 discount didn't have anything to do with the civil  
5 court - - -

6                   MR. POTTER: No, there were no - - -

7                   JUDGE ABDUS-SALAAM: - - - that you can  
8 collect?

9                   MR. POTTER: There were - - - there were no  
10 damages awarded as to past - - - as to past rent.  
11 They could not be awarded in the - - - in - - - at -  
12 - - in that - - - the - - -

13                   JUDGE PIGOTT: Civil court.

14                   MR. POTTER: The past - - - yes. The past-  
15 due rent could have been awarded in a civil court.  
16 It was not. There is no way to - - -

17                   JUDGE ABDUS-SALAAM: So should we send this  
18 back to the civil court or - - -

19                   MR. POTTER: To - - -

20                   JUDGE ABDUS-SALAAM: - - - back down to  
21 determine what those damages should have been and - -  
22 - and then - - -

23                   MR. POTTER: To - - - to deduct - - -

24                   JUDGE ABDUS-SALAAM: - - - reduce the  
25 judgment?

1 MR. POTTER: To - - - to deduct the past-  
2 due rent?

3 JUDGE ABDUS-SALAAM: Right.

4 MR. POTTER: Deduct the past-due rent from  
5 the total? I'm not going to - - - I - - - I'm not  
6 going to draw a line in the sand on that one. That's  
7 in a sense not really the material issue here. If it  
8 comes - - -

9 CHIEF JUDGE LIPPMAN: Okay, what's the  
10 material issue? Go ahead, yeah, finish. Go ahead.

11 MR. POTTER: The mat - - - the material  
12 issue is that the appellants failed to meet a very  
13 simple straightforward burden of proof. That  
14 actually in its - - - in its looking to  
15 disproportionality, encapsulate - - -

16 JUDGE RIVERA: Could I ask about the - - -  
17 the - - - what you were mentioning about the  
18 incentivization or disincentive to mitigate? If  
19 you've got an acceleration clause that is held to be  
20 valid, what's the incentive to mitigate?

21 MR. POTTER: The incentive - - - the  
22 incentive to mitigate - - -

23 JUDGE RIVERA: But you're saying the market  
24 drives that anyway. You don't - - - you don't need  
25 us to say you need to mitigate?

1                   MR. POTTER: We don't - - - I - - - it's  
2 not necessary for the court to say that. If the  
3 parties wish, they can contract in for a duty to  
4 mitigate. In fact, what we're seeing is - - - is - -  
5 -

6                   JUDGE SMITH: But what I - - - I mean,  
7 Judge - - - Judge Rivera is asking why the law  
8 doesn't need to impose the duty. I would - - - I  
9 would think your answer is that even - - - yeah, even  
10 if I'm legally entitled not to mitigate, I'd be dumb  
11 not to do it, because I don't know if I can collect  
12 from these people. If they were good for the money,  
13 they would have paid the rent to begin with?

14                   MR. POTTER: Well, that is indeed, whether  
15 they're good for the money. We're - - - we're left  
16 holding the bag trying to collect. At a minimum, we  
17 - - -

18                   JUDGE SMITH: So almost any landlord is - -  
19 - no landlord is deliberately going to let his  
20 property sit vacant in the hope that that the - - -  
21 his last deadbeat tenant is - - - is going to pay the  
22 judgment.

23                   MR. POTTER: And in a sense that's - - -  
24 that means that the - - - the type one scenario  
25 describe under Holy Properties is essentially

1 academic. I mean, if I'm independently wealthy as a  
2 landlord and I don't need rent, then, okay, maybe  
3 I'll let it sit - - - let it sit vacant.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 Thanks.

6 MR. POTTER: Thank you.

7 CHIEF JUDGE LIPPMAN: Rebuttal.

8 MS. BROWN: I would like to respond to a  
9 comment that Judge - - - Justice Rivera made about  
10 this - - - the clause in the lease which would seem  
11 to allow the - - - the landlord to sue as the rent  
12 accrued. The - - - the plaintiff here, his - - -  
13 it's all or nothing. They never relied on - - -

14 JUDGE SMITH: I think he acknowledged that.

15 MS. BROWN: Yeah, yeah. So that's - - -  
16 that's a given. He did acknowledge that. And in  
17 terms of discovery, the - - - the lower court granted  
18 summary judgment to plaintiff without us having the  
19 benefit of any discovery on proportionality. That's  
20 in our papers below, and - - - and we argued that on  
21 appeal.

22 JUDGE PIGOTT: Summary judgment's on  
23 liability and then I think his point was you didn't  
24 make any complaint about damages.

25 MS. BROWN: The - - -

1 JUDGE PIGOTT: You agreed to it.

2 MS. BROWN: The issue of the - - - we - - -  
3 we needed discovery on the prop - - - proportionality  
4 issue and that was in our papers below. We asked for  
5 that.

6 JUDGE PIGOTT: In the matter of law, if - -  
7 - if - - - if you're a - - - an educational  
8 institution. You say, I need this dormitory and I  
9 don't want to get jerked around. So I'm - - - I'm  
10 leasing it for a rather substantial amount of time.  
11 And - - - and I don't want to be evicted, and I don't  
12 want five years from now for them to say oh, we're  
13 doing really well and therefore, we're going to up  
14 the rent. This is what I want, and this is the deal  
15 I made. And part of the deal was that there's some  
16 security on the landlord's part that he's going to  
17 get paid. And so there - - - there was a, it seems  
18 to me, a mutuality of contract, at least, on the - -  
19 - on the - - - on the rent.

20 MS. BROWN: Right, well, we wanted  
21 discovery, because we wanted to find out whether the  
22 landlord did have difficulty re-renting the property.  
23 And it did turn - - - he - - - the - - - we raised in  
24 our brief that this property was re-rented.

25 JUDGE ABDUS-SALAAM: Counsel, if there's no

1 need to mitigate, what are you discovering?

2 MS. BROWN: Excuse me?

3 JUDGE ABDUS-SALAAM: If there's no duty to  
4 mitigate, what are you discovering?

5 MS. BROWN: Well, the - - - we're - - - we  
6 were - - - on our - - - we were trying to show that  
7 the liquidated damages clause was disproportionate to  
8 the landlord's probable losses.

9 JUDGE SMITH: But - - - but the - - - but -  
10 - - but the - - - but isn't that measured as of the  
11 time of the contract? The - - - wheth - - - whether  
12 he actually had a problem re-renting wouldn't be  
13 relevant, would it?

14 MS. BROWN: Well, according to JMD, which I  
15 cited - - - had cited in the brief, JMD indicates  
16 that you can look at post-contract - - - the events  
17 in determining whether the liquidated damages clause  
18 is - - - is disproportionate to the probable loss.  
19 So JMD does indi - - - does say that. You can look  
20 at post-contract. So we were entitled to discovery  
21 to see what the actual rental history was of this  
22 building.

23 And we - - - we did show that the - - - the  
24 acceleration clause was completely disproportionate  
25 to the - - - to the landlord's probable loss. The -

1           - - the landlord has possession of the property, can  
2 re-rent it to anybody he chooses without making any  
3 accounting to the tenant. He gets ten years' worth  
4 of rent immediately, does not have to discount - - -

5           JUDGE PIGOTT: But you - - - you broke the  
6 - - - you broke the lease. I mean - - - and now  
7 you're saying, you know, this is terrible. We broke  
8 our lease and now he wants us to pay. That's just  
9 not fair.

10           MS. BROWN: Well, the landlord made an  
11 affirmative choice of going to court and getting a  
12 warrant of eviction and dis - - - and the - - - the  
13 tenant cannot go back into the property at this  
14 point.

15           JUDGE SMITH: But you're - - - you're not  
16 saying that he forfeits all right to damages just  
17 because he got a warrant of eviction? I mean,  
18 ordinary - - - you can evict your tenant and still  
19 sue for damages for breach.

20           MS. BROWN: Yes, but in this particular  
21 case - - -

22           JUDGE SMITH: You're - - - you're saying -  
23 - - you're - - - you're saying - - -

24           MS. BROWN: Yeah.

25           JUDGE SMITH: - - - that to get - - - that

1 to get possession of the premises and to get all  
2 those years of rent upfront with no discount, that's  
3 dis - - - that's disproportionate.

4 MS. BROWN: Yes, yes, and we're also  
5 arguing that this - - - this particular plaintiff  
6 took the position that it's all or nothing. It's the  
7 acceleration clause or nothing, and - - - and never  
8 made the argument that it should be allowed to sue  
9 for - - - for rent as it became due. So they chose  
10 that particular - - -

11 JUDGE SMITH: But you're not - - - you - -  
12 - you would not say - - - I mean, if you win, are you  
13 saying he's entitled to zero damages or he's just  
14 entitled to his actual damages?

15 MS. BROWN: He's entitled to zero damages  
16 according to Fifty States, because they - - - the  
17 tenant is not in possession of the property. So the  
18 acceleration clause is - - -

19 JUDGE SMITH: Is that a penalty clause  
20 means?

21 MS. BROWN: - - - unenforceable.

22 JUDGE SMITH: You mean if you put a penalty  
23 clause in your agreement, you get no damages at all?  
24 I thought you just - - - I thought we just invalidate  
25 the penalty clause and he has to seek his actual

1 damages.

2 MS. BROWN: Well, he did not - - - he did  
3 not take that position below. He took an all-or-  
4 nothing position.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. BROWN: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you, counsel.

8 (Court is adjourned)

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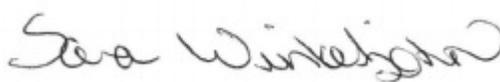
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc., No. 228 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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