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COURT OF APPEALS

STATE OF NEW YORK

AMALGAMATED BANK,

Respondent,

-against-

No. 105

HELMSLEY-SPEAR, INC., AND
SCHNEIDER & SCHNEIDER, INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
June 1, 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:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 105,
2 Amalgamated Bank.

3 Counselor, would you like any rebuttal
4 time?

5 MR. SULLIVAN: One minute, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: One minute; go ahead,
8 counselor, you're on.

9 MR. SULLIVAN: Good afternoon, Yours Honor,
10 Christopher Sullivan of Herrick, Feinstein for
11 appellants. The First Department erred in two
12 critical respects in reversing the decision of the
13 trial court. First, by not recognizing that
14 appellants are interested persons within the meaning
15 of CPLR 5015(a).

16 CHIEF JUDGE LIPPMAN: Well, talk about
17 Oppenheimer. What - - - what does Oppenheimer say?

18 MR. SULLIVAN: Oppenheimer, Your Honor,
19 addresses two separate points. The first is, what it
20 takes to be an interested person within the meaning
21 of 5015(a), and the second is whether or not it's
22 appropriate to vacate the default judgment that was
23 entered against - - -

24 CHIEF JUDGE LIPPMAN: Okay, you're an
25 interested person?

1 MR. SULLIVAN: Yes, Your Honor. We're - -
2 - the - - - the two points that we specifically - - -

3 CHIEF JUDGE LIPPMAN: Why?

4 MR. SULLIVAN: Because this court has
5 stated, Your Honor, that all that's necessary to be
6 an interested person is that some legitimate interest
7 be served and that judicial assistance will avoid
8 injustice.

9 JUDGE STEIN: Why - - - why would there be
10 injustice here?

11 MR. SULLIVAN: Because in the context of
12 this case, Your Honor, the appellants never received
13 notice of the underlying claim against Helmsley-Spear
14 - - -

15 JUDGE PIGOTT: That's because you weren't
16 in the case. I - - - I don't understand this at all.
17 You - - - you're being sued because they think you -
18 - - you transferred money for less than consid - - -
19 you know, for less than adequate consideration. Your
20 defense ought to be that.

21 And then in the record, I assume it might
22 be there somewhere, but I didn't find where you were
23 denying that there was transfers for less than
24 adequate consideration. You had a very long denial,
25 with about - - - I don't know - - - eighty-four

1 affirmative defenses.

2 But now you're running back and you want to
3 say, well, we want to relitigate something that will
4 have an effect of reducing a judgment, but it doesn't
5 have any effect on whether or not you've transferred
6 this stuff in fraud to creditors.

7 MR. SULLIVAN: Well - - -

8 JUDGE PIGOTT: And that's the issue of the
9 case that you're in.

10 MR. SULLIVAN: Well, actually, Your Honor,
11 the underlying case very much involves the
12 appellants, and that's where the First Department
13 went wrong, because remember, in this case, the
14 appellants sold Helmsley-Spear - - - the stock, which
15 by the way, is not the subject of a fraudulent
16 conveyance - - - and the underlying assets. In
17 October of 2007, over two years before respondent
18 ever surfaced with a claim - - -

19 JUDGE PIGOTT: Yeah, so you're gone.
20 You're done. You're out of this case.

21 MR. SULLIVAN: Now, here's the problem.
22 Because this isn't some remote party that has nothing
23 to do with this case. How does a - - - how does a
24 corporation - - - how do the owners of a corporation
25 that are selling the corporation protect themselves

1 against unknown claims, unknown liabilities? They
2 did what the appellants did here. They reserve the
3 right in the purchase agreement to get notice of any
4 claim against Helmsley-Spear.

5 JUDGE PIGOTT: That's up - - - that's up to
6 your suc - - - your - - - your successor purchaser.

7 MR. SULLIVAN: Well, it - - -

8 JUDGE PIGOTT: If you got a complaint
9 against them, I can see it, but, boy, it looked like,
10 you know - - - looking through the - - - the default
11 judgment and then the hearing afterwards, where they
12 - - - they put on an expert that said, yeah, this is
13 exactly what happened, they tacked down every corner.
14 I don't know - - - I don't know where you say - - -

15 MR. SULLIVAN: It's - - -

16 JUDGE PIGOTT: - - - they were guilty of
17 fraud, because Oppenheimer talks about the person who
18 was guilty of the fraud - - -

19 MR. SULLIVAN: Well - - -

20 JUDGE PIGOTT: - - - they - - - they're
21 going to open that judgment.

22 MR. SULLIVAN: Yes.

23 JUDGE PIGOTT: But the - - - but the person
24 that's being charged with fraud is you - - -

25 MR. SULLIVAN: Well - - -

1 JUDGE PIGOTT: - - - and you now want to
2 come in and upset, what it looks like, a pretty
3 legitimate judgment, proven adequately and - - -

4 MR. SULLIVAN: I could argue the other side
5 of that, Your Honor, but - - -

6 JUDGE PIGOTT: I would - - - you could
7 continue.

8 MR. SULLIVAN: Let me address it if I may.
9 What makes this case unusual and what - - - what
10 makes appellants properly parties is not just that
11 they had a purchase agreement with the buyer of
12 Helmsley-Spear that required them to get notice and
13 for them to be able to participate in and defend.

14 It's that the claim against Helmsley-Spear
15 for allegedly overvaluing a real property appraisal
16 on the eve of the real estate collapse in 2008, the
17 claim requires appellants to be involved. Think
18 about it. The complaint states - - -

19 JUDGE ABDUS-SALAAM: Counsel - - - counsel,
20 even if you properly should have been allowed to
21 intervene, can you now move to the other point,
22 because intervening, and then you have to vacate the
23 default, right?

24 MR. SULLIVAN: Yeah, I - - -

25 JUDGE ABDUS-SALAAM: And what grounds - - -

1 I didn't see anything that suggested there were
2 grounds to vacate the default.

3 MR. SULLIVAN: Yes, Your Honor, I'd be
4 happy to do so.

5 JUDGE RIVERA: If you could just clarify.
6 You - - - as I believe, the affidavit says, grounds
7 A1 and A3, excusal neglect - - - on the - - -
8 excusable default and the other being the fraud, so
9 if you - - - when you're answering this question, you
10 be clear, because those were the grounds you
11 asserted.

12 MR. SULLIVAN: If I may, Your Honor, and I
13 will proceed - - -

14 JUDGE RIVERA: Yes, yes.

15 MR. SULLIVAN: - - - in that order. It
16 isn't intervention per se. It is the fact that CPLR
17 5015(a) makes clear that any inter - - - interested
18 person, not limited to parties, may seek relief from
19 a default judgment, and that's this court's decision
20 in Oppenheimer, quoting Weinstein, Korn & Miller.
21 You need a - - -

22 CHIEF JUDGE LIPPMAN: And does it - - - and
23 does it matter? Does it have to be a fraud?

24 MR. SULLIVAN: No, absolutely not, Your
25 Honor. It could be an - - -

1 CHIEF JUDGE LIPPMAN: Why, why? That's
2 what Oppen - - -

3 MR. SULLIVAN: It could - - -

4 CHIEF JUDGE LIPPMAN: - - - that's what
5 Oppenheimer says?

6 MR. SULLIVAN: Oppenheimer, Your Honor,
7 quotes Weinstein - - - happened to involved circum -
8 - -

9 JUDGE RIVERA: Oh, but Oppenheimer - - -
10 but they raised - - - that was their ground. Their
11 ground was fraud.

12 MR. SULLIVAN: In a - - -

13 JUDGE RIVERA: You raised A1 and A3, so
14 what are the merits of your claim?

15 MR. SULLIVAN: Actually, Your Honor, the -
16 - - the Oppenheimer did involve circumstances of
17 misconduct, but it quotes Weinstein, Korn & Miller.
18 And Weinstein, Korn - - - Korn & Miller quotes
19 Professor Siegel saying, a trial court retains the
20 inherent discretionary power, even under
21 circumstances not enumerated in 5015(a), to vacate
22 the full judgment.

23 CHIEF JUDGE LIPPMAN: Because it's a - - -
24 because it's the just thing to do?

25 MR. SULLIVAN: Yes, because you have good

1 cause and it's in the interest of justice. And
2 that's the Third Department - - -

3 CHIEF JUDGE LIPPMAN: That's the two test?

4 MR. SULLIVAN: Yes. That's the Third
5 Department in Bond v. Giebel; it's the Second
6 Department in Lane v. Lane; it's Professor Siegel - -
7 -

8 JUDGE RIVERA: Then what's the point of the
9 five grounds, then?

10 MR. SULLIVAN: Okay, the five grounds, if
11 you read Professor Siegel's commentary, he says that
12 the drafters of the rule intended that the trial
13 court retain it's inherent discretionary power, in
14 situations that warrant vacatur and are not covered
15 by the rule.

16 JUDGE STEIN: And that's the question.
17 What are you saying was done wrong here by the
18 plaintiffs? What did they do wrong? What - - -

19 MR. SULLIVAN: It's not so - - - it's not
20 so much what they did wrong, Your Honor, as that
21 appellants have a right to defend the claim they
22 believe to be frivolous.

23 JUDGE STEIN: So anytime anybody goes after
24 a third party to collect on a judgment, that person
25 has then the right to come in and vacate that

1 judgment?

2 MR. SULLIVAN: No, but that's not our case.
3 In the context of this case, we ran - - - appellants
4 ran Helmsley-Spear at the time the appraisal was
5 done. You can't litigate the case without them.

6 JUDGE RIVERA: But why - - - why - - - why
7 - - -

8 MR. SULLIVAN: Who's going to testify?

9 JUDGE RIVERA: Why is it - - - why aren't
10 you protected by your ability to raise claims or
11 defenses in the supplemental action? That's what I'm
12 not understanding, because I still don't understand
13 what your grounds are - - -

14 MR. SULLIVAN: That - - -

15 JUDGE RIVERA: - - - under 5015.

16 MR. SULLIVAN: The - - - the supplemental
17 proceeding goes strictly to whether or not a transfer
18 was made, either without consideration or with intent
19 and so on.

20 JUDGE RIVERA: Okay, because that's what
21 affects me. Let's say - - - let's say - - -

22 MR. SULLIVAN: It's limited to that, and
23 that's not conceded by them.

24 JUDGE RIVERA: I understand, but let's say
25 - - - let's say we agreed with you. Let's say we

1 agreed with you. You go back; you argue in the
2 default and you lose. Are you saying you then would
3 not have an opportunity in that supplemental action -
4 - -

5 MR. SULLIVAN: You - - -

6 JUDGE RIVERA: - - - to argue that the
7 transfer itself was not fraudulent?

8 MR. SULLIVAN: Yes, I would be able to do
9 that, Your Honor, but that's Oppenheimer. In
10 Oppenheimer, this court reversed the denial of the
11 motion by the shareholders of an insolvent
12 corporation - - -

13 JUDGE PIGOTT: Because Oppenheimer was the
14 fraudulent party.

15 MR. SULLIVAN: On this - - -

16 JUDGE PIGOTT: You want - - - you want to
17 say, we committed a fraud. We - - - we transferred
18 our - - - our stock for less than adequate
19 consideration and these people are coming after us
20 for that. And we don't want that to happen. So what
21 we want to do is delay this thing, probably three to
22 four more years, on - - - on reopening a lawsuit
23 that's already been - - - been decided, and - - - and
24 don't give me that employee stuff, because even in
25 your own papers you say he was an employee, so

1 there's - - - no one's going after that seventy-four-
2 year-old appraiser, I don't think.

3 But you want to say, so we can try to avoid
4 the fraud that we committed on the supplemental
5 proceedings. It's - - - it - - - I think I'm echoing
6 Judge Rivera. Why don't you just litigate your
7 supplemental proceedings, say this was all for
8 adequate consideration; we don't care what happens
9 now.

10 MR. SULLIVAN: Because 5015(a) gives me the
11 right - - -

12 JUDGE PIGOTT: You're begging the question.

13 MR. SULLIVAN: - - - to undo the default
14 judgment.

15 JUDGE PIGOTT: You're begging the question.
16 What I want to say to you is, let's assume this is
17 ten years from now, and they bring you - - - they
18 bring the supplemental. Defend it. Just say it was
19 all for adequate consideration. Here are the papers;
20 go home.

21 MR. SULLIVAN: Because it's - - - because,
22 Your Honor, we believe it's a frivolous claim against
23 Helmsley-Spear and it can't be litigated without us.
24 Who's going to put on evidence? Who's going to test
25 - - -

1 JUDGE PIGOTT: The Helmsley-Spear - - - the
2 ninety-nine percent owner.

3 MR. SULLIVAN: No, they discontinued
4 without prejudice against him on the eve of trial.

5 JUDGE PIGOTT: No, not McCauley. I'm
6 talking about the - - - the - - -

7 MR. SULLIVAN: I am - - -

8 JUDGE PIGOTT: Who owns - - - who owns the
9 stock?

10 MR. SULLIVAN: Lynn Schneider, Your Honor,
11 but you're - - - may I clarify, Your Honor?

12 JUDGE PIGOTT: She holds it. They - - --

13 MR. SULLIVAN: The stock is not the subject
14 of the fraud. That's the First Department's mistake.

15 JUDGE PIGOTT: No, no, no. You're missing
16 my - - - what I'm saying is the owner of Helmsley-
17 Spear - - -

18 MR. SULLIVAN: Yes.

19 JUDGE PIGOTT: - - - defaulted. They - - -
20 they appeared; they asked for an adjournment. They
21 defaulted. And you now want to say, I want to come
22 in and - - - and undo what they did. And you - - -
23 why? I mean - - -

24 MR. SULLIVAN: Because, Your Honor, in - -
25 - in Oppenheimer v. Westcott, you didn't say it's

1 Honor, I agree that they conflated the two completely
2 and they didn't understand how 5015(a) should be
3 applied in that circumstance. But I do think that it
4 is the - - - it is - - - this court has held, and the
5 Third Department and the Second Department have
6 followed suit, that moving party has the option of
7 looking to undo the default judgment. They don't
8 have to be relegated to a somewhat arcane - - -

9 JUDGE FAHEY: Well - - -

10 MR. SULLIVAN: - - - debtor-creditor
11 defense. They can go back and say - - -

12 JUDGE FAHEY: At least they can go - - -

13 MR. SULLIVAN: - - - you have no claim
14 against Helmsley-Spear, because the real estate
15 market collapsed. That's nonsense.

16 JUDGE FAHEY: That's fine. As Judge Rivera
17 and everybody else has pointed out, you'll be able to
18 litigate that at some point. But assuming it goes
19 back, it - - - I can't imagine it - - - you know,
20 outline - - - following up on what Judge Pigott said
21 here, how - - - how - - - they're not going to find
22 that it wasn't abuse of discretion. So - - - so
23 there's - - -

24 MR. SULLIVAN: Your Honor, the record is -
25 - - the record raises any number of questions. I'll

1 give you two.

2 JUDGE FAHEY: Okay.

3 MR. SULLIVAN: The record says that this
4 bank on a full recourse mortgage loan, took a deed
5 in lieu of foreclosure in May 2009, and commenced a
6 nonjudicial foreclosure that resulted in the sale of
7 the property in December 2009 for seven million
8 dollars. One month before that, they sued Helmsley-
9 Spear for negligence with respect to the appraisal.
10 What happened to the recourse obligation?

11 They claimed, at the special inquest, their
12 damages were the difference between the mortgage debt
13 and the seven million dollars they got for the
14 property. Well, what damages, if they never moved
15 for a deficiency? If the value of the prop - - -

16 JUDGE PIGOTT: Can I raise that? Can I
17 just decide I want to jump into this lawsuit, because
18 it's interesting?

19 MR. SULLIVAN: No, Your Honor, but you can
20 do - - -

21 JUDGE PIGOTT: Why not?

22 MR. SULLIVAN: - - - what the trial court
23 did - - -

24 JUDGE PIGOTT: Why - - - why not?

25 MR. SULLIVAN: - - - because the trial

1 court said - - -

2 JUDGE PIGOTT: I don't - - - why don't I
3 have as much - - -

4 MR. SULLIVAN: - - - you've got meritorious
5 defenses to the claim.

6 JUDGE PIGOTT: Why don't I have - - -

7 MR. SULLIVAN: They found that.

8 JUDGE PIGOTT: Why don't I have as much
9 standing as you do?

10 MR. SULLIVAN: Because you weren't the
11 owner. You didn't sign a purchase agreement. The
12 case can be litigated without you. It can't be
13 litigated without Lynn Schneider. Who's going to
14 testify regarding the contract? A low-level
15 employee, against whom the claim's been dismissed?
16 Who's going to stand there and say what Helmsley-
17 Spear did before the company was sold?

18 JUDGE PIGOTT: But the - - - the expert
19 they got on their supplement - - - on their - - - on
20 their hearing on default - - - they had a whole
21 expert that said all the mistakes he made.

22 MR. SULLIVAN: Unopposed. Unopposed.
23 They're not - - -

24 JUDGE RIVERA: But I'm confused. You say -
25 - - you say that Ms. Schneider had an agreement with

1 Helmsley to be put on notice of claims. Is that
2 right?

3 MR. SULLIVAN: And to have the right to
4 step in and defend.

5 JUDGE RIVERA: Okay, so why doesn't she
6 have an action against Helmsley?

7 MR. SULLIVAN: She - - - she may, in that
8 situation - - - Helmsley's insolvent, Your Honor.
9 She may in that situation have an action against
10 Helmsley.

11 JUDGE RIVERA: Well, then she should have
12 protected herself against that one, too.

13 MR. SULLIVAN: Okay, but she does have the
14 ri - - -

15 JUDGE RIVERA: And she owned ninety-nine
16 percent.

17 MR. SULLIVAN: The - - - and - and if she
18 falls under 5015(a), she has another option. It's -
19 - - it's Oppenheimer.

20 JUDGE ABDUS-SALAAM: Can we get back to - -
21 -

22 MR. SULLIVAN: You don't have to go after
23 the insolvent company.

24 JUDGE ABDUS-SALAAM: Counsel, can we get
25 back to her falling under 5015(a), because you're

1 saying she has an interest, and that should be
2 enough, essentially. Talking about conflating, I'm -
3 - - I'm trying to understand where just having an
4 interest is enough to vacate the default judgment
5 under - - - you're - - - you're - - - under what
6 ground? Is this just because she may be harmed by
7 this judgment? Is - - - I'm trying to - - -

8 MR. SULLIVAN: The judgment - - -

9 JUDGE ABDUS-SALAAM: - - - I'm still trying
10 to understand the ground under 5015(a) that you're
11 saying.

12 MR. SULLIVAN: The - - - two years after
13 she sold her stock in the company, respondent shows
14 up and says, you're personally liable under the
15 debtor-creditor law because your company, you know,
16 made a negligent appraisal that you knew nothing
17 about. So now you're suggesting - - - the court is
18 suggesting that she needs to defend - - -

19 JUDGE PIGOTT: No, no, it's not that - - -

20 MR. SULLIVAN: - - - whether she had the
21 forethought - - -

22 JUDGE PIGOTT: It's not that there was - - -
23 - there was a bad appraisal. It's that after the
24 judgment was render - - - if it - - - if it was for
25 five bucks, she - - - she sold her interest for less

1 than adequate consideration.

2 MR. SULLIVAN: That's not in the record,
3 Your Honor. But in any - - -

4 JUDGE PIGOTT: But that's - - - that's the
5 point of the - - -

6 MR. SULLIVAN: But you don't have to get to
7 that. She's entitled to - - -

8 JUDGE PIGOTT: You don't want to get to
9 that, is my point.

10 MR. SULLIVAN: I'm - - - I want her to have
11 both options, and the law gives her both, and this
12 court gives her both.

13 JUDGE PIGOTT: Okay.

14 MR. SULLIVAN: That's the point.

15 JUDGE ABDUS-SALAAM: I still don't - - -
16 never mind.

17 CHIEF JUDGE LIPPMAN: Go ahead, Judge
18 Abdus-Salaam.

19 MR. SULLIVAN: No, I'm sorry, Your Honor.

20 JUDGE ABDUS-SALAAM: You have - - - you
21 have rebuttal time.

22 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
23 have your rebuttal. Let's hear from your adversary.

24 MR. KANDEL: May it please the court, Tyler
25 Kandel on behalf of respondent, Amalgamated Bank.

1 CHIEF JUDGE LIPPMAN: Counsel, why
2 shouldn't we let them in - - - in this proceeding?
3 They're - - - they're really the ones who know what's
4 going on, right?

5 MR. KANDEL: Well, no, Your Honor, and to
6 the extent - - -

7 CHIEF JUDGE LIPPMAN: No? They don't have
8 knowledge here that's essential to the - - - to the
9 underlying proceeding?

10 MR. KANDEL: No, they don't. And to the
11 extent that counsel made the argument that because
12 they are former owners of the corporation - - -
13 really only one party of the - - - of the appellants
14 are former owners, and that's Lynn Schneider.
15 Schneider & Schneider has never been an owner, former
16 or current, of Helmsley-Spear. So that argument
17 falls by the wayside with at least one of the two
18 appellants.

19 But with respect to Lynn Schneider, there
20 is no need to put Lynn Schneider on the stand with
21 respect to an argument or a claim against Helmsley-
22 Spear for issuing a negligent appraisal. We would
23 not need her to give testimony. She didn't prepare
24 the appraisal.

25 CHIEF JUDGE LIPPMAN: But isn't it really a

1 predicate in relation to the other supplemental
2 proceeding? They're the ones who are going to have
3 to pay if anyone's going to pay, right?

4 MR. KANDEL: Well, the - - - the procedural
5 predicate is the fact that there was a default
6 judgment - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. KANDEL: - - - entered against - - -

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. SULLIVAN: - - - Helmsley-Spear. But
11 the substance of the supplemental proceeding and
12 just, Your Honor, to - - - to correct the - - - the
13 substance of the supplemental proceeding, it's not
14 that she sold her interest in the corporation for
15 less than what it was worth. It's that the
16 appellants received transfers of all or substantially
17 all of Helmsley-Spear's assets for no consideration
18 to Helmsley-Spear. And then they turn around and
19 sold those assets to Kent Swig's entity, Helmsley - -
20 - HSI Holdings, LLC.

21 CHIEF JUDGE LIPPMAN: If - - - if Opp - - -

22 MR. KANDEL: That's the essence.

23 CHIEF JUDGE LIPPMAN: If Oppenheimer is - -
24 - is relevant here, why isn't he right that - - -
25 that under Oppenheimer, they could come in?

1 MR. KANDEL: Well, for two reasons, Your
2 Honor. With respect to the stand - - -

3 CHIEF JUDGE LIPPMAN: It doesn't have to be
4 fraud, does it?

5 MR. KANDEL: Well, with respect to the
6 standing argument, as to whether or not appellants
7 are interested persons under 5015(a), to - - - to the
8 Oppenheimer court, to this court, what was essential,
9 if not dispositive to that issue, and it's a two-
10 prong test, was whether at issue was the invalidity
11 of the judgment. And in Oppenheimer, they had
12 claimed that the judgment had been out - - -
13 invalidly obtained on the basis of fraud. And in the
14 other cases that appellants have cited - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but it didn't
16 say in Oppenheimer that that's the only issue - - -
17 only if there's fraud.

18 MR. KANDEL: No, not fraud, but if the
19 judgment has been invalidly obtained. It could be
20 fraud; it could be misrepresentation; it could be
21 misconduct. It could even be a collusion, which is
22 what happened in Lane v. Lane and Bond v. Giebel, the
23 Third Department and Second Department cases that
24 have been cited by appellants.

25 JUDGE ABDUS-SALAAM: So counsel, you're

1 saying that as your adversary - - - your adversary
2 says that it can be something other than one of the
3 enumerated provisions under 5015(a) and - - -

4 MR. KANDEL: Well - - -

5 JUDGE ABDUS-SALAAM: - - - so you're saying
6 no, that can't be right that - - -

7 MR. KANDEL: Well, I think there are
8 different - - - there's two different tests. One is,
9 whether or not you have standing as an interested
10 person. That doesn't have to do specifically with
11 the enumerated conditions in 5015(a). Then if you
12 have standing, as the Oppenheimer court decided that
13 the fraudulent transferee movants in that case did,
14 then the court should turn for a substantive
15 consideration of the merits of the application, and
16 then decide whether or not any of those conditions
17 apply.

18 And it could even go more than that, and
19 say that the court's inherent discretionary power
20 could be exercised, as the courts did in Bond v.
21 Giebel and Lane v. Lane, in which - - -

22 JUDGE PIGOTT: Are you suggesting that they
23 would also have to show a meritorious defense?

24 MR. KANDEL: Well, that's the basis on
25 which they moved to the trial court for - - - for

1 vacatur on the basis of excusable default. They all
2 but abandoned that - - - that cause - - - or that
3 claim to this court, except on reply; after we
4 pointed out that their moving brief had nothing to do
5 with excusable default, they put in a one-page
6 argument addressing that issue.

7 That was their primary claim to the trial
8 court and to the Appellate Division, for that matter.
9 And the trial court didn't even reach the issue,
10 didn't address the issue of whether or not they had
11 established that Helmsley-Spear's default was
12 reasonable.

13 And that's the - - - that's what the law
14 says. We cited cases, which were undisputed by
15 counsel - - - by - - - by appellants, standing for
16 the proposition when - - - that when you're a
17 nonparty interested person - - - in other words, the
18 nondefaulting party - - - you must establish that the
19 defaulting party's excuse was reasonable.

20 Appellants, instead, established or claimed
21 that their default was reasonable. Well, they didn't
22 default. They weren't parties to the action. They
23 said, they had no notice of the action; therefore,
24 they had a reasonable excuse, if not - - - they said
25 - - - the best excuse for why they defaulted. They

1 didn't default. Helmsley-Spear defaulted.

2 They also said that they have meritorious
3 defenses to the action. But there aren't any
4 defenses to the action because there aren't any
5 allegations made against them in the action.

6 JUDGE PIGOTT: Helmsley-Spear themselves
7 didn't move to vacate the default.

8 MR. KANDEL: No, Helmsley-Spear didn't move
9 to vacate the default. And just - - - if I can
10 address one other point - - - counsel has argued
11 today that they were entitled to notice of the action
12 so that they could defend it under their purchase
13 agreement. Well, that's not what their papers say.
14 Their papers say, although there's no support for it
15 in the record, that Kent Swig's entity was obligated
16 to defend this case. And that - - -

17 JUDGE FAHEY: He was the one who bought
18 Helmsley-Spear?

19 MR. KANDEL: He's the one that bought
20 Helmsley-Spear and the assets of Helmsley-Spear from
21 the appellants.

22 JUDGE FAHEY: Okay, thank you.

23 MR. KANDEL: On page 43 of their - - - of
24 their - - - of their brief to the Appellate Division,
25 they said that Kent Swig was obligated to defend this

1 case, and that he chose not to do so, which again,
2 provides the basis for the - - - for the Appellate
3 Division's ruling that the default was intentional by
4 Helmsley-Spear, a point that they don't concede.

5 But to the extent that they were entitled
6 to notice, they - - - they acknowledged in their
7 papers and in the - - - or I should say, in the oral
8 argument before the trial court, that they had notice
9 of the proceeding. They received notice of the
10 proceeding after it was commenced. And the court - -
11 - the trial court judge, Justice Kornreich - - - was
12 astonished to that fact, and said, well, why didn't
13 you simply call Mr. Swig and ask him if he was
14 defending?

15 JUDGE PIGOTT: Was that the letters where
16 they said all you're doing in these - - - asking
17 these questions is to try to set up a - - -

18 MR. KANDEL: Well, that was post-judgment.
19 That was our post-judgment discovery, Your Honor.
20 And they couldn't have distanced themselves more from
21 Helmsley-Spear when we were trying to discover
22 information about the fraudulent transfers. But when
23 they're trying to come back into the case, reopen a
24 valid default judgment, they're basically one and the
25 same as Helmsley-Spear. So they've shifted their

1 arguments 180 degrees on that - - - on that topic.

2 JUDGE FAHEY: Well, here, though, just
3 taking a step back to - - - to what Oppenheimer says,
4 which - - - which I was looking at it here, and it
5 seems to be saying that - - - the Appellate Division
6 seems to be saying, when they were talking about
7 Oppenheimer, that no wrongful act precipitated the
8 default judgment in this case, and in Oppenheimer
9 there had been. So does that - - - is - - - what do
10 you say about their interpretation of Oppenheimer?

11 MR. KANDEL: Well, I - - - I think that
12 that statement - - - that no wrongful acts have
13 occurred in this case - - - is a - - - is applicable
14 to both the analysis of the interested persons test
15 and to whether or not the judgment should be vacated,
16 because in Oppenheimer - - - because they - - -

17 JUDGE FAHEY: I'm thinking of it just - - -

18 MR. KANDEL: - - - the appellants - - -

19 JUDGE FAHEY: - - - I'm thinking of it just
20 as it applies to standing, not so much as to the
21 discretionary - - -

22 MR. KANDEL: Well, I guess my point with
23 the respect to the - - - to the issue is whether or
24 not vacatur is warranted under 5015(a), is that
25 appellants have contended that that case, appellant -

1 - - Oppenheimer, is identical and dispositive to the
2 circumstances and facts in this case. So I guess my
3 point is as to whether or not that statement - - -
4 that statement applies both to the analysis of the
5 interested persons test and to the lack of any claim
6 here that 5015(a)(3) applies as it did in
7 Oppenheimer.

8 But with respect to the statement as it
9 replies - - - as it applies to the interested persons
10 test, again, the Oppenheim - - - the Oppenheimer
11 court said that what's dispositive here, in that
12 case, was that the invalidity of the - - - of the
13 judgment was at issue, which gave rise to the
14 determination of - - - that the appellants or that
15 the movants in that case were interested persons
16 because judicial assistance was not necessary to
17 avoid the prosecution of what - - - was necessary,
18 rather, to avoid the prosecution of the supplemental
19 proceeding, because the judgment that was being
20 enforced in the supplemental proceeding was baseless;
21 it was - - - it was obtained on fraud.

22 Conversely, here, there is no fraud, no
23 misconduct, no misrepresentation claim. They concede
24 those facts, that there is no basis on which to claim
25 that this judgment was invalidly obtained.

1 Therefore, judicial assistance is not necessary to
2 avoid any injustice.

3 JUDGE FAHEY: You're saying there's two
4 prongs, the legitimate interest of a moving party - -
5 - sure, they got an interest - - - but you're not
6 avoiding an injustice here, and point of fact, there
7 is no injustice here.

8 MR. KANDEL: Well, I agree with the second
9 part, Your Honor. But with respect to the first - -
10 - the first prong of the interested person test, they
11 also can't meet that test, because the court said
12 "Without a valid judgment against Hancock,
13 Oppenheimer has no claim against the Bernstein
14 defendants", who are the - - - who are the fraudulent
15 transferees in that case. "In light of that fact,
16 and the insolvency of the defendant, it is manifest
17 that no one has a greater or more legitimate interest
18 in setting aside the judgment."

19 Well, here, there is no issue of the
20 validity of the judgment. Therefore, conversely to
21 the finding in Oppenheimer, we do have a cause of
22 action against appellants. And while they might have
23 an interest in setting aside the judgment here, it's
24 not legitimate. It's only to delay the prosecution
25 of the supplemental proceeding. So I would argue

1 MR. SULLIVAN: Thank you, Your Honor.

2 JUDGE RIVERA: Counsel, is it true you're
3 not challenging the validity of the judgment?

4 MR. SULLIVAN: Of course we are, and the -
5 - - and the quotation from Oppenheimer, which is
6 repeated by the Third Department in Bond and by the
7 Second Department in Lane, doesn't go to the issue of
8 whether the judgment was procured by fraud. It means
9 if the judgment is vacated on the application of an
10 interested party. Counsel's doing what the Appellate
11 Division did, conflating standing and vacatur.

12 JUDGE PIGOTT: Nor - - - normally, in - - -
13 in these cases, if there's going to be a vacatur,
14 it's - - - it's usually with a bond posted to protect
15 the people or - - -

16 MR. SULLIVAN: We'll put it up, Your Honor.
17 We'll put it - - -

18 JUDGE PIGOTT: Well, you don't get to make
19 that order. I - - - I just noticed that the Supreme
20 Court didn't seem to bo - - - bother with any of
21 that.

22 MR. SULLIVAN: I - - - I can't speak to
23 that, Your Honor, but I can speak to this point.
24 Oppenheimer, the first part, without a valid
25 judgment, there's no claim against the shareholders;

1 no one has a greater interest. That's standing.
2 Standing.

3 JUDGE RIVERA: So what did you argue was
4 not valid about the judgment?

5 MR. SULLIVAN: We argued - - -

6 JUDGE RIVERA: What's the essence of that
7 argument?

8 MR. SULLIVAN: We argued that the court in
9 its discretion should allow us in the case because it
10 wasn't fair; it was prejudicial. The claim itself
11 was frivolous. The complaint says negligence. It
12 doesn't say negligent supervision. It doesn't say
13 respondeat superior. It said Helmsley was negligent.
14 There are a host of factual issues. How did you
15 release the guarantors when McCauley cited it?

16 JUDGE STEIN: How did that go to the
17 validity of the judgment, though?

18 MR. SULLIVAN: The - - - the - - -

19 JUDGE STEIN: That goes to the merits of
20 the judgment. How does it go to the validity?

21 MR. SULLIVAN: Validity in the sense that
22 in a situation in which the judgment was obtained
23 without notice - - - it is not true that appellants
24 had notice. They got notice after the default
25 judgment, after January.

1 JUDGE PIGOTT: But you're not entitled to
2 notice.

3 MR. SULLIVAN: It's stipulated in the
4 record.

5 JUDGE PIGOTT: They're saying you're not
6 entitled to notice.

7 MR. SULLIVAN: I understand that, Your
8 Honor, but the statement was made they had notice
9 prior. Without - - -

10 JUDGE PIGOTT: No, no, you - - - you're
11 ducking me. I - - - I - - -

12 MR. SULLIVAN: I'm sorry.

13 JUDGE PIGOTT: - - - like I said, can I get
14 into this case, and - - - and - - - I mean, they
15 wouldn't give me notice, either.

16 MR. SULLIVAN: Do you have money?

17 JUDGE PIGOTT: But the - - - I mean, the
18 point is, they're saying, you're a stranger to this
19 whole action, so of course you're not going to know.

20 MR. SULLIVAN: Stranger? We ran the
21 company. We had a contract with the buyer. They
22 couldn't litigate - - -

23 JUDGE PIGOTT: Don't dig too deep.

24 MR. SULLIVAN: The cont - - - Your Honor,
25 the purchase agreement provides, at 157, that - - -

1 that Helm - - - that the appellants continue to
2 litigate five separate actions against Helmsley-Spear
3 after the sale on behalf of the new owner. They were
4 intimately involved at every step of the - - -

5 JUDGE ABDUS-SALAAM: Counsel, I'm a little
6 - - - I'm a little concerned about what you seem to
7 be proposing as this rule for vacating a judgment,
8 which is, it's prejudicial; it's unfair; it's a
9 number of other things, but 5015 is set forth - - -
10 it sets forth grounds, and I understand that the
11 court has discretion when there are things not
12 specifically enumerated in 5015, but are we opening
13 the door to having everyone come in and say, well,
14 this judgment is unfair, it's prejudicial, so that's
15 why we should vacate it?

16 MR. SULLIVAN: Well, in - - - in - - -

17 JUDGE ABDUS-SALAAM: Even though we don't
18 have a really good excuse or - - -

19 MR. SULLIVAN: I - - - I don't think you're
20 opening the door, Your Honor. I think in *Bond v.*
21 *Giebel*, the Third Department said, even though
22 there's no fraud here, the circumstances surrounding
23 this judgment give rise - - -

24 JUDGE STEIN: Yeah, which involved
25 collusion on the part of the defendant there, and it

1 - - -

2 MR. SULLIVAN: Without any demon - - - any
3 proving of that, the mere suggestion - - - in Lane v.
4 Lane, the insurance company had a question about
5 whether there was some issue, but in Citibank v.
6 Keller, it was just financial prejudice. And in each
7 of those cases, the court said, quoting this court in
8 Woodson, 5015(a) does not set forth an exhaustive
9 list. The trial court has, in addition to the
10 enumerated grounds - - -

11 JUDGE STEIN: But in Bond, for example, the
12 court was concerned about a fraud upon the judicial
13 system - - - the court; there - - - there's nothing
14 of that nature here.

15 MR. SULLIVAN: I - - - I think, Your Honor,
16 in Citibank v. Keller, they were concerned about the
17 financial prejudice to the moving party. In Lane, it
18 was a combination of financial prejudice - - - they
19 said that - - - the financial prejudice to the moving
20 party and circumstances. In Oppenheimer, there were
21 circumstances of misconduct. But in each case, the
22 point is the trial court used its discretion to find
23 that in the interest of justice, there's no prejudice
24 to the party respon - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 Thanks, counsel.

2 MR. SULLIVAN: Thank you very much, Your
3 Honor.

4 CHIEF JUDGE LIPPMAN: Thank you both.
5 Appreciate it.

6 (Court is adjourned)

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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 Amalgamated Bank v. Helmsley-Spear, Inc., and Schneider & Schneider, Inc., Incorporated, No. 105, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: June 8, 2015