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COURT OF APPEALS

STATE OF NEW YORK

COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK, B.A.,

Respondent,

-against-

No. 54

C. V HERRERA NAVARRO,

Appellant.

20 Eagle Street
Albany, New York 12207
May 05, 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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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with 54.

3 And, counsel, you want - - - you want a
4 little rebuttal time, counsel?

5 MR. KINGHAM: If I may, I reserve three
6 minutes for rebuttal, Your Honor.

7 CHIEF JUDGE LIPPMAN: Three minutes, you
8 have it. Go ahead. You're on.

9 MR. KINGHAM: Thank you. All right, good
10 afternoon, Chief Judge Lippman, and may it please the
11 court. I'm Barry Kingham. I represent Francisco
12 Herrera who is the appellant. And as the court
13 knows, this is a de novo - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what about
15 the guaranty?

16 MR. KINGHAM: That's what we're here for.

17 CHIEF JUDGE LIPPMAN: Yes. What - - - what
18 is - - - is equivocal in any way about the guaranty?

19 MR. KINGHAM: Well, it - - - I don't - - -
20 I don't think that the statements in the guaranty as
21 to waivers of defenses, which is really the critical
22 point, is - - - is equivocal. It says we waive
23 defenses. The question here is whether or not the
24 appellant, Mr. Herrera, is permitted to challenge - -
25 -

1 CHIEF JUDGE LIPPMAN: What - - - what about
2 the language in there about the validity of the - - -
3 of the claim?

4 JUDGE READ: "Absolute and unconditional
5 irrespective." That's pretty broad.

6 MR. KINGHAM: It is indeed, Judge.

7 JUDGE READ: How do you get around that?

8 MR. KINGHAM: So it's as broad as it - - I
9 - - - I'm not going to dispute it's as broad as it
10 gets. You see these guaranties all over the - - -

11 CHIEF JUDGE LIPPMAN: So - - - so what's
12 your answer to Judge Read's question? How do you get
13 around that when it's so - - - seems to be just so
14 absolute on its face.

15 MR. KINGHAM: It - - - I've got - - - I've
16 got two points to that. First - - -

17 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

18 MR. KINGHAM: First - - - first of all, as
19 to the - - - as to the first part of the guaranty
20 which is (i) in the guaranty, which deals with the
21 validity and enforceability of any applicable
22 agreement, note, or other instrument, all right.
23 This federal default judgment is not covered by that.
24 It's not an agreement, a note, or an "other
25 instrument" by any definition, and we've pointed that

1 out in our reply brief. I don't think that's an
2 issue here.

3 CHIEF JUDGE LIPPMAN: Is it stronger than
4 any of those things? It's actually a judgment?

5 MR. KINGHAM: No, it's diff - - - it's
6 different, Your Honor. The question is, you know,
7 how do judgments get enforced and so forth, but it's
8 not - - - I don't know that it's any stronger or
9 weaker. It's just that it isn't one of those things.
10 You know, we were accused by the majority of the
11 Appellate Division of engaging in - - -

12 JUDGE RIVERA: Yeah, but what about (iv)
13 that talks about defenses? It's pretty clear.

14 MR. KINGHAM: It - - - it is pretty clear
15 that all - - -

16 JUDGE RIVERA: You can't raise it ag - - -
17 again.

18 MR. KINGHAM: - - - all defenses - - -

19 JUDGE RIVERA: You can't raise defenses
20 that inure to the guarantor and you can't raise
21 defenses that inure to the seller. So what's - - -
22 what is left?

23 MR. KINGHAM: Well, what is left, Your
24 Honor, is the obligation of the bank to establish - -
25 - the burden of the bank to establish there is an

1 obligation as defined. I don't think you even get to
2 the waiver. I don't think you get to the waiver.

3 JUDGE STEIN: Well, hasn't the bank
4 established that, though? They showed the
5 obligation, they showed the judgment. It's valid on
6 its face. So what - - - what more do they have to
7 establish here?

8 MR. KINGHAM: They - - - they have to
9 establish by the very language of the guaranty that
10 it is, and I quote, "A liability under this
11 guaranty." And we challenge that there's a liability
12 under the guaranty.

13 JUDGE ABDUS-SALAAM: Because it's a
14 judgment or because you believe that the underlying
15 debt is not one of the obligations under the
16 guaranty?

17 MR. KINGHAM: It's - - - it's because the -
18 - - well, the underlying debt in this case, Your
19 Honor, is the judgment. There was some confusion
20 with the Appellate Division majority there. The
21 underlying debt is - - - that's the underlying debt
22 that they're trying to enforce here is the judgment.
23 It's - - -

24 JUDGE RIVERA: No. The judgment's just
25 saying that indeed, there's been a violation of the

1 agreement.

2 MR. KINGHAM: Well, the - - - the judgment
3 is - - -

4 JUDGE RIVERA: And you had your oppor - - -
5 your client had an opportunity to try and obj - - -
6 object - - -

7 MR. KINGHAM: Well he - - - he - - -

8 JUDGE RIVERA: - - - and he did nothing.
9 He did nothing.

10 MR. KINGHAM: He really didn't - - - and he
11 really didn't have an opportunity. And I think, Your
12 Honor, if you scrut - - -

13 JUDGE RIVERA: How is that?

14 MR. KINGHAM: - - - scrutinize - - -

15 JUDGE RIVERA: Wasn't he still in control
16 of that corporation - - -

17 MR. KINGHAM: If you - - -

18 JUDGE RIVERA: - - - when the - - - when
19 the action was actually filed in March?

20 MR. KINGHAM: A, he was never in control of
21 the corporation. We haven't gotten to that - - -

22 JUDGE RIVERA: Well, nominally. His name
23 is on the papers; isn't it?

24 MR. KINGHAM: It - - - his name is as an
25 officer and a director of the corporation. But it -

1 - -

2 JUDGE RIVERA: So if his name is an officer
3 and a director and the - - - and the company gets
4 sued and he sits on his hands and there's a default
5 judgment, what - - - what would be the consequence of
6 that?

7 MR. KINGHAM: But he - - - he - - - he
8 doesn't sit on his hands, Your Honor. The default
9 judgment occurred when the bank controlled the
10 company.

11 CHIEF JUDGE LIPPMAN: Yeah. But wasn't it
12 his choice? Didn't he know he was, you know,
13 basically hoisted by this guaranty, and he chose not
14 to come in.

15 MR. KINGHAM: Well, he's not - - -

16 CHIEF JUDGE LIPPMAN: Wouldn't - - - if you
17 - - - if - - - if you or myself were - - - were - - -
18 knew that - - - that under the guaranty we were
19 liable to be - - - wind up in the - - - in the - - -
20 you know, just with these debts that you could not
21 recover on a huge debt, wouldn't we choose to go in
22 and say hey, wait a second, this isn't right, this is
23 collusion - - -

24 MR. KINGHAM: So - - -

25 CHIEF JUDGE LIPPMAN: - - - or whatever you

1 want to say?

2 MR. KINGHAM: Right. Chief Judge Lippman,
3 I don't disagree with that proposition. But we have
4 not had any discovery in this case, and there's been
5 no opportunity - - -

6 CHIEF JUDGE LIPPMAN: Well, what's there to
7 discover about when you have an absolute guaranty and
8 you choose, again, in the face of knowing that
9 there's an awful whopper of a debt here, that you
10 say, well, I - - - I'm - - - you just leave it alone.

11 MR. KINGHAM: But - - - but - - -

12 CHIEF JUDGE LIPPMAN: You - - - but why
13 didn't you have the opportunity? That's what I want
14 to know.

15 MR. KINGHAM: Right. The opportunity, in
16 fact, was a few days and dur - - -

17 JUDGE FAHEY: Well, the - - - the sequence
18 I have is March 2nd. The action was filed March 3rd.
19 They moved for - - - or April 3rd they moved for
20 default, of 2012.

21 MR. KINGHAM: That's - - -

22 JUDGE FAHEY: So this - - - so it was about
23 a month. That - - - that - - -

24 MR. KINGHAM: That - - - that - - - that's
25 correct, Your Honor. And in - - - in the meantime,

1 Mr. Herrera, who's a Mexican who speaks non-English -
2 - -

3 JUDGE FAHEY: Mr. Herrera was - - - well,
4 wait a minute. Mr. Herrera - - - A, I don't think
5 that's an argument, that - - - that's a legal
6 argument.

7 MR. KINGHAM: I - - - I'm just answering.
8 I'm not - - -

9 JUDGE FAHEY: Yeah. I thought that he was
10 served individually also, not just as a director and
11 that he was - - - and that the action was then
12 discontinued against him individually.

13 MR. KINGHAM: He - - - he - - - he was
14 served and then - - -

15 JUDGE FAHEY: So that being the case, if he
16 was - - -

17 MR. KINGHAM: - - - was discontinued.

18 JUDGE FAHEY: I'm sorry.

19 MR. KINGHAM: I'm sorry. He - - - he was
20 served, Your Honor, and - - - and the action was
21 discontinued. That's correct.

22 JUDGE FAHEY: Okay. So that - - - so that
23 means he was definitely on notice. He knew what was
24 going on and so that he then chose not to answer.
25 That - - - that's, I guess, the difficulty I have - -

1 - have with it. That being the case, take a step
2 back. Is the way I understand your argument, it's a
3 condition precedent argument. You're saying - - -

4 MR. KINGHAM: Right.

5 JUDGE FAHEY: Is - - - is that correct?
6 And that Judge Ramos in the Supreme Court said that
7 it is a three-prong test: guaranty, underlying debt,
8 and failure to perform.

9 MR. KINGHAM: Right.

10 JUDGE FAHEY: What you're saying is there
11 was no underlying debt. I - - - I thought that was -
12 - - I thought that was the core of the argument. But
13 in your answer to Judge Salaam's question, you seem
14 to say that the judgment itself was the underlying
15 debt, not the fact that there were false account
16 receivables.

17 MR. KINGHAM: That - - - that's correct.

18 That - - - that is correct, Your Honor. There - - -

19 JUDGE FAHEY: Explain it to me, your point,
20 then.

21 MR. KINGHAM: All right. But there - - -
22 there are two parts to the guaranty.

23 JUDGE FAHEY: Okay.

24 MR. KINGHAM: The first was a guaranty of
25 the receivables.

1 JUDGE FAHEY: Um-hum.

2 MR. KINGHAM: And we raised fact questions
3 below as to the existence or nonexistence of real
4 receivables. Judge Ramos found in our favor, denied
5 summary judgment. The bank didn't appeal it. Okay.

6 JUDGE FAHEY: Um-hum.

7 MR. KINGHAM: Then you have what the bank
8 came up with on their reply below, which was part
9 1(b) of the guaranty, because by then they had the
10 federal default judgment. So it is the federal
11 default judgment itself which is the, as defined,
12 underlying debt.

13 JUDGE FAHEY: So we don't get to the 1(a)
14 argument. So whether or not - - -

15 MR. KINGHAM: We don't.

16 JUDGE FAHEY: - - - there were false - - -
17 it's not in front of us.

18 MR. KINGHAM: Correct.

19 JUDGE FAHEY: The only argument is the
20 collusion argument.

21 MR. KINGHAM: That's correct.

22 JUDGE FAHEY: And - - - and it really comes
23 down to, it's condition precedent, or is it
24 collusion/a defense.

25 MR. KINGHAM: That's right. And that's

1 where Canterbury comes in, Your Honor.

2 JUDGE FAHEY: Right.

3 MR. KINGHAM: Which I rely on Canterbury
4 and the Canterbury progeny. And I think frankly, if
5 you read the dissent in the First Department, they
6 say it much better than we do in our papers, quite
7 frankly. It's very clear as to why it is that the
8 wrongful act of Rabobank - - - and by wrongful, I
9 don't mean criminal.

10 JUDGE FAHEY: Uh-huh.

11 MR. KINGHAM: But they caused this judgment
12 to occur by collusion, and therefore the judgment
13 can't be used.

14 JUDGE RIVERA: No, but there is a
15 difference. They didn't - - - they didn't - - - they
16 - - - they had already claimed that there was a
17 violation before you even get to seek in the default,
18 because they then pursued the action based on what
19 they claim was the failure of the business to adhere
20 to its agreements, to its obligations. So it's not
21 exactly like Canterbury.

22 MR. KINGHAM: Well, no. It's not - - -

23 JUDGE RIVERA: It is different.

24 MR. KINGHAM: Yes. Yes, Your Honor, and
25 no.

1 JUDGE RIVERA: I mean, you're seeking to do
2 an end run. It looks to me like you're seeking to do
3 an end run around the - - - the guaranty which has
4 foreclosed a defense, by saying oh, no, we're not
5 challenging the underlying debt. We're challenging
6 this judgment.

7 MR. KINGHAM: Well, but the - - -

8 JUDGE RIVERA: But - - - but if you drill
9 down, you're getting to the debt.

10 MR. KINGHAM: Well, we actually did
11 challenge the underlying - - - underlying debt at - -
12 -

13 JUDGE RIVERA: But I - - -

14 MR. KINGHAM: - - - Judge Ramos.

15 JUDGE RIVERA: Oh, on appeal here. I'm
16 talking about the appeal here.

17 MR. KINGHAM: But, in fact, as far as the
18 appeal here is concerned, we're challenging the
19 validity of the judgment as an obligation, and we're
20 saying, as Judge Fahey points out, that the judgment
21 cannot be valid as a condition precedent.

22 JUDGE RIVERA: Well, I - - - I
23 misunderstood, then. I thought that they were
24 presenting the judgment as their proof.

25 MR. KINGHAM: No.

1 JUDGE RIVERA: Right? That we have - - -
2 we have a judgment based on the violation of these
3 obligations; the underlying debt has not - - - have
4 not complied with the terms of the obligations. We
5 went and pursued it in federal action on that.
6 People didn't show up. We have a default, and now
7 we're trying to pursue our rights under the default
8 judgment. I thought that's what they were doing, and
9 that you wanted to say default judgment is no good.

10 MR. KINGHAM: Well, we do want to say the
11 default judgment is no good, but we're also pointing
12 out, Your Honor, that they cannot - - - there is a
13 fact question.

14 JUDGE RIVERA: Um-hum.

15 MR. KINGHAM: And if the court finds
16 there's no fact question, then it's over. But there
17 is a fact question as to who controlled Rabobank at
18 the time the default judgment - - -

19 JUDGE RIVERA: Let - - - let me - - - let
20 me ask you this.

21 MR. KINGHAM: - - - was entered into.

22 JUDGE FAHEY: Let - - - let me - - - just
23 to be clear. Are - - - is it your position that
24 under the language of the guaranty, you could
25 challenge - - - forget about the default judgment

1 right now - - - you could challenge whether or not
2 there actually was an underlying debt?

3 MR. KINGHAM: Yes, Your Honor.

4 JUDGE RIVERA: That it's not covered by
5 (i), (ii), (iii), or (iv)?

6 MR. KINGHAM: Correct.

7 JUDGE RIVERA: Okay.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. KINGHAM: Thank you.

10 CHIEF JUDGE LIPPMAN: Thanks. You'll have
11 your rebuttal.

12 MR. KINGHAM: Thank you, Your Honor.

13 MR. PRESSMENT: May it please the court.
14 Judges of the Court of Appeals, a waived defense by
15 any other name - - -

16 CHIEF JUDGE LIPPMAN: Counsel, what about
17 collusion? What about if - - - if your client is
18 guilty of collusion?

19 MR. PRESSMENT: Your Honor, you don't even
20 get to collusion until you get beyond the waiver to
21 which the appellant agreed.

22 CHIEF JUDGE LIPPMAN: So you're saying that
23 even if the collusion argument has merit, you don't
24 reach it?

25 MR. PRESSMENT: You don't reach it, Your

1 Honor.

2 JUDGE STEIN: What - - - what - - - what if
3 - - - what if they came along and said, you know
4 what, you're right, we owed this money, but I paid
5 it. It's all been paid, every nickel of it. Is that
6 a defense that they waived?

7 MR. PRESSMENT: No. There's always a
8 defense to actual payment, because one - - -

9 JUDGE STEIN: Well, what - - - where does
10 it say that? The waiver says anything. It covers
11 anything. Where does it exc - - - what - - - what
12 does it exclude and why?

13 MR. PRESSMENT: Sure. Judge Stein, the
14 three elements of a guaranty collection case under
15 New York law are existence of the guaranty, existence
16 of a debt triggering the guaranty, and then existence
17 of nonpayment. So in your case, Judge Stein, your
18 question would go to whether or not there was actual
19 payment.

20 JUDGE STEIN: Yes, but what if - - - okay.
21 So - - - so that's - - - so if you - - - you bring an
22 action and you say here's the guaranty, here's the
23 debt triggering the payment, and you allege lack of
24 payment, it's not a defense for them to come forward
25 and say whoa, whoa, whoa, wait a minute, we did pay

1 it. That's not a defense?

2 MR. PRESSMENT: Well, that's a fact - - -
3 that's a - - - because a 3213 motion, Judge Stein,
4 it's a summary judgment motion. So - - -

5 JUDGE STEIN: Right.

6 MR. PRESSMENT: - - - in that case, with
7 respect to one of the essential elements, there'd be
8 a question of fact as to one of the three elements;
9 that being, again, existence of the guaranty,
10 existence of the debt triggering the guaranty, and
11 nonpayment. You would have a factual question.
12 Here, we don't have that. There is - - -

13 JUDGE FAHEY: But you're saying that's
14 still - - - it's still a defense, though, is what
15 you're saying, and they can't - - - and they're
16 couching it as a condition precedent, not a defense.

17 MR. PRESSMENT: In that case, in terms of
18 whether or not the debt has been paid.

19 JUDGE FAHEY: I thought it was more whether
20 or not the debt existed itself.

21 MR. PRESSMENT: There - - - in this case,
22 Judge Fahey, the question is this. Their dispute is
23 whether or not the debt exists.

24 JUDGE FAHEY: Right.

25 MR. PRESSMENT: But that's not really what

1 they're arguing. There is no question that the
2 federal judgment exists. It's on the books.
3 Rabobank took steps to immediately collect upon it
4 upon issuance. What their issue is, whether or not
5 it was properly obtained. That is a defense, and, in
6 fact, if you follow the appellant's reasoning, it
7 would add a fourth element to every guaranty
8 collection action brought in New York State. You
9 wouldn't just have to show the guaranty, the debt,
10 and nonpayment. You would have to show an additional
11 element: that the debt was properly obtained, that
12 it arose properly. That's not - - -

13 CHIEF JUDGE LIPPMAN: Was - - - was it
14 properly obtained here?

15 MR. PRESSMENT: Absolutely, Your Honor, and
16 that gets to the facts. Now, again - - -

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. PRESSMENT: - - - you don't get to the
19 facts - - -

20 CHIEF JUDGE LIPPMAN: Go. Yeah, yeah. But
21 - - - but tell us - - -

22 MR. PRESSMENT: But let's get there.

23 CHIEF JUDGE LIPPMAN: - - - was it properly
24 obtained?

25 MR. PRESSMENT: Absolutely. Your Honor, in

1 getting to that point, Chief Judge Lippman, the key
2 is the time line. On March 2nd, as Judge Fahey
3 noted, we filed the complaint. Appellant was served,
4 as was Agra USA. They had twenty-four days under the
5 federal rules to respond. Appellant hired his own
6 lawyer, Mr. Kingham. Appellant filed a pre-motion
7 letter to dismiss for lack of jurisdiction.
8 Appellant chose not to hire any lawyer for the
9 company for which he was the only director and
10 officer.

11 Twenty-four days he sat and did nothing.
12 On April 3rd, more than thirty days after we filed
13 the complaint, we filed for default and we got it.
14 At that date, April 3rd, appellant is still the only
15 director and officer of this company.

16 JUDGE STEIN: So - - - so they're claiming
17 that they were a director in name only. He was a
18 director in name only, that - - - that your client
19 had - - - had de facto control of the whole thing
20 here, and he couldn't have done anything.

21 MR. PRESSMENT: That's their claim, Judge
22 Stein. But you get around that claim when you
23 realize that the inaction continued. On April 11th,
24 he is removed as a director. But on April 16th - - -
25 again, the default is already in the record. That

1 happened on his watch. On April - - -

2 JUDGE ABDUS-SALAAM: Can we step back a
3 moment? When Mr. Herrera was served, he was served
4 in his individual capacity and as the only director
5 shareholder - - - or I should say director of this
6 Agra USA. Was - - - was that the capacity in which
7 he was served?

8 MR. PRESSMENT: Agra USA appointed an
9 agent, but we provided multiple copies to Mr.
10 Herrera. So we also provided copies to Agra USA
11 through their agent, designated agent under the
12 agreement, as well as Mr. Herrera. There's no
13 question he had notice. Now, if I get back to the
14 time line, following entry of the default on April
15 3rd, when appellant is still a director and officer -
16 - - he's removed on April 11th as a director and
17 officer. On April 16th we bring a motion for
18 judgment against Agra USA.

19 JUDGE PIGOTT: Let me ask you a couple
20 basic questions. When you say there was an agent,
21 who appointed the agent?

22 MR. PRESSMENT: He agreed to it. He agreed
23 to it - - -

24 JUDGE PIGOTT: Who - - - who - - -

25 MR. PRESSMENT: - - - by terms of his

1 guaranty.

2 JUDGE PIGOTT: Who appoint - - - who
3 appointed the agent?

4 MR. PRESSMENT: Agra USA appointed the
5 agent and - - -

6 JUDGE PIGOTT: Who in - - - who Agra USA
7 appointed the agent?

8 MR. PRESSMENT: I - - - I don't know the
9 answer to that, Judge Pigott.

10 JUDGE PIGOTT: Okay. Okay.

11 MR. PRESSMENT: I - - - I do know that
12 there is no question they received copies, received
13 service.

14 JUDGE PIGOTT: No. When you - - - when you
15 talk collusion, I thought, well, if the bank was the
16 one that was in control of the thing and said, you
17 know, you're going to be the agent, here's the
18 summons and complaint - - -

19 MR. PRESSMENT: Yeah.

20 JUDGE PIGOTT: - - - don't answer it,
21 that'd - - - that would be an arrow in their quiver,
22 I would think.

23 MR. PRESSMENT: Well - - - but let me get
24 to that point, Judge Pigott. Because I think it
25 draws upon something I was trying to get to, as well,

1 with Judge Fahey's question. On April 16th when we
2 filed that motion appellant gets notice of the
3 motion. Appell - - -

4 JUDGE PIGOTT: Well, who removed - - - who
5 removed him as director?

6 MR. KINGHAM: There was a vote by - - - by
7 the parent company.

8 JUDGE PIGOTT: But who - - -

9 MR. PRESSMENT: He's removed as director.
10 At that time, Deloitte & Touche.

11 JUDGE PIGOTT: Who controlled the parent
12 company?

13 MR. PRESSMENT: At that point, Deloitte &
14 Touche had been appointed as receiver.

15 JUDGE PIGOTT: Who appointed them?

16 MR. PRESSMENT: By the Canadian bankruptcy
17 court.

18 JUDGE PIGOTT: Okay.

19 MR. PRESSMENT: And there is an order in
20 the record pursuant to which Deloitte was appointed.
21 So this whole claim that Rabobank injected itself
22 actually fails on its face. But on April 16th, he
23 gets notice, hey, we're moving for judgment - - -
24 moving for judgment for default against Agra USA.
25 Appellant knew at that point in time. He didn't just

1 has the ability to object and say, don't enter the
2 default. I'm going to raise this collusion argument.

3 JUDGE PIGOTT: No, no.

4 MR. PRESSMENT: And there was a hearing for
5 that.

6 JUDGE PIGOTT: How - - - how you going to
7 do that? Would you listen to that as a lawyer?
8 Somebody calls you up and say, you know, don't enter
9 a default even though you're entitled to it, because
10 I'm going to raise a collusion - - -

11 MR. PRESSMENT: No, no.

12 JUDGE PIGOTT: - - - argument against you?

13 MR. PRESSMENT: Judge Pigott, I'm - - - I'm
14 not saying that. I'm saying he had the ability to
15 submit a letter. I can't say what the effect would
16 have been on the Court. But his claim is this was
17 done under cover of night when, in fact, it was done
18 openly. And he - - -

19 JUDGE RIVERA: You're saying he's not even
20 making a showing of having tried. Is that what your
21 point?

22 MR. PRESSMENT: He didn't try at all,
23 correct.

24 JUDGE FAHEY: So what you're saying is he
25 could have answered, right?

1 MR. PRESSMENT: Well, I believe he could
2 have answered on the company. He was the only
3 director and officer.

4 CHIEF JUDGE LIPPMAN: Why do you think he
5 didn't answer?

6 MR. PRESSMENT: Your Honor, it's two
7 things. Either he chose not to or he wasn't advised
8 of the ramifications of not doing so.

9 JUDGE RIVERA: Well, he could have answered
10 before the 11th, but not after.

11 MR. PRESSMENT: He could have answered.

12 JUDGE RIVERA: On behalf of the company.

13 MR. PRESSMENT: Correct.

14 JUDGE RIVERA: On behalf of the company.

15 MR. PRESSMENT: Correct. But he still,
16 even after the 11th, had an opportunity, pursuant to
17 Judge Gardephe and the federal court's order. He
18 still had an opportunity to object. He still was
19 advised at a hearing.

20 JUDGE RIVERA: But in what role, if he's no
21 longer able to manage this company? He has no role
22 in the company.

23 MR. PRESSMENT: Anybody - - - pursuant to
24 Federal Rule 24 and - - - and it wouldn't have
25 required intervention at that point, Judge Rivera.

1 JUDGE RIVERA: Okay.

2 MR. PRESSMENT: But he could have
3 intervened because he would have been adversely
4 affected by a default judgment.

5 JUDGE RIVERA: Because he got the interest
6 as the guarantor.

7 MR. PRESSMENT: Correct.

8 JUDGE RIVERA: So let me ask you this. If
9 he had done that, is - - - what claims - - - what
10 defense does he have?

11 MR. PRESSMENT: He had the - - -

12 JUDGE RIVERA: What is he - - -

13 MR. PRESSMENT: He had no defense.

14 JUDGE RIVERA: What is he able to raise
15 under this guarantee?

16 MR. PRESSMENT: No defense.

17 JUDGE RIVERA: If he had showed up.

18 MR. PRESSMENT: No defense. In fact, Judge
19 Rivera, you've got it exactly right when you said
20 it's pretty clear under II(iv). It's pretty clear.
21 It's very clear.

22 And as you said, Judge Read, it's about as
23 broad as it gets. There is no way around that
24 waiver.

25 CHIEF JUDGE LIPPMAN: Is there any circ - -

1 -

2 MR. PRESSMENT: The language - - -

3 CHIEF JUDGE LIPPMAN: What circumstance - -
4 - when you say there is no way, is there no possible
5 way?

6 MR. PRESSMENT: Well - - -

7 CHIEF JUDGE LIPPMAN: What could he argue
8 that would - - - that would be - - - you know, rebut
9 the waiver or that it doesn't apply?

10 MR. PRESSMENT: First - - -

11 CHIEF JUDGE LIPPMAN: Is there anything, or
12 is that waiver so absolutely totally whatever the
13 wildest scenario that you could think of that - - -
14 that the money was stolen, that - - - whatever it
15 was. Is there nothing?

16 MR. PRESSMENT: Here - - - here's the
17 point, Judge Lippman.

18 CHIEF JUDGE LIPPMAN: Yes.

19 MR. PRESSMENT: The waiver language that
20 Rabobank used with respect to appellant is the
21 precise language that this court blessed in Citibank
22 v. Plapinger.

23 CHIEF JUDGE LIPPMAN: Where there's no way
24 of getting around with it, nothing, period? Nothing
25 in the world gets around it?

1 MR. PRESSMENT: The First Department in Red
2 Tulip, said, appropriately so, that that language
3 presents a, quote, "insurmountable obstacle to the
4 assertion of a defense."

5 CHIEF JUDGE LIPPMAN: What if there was a
6 bribery in the - - - in the federal court and the
7 judgment was gotten because your client gave the
8 federal judge a significant amount of money - - - the
9 money to issue that judgement, waiver still covers
10 it?

11 MR. PRESSMENT: It - - - Your Honor, it
12 certainly covers it with respect to a defense in a
13 guaranty action. But what you may be getting to,
14 Chief Judge Lippman, is he may have an affirmative
15 claim. But you can't say that you have an
16 affirmative claim and use that to block enforcement
17 of the guaranty as a defense.

18 JUDGE STEIN: What about some kind of
19 public policy, you know, objection to - - - to this
20 waiver? Could - - - could there be possibly such a
21 thing?

22 MR. PRESSMENT: I don't believe so, Judge
23 Stein. This waiver has been used for years since
24 Plapinger, and the courts have been consistent on it.

25 JUDGE ABDUS-SALAAM: So the only way out of

1 this was to never sign the guaranty?

2 MR. PRESSMENT: Correct.

3 JUDGE ABDUS-SALAAM: Never - - - never - -
4 - never do it all.

5 MR. PRESSMENT: If - - - if you'd never
6 agreed to this - - -

7 JUDGE RIVERA: Well - - - well, there is -
8 - - there is - - -

9 MR. PRESSMENT: And that's - - - and that's
10 what Plapinger says.

11 JUDGE RIVERA: - - - some Second Circuit
12 precedent that suggests that if - - - if you're
13 really talking about collusion, that that means that
14 that was not the expectation of the parties; that he
15 could not have entered this guaranty anticipating or
16 - - - or agreeing to collusion that would undermine
17 their position.

18 MR. PRESSMENT: Judge Rivera - - -

19 JUDGE RIVERA: Why - - - why isn't that a
20 good argument here?

21 MR. PRESSMENT: It's - - - it's not a good
22 argument because the Second Circuit did not,
23 respectfully, come to that conclusion. The case is
24 Manufacturers Hanover, and in that case, the waiver
25 that the guarantor agreed to was not as broad. And

1 that's what Manufacturers said, that the Second
2 Circuit said this is not like Plapinger where they're
3 waiving any possible circumstance that might
4 otherwise constitute a defense. Now, here, appellant
5 is undone by his very own words. On page 22 of his
6 brief - - -

7 JUDGE RIVERA: Um-hum.

8 MR. PRESSMENT: - - - footnote 9 he says
9 there is no question collusion can be a defense.

10 JUDGE RIVERA: Um-hum.

11 MR. PRESSMENT: Where here on the face of
12 his guaranty he has waived any circumstance that
13 could be a defense.

14 JUDGE RIVERA: I was actually thinking of a
15 different Second Circuit case. It was the Copana
16 (ph.) case written by Justice Sotomayor where it - -
17 - it's clear at the end. She says there's no
18 evidence here of collusion, but that would present a
19 different situation.

20 MR. PRESSMENT: I think the courts that
21 have found that elements of fraud or collusion - - -

22 JUDGE RIVERA: Yeah.

23 MR. PRESSMENT: - - - could present a
24 different situation. What they have done is given
25 the claimants a right to assert an affirmative claim.

1 They have not found that those would block, in the
2 face of a waiver drawn exact - - -

3 JUDGE RIVERA: Is it possibly different to
4 argue that there's collusion that results in - - - in
5 the underlying debt versus collusion in trying to
6 secure a judgment?

7 MR. PRESSMENT: Well, here, the underlying
8 debt on which we're suing is the judgment.

9 JUDGE RIVERA: Is the judgment. Okay.

10 MR. PRESSMENT: Is the judgment. And
11 there's no dispute whatsoever that it's a valid
12 judgment. Now, I - - - if I may for a moment - - -

13 CHIEF JUDGE LIPPMAN: Go ahead, finish your
14 thought, counsel. But your time's up.

15 MR. PRESSMENT: Drawing on Judge Stein's
16 question about public policy. I think public policy
17 does play a role in this case, and here's how. The
18 waiver of the sort drawn up by Rabobank and agreed to
19 freely by appellant is the type of waiver that
20 permits banks and other lending institutions to make
21 loans of money to often small businesses and
22 individuals who absent that additional security - - -

23 CHIEF JUDGE LIPPMAN: Okay, counsel. We -
24 - - we get your argument.

25 MR. PRESSMENT: Okay. Thank you.

1 CHIEF JUDGE LIPPMAN: Let's hear from - - -
2 rebuttal from your adversary. Thanks, counsel.

3 Counsel, rebuttal.

4 MR. KINGHAM: Your Honor, first a very
5 important statement in the dissent in the Appellate
6 Division, which you'll find at page - - - (xxv) in
7 the record, and I quote, "A party seeking to enforce
8 a guaranty may not wrongfully cause the event that
9 triggers the guaranty and then hide behind a waiver
10 clause, in effect."

11 JUDGE FAHEY: Can I ask a question,
12 counsel?

13 MR. KINGHAM: Yes, Your Honor.

14 JUDGE FAHEY: You're relying on Canterbury.

15 MR. KINGHAM: Yes.

16 JUDGE FAHEY: And Canterbury supports your
17 position, but is the procedural posture the same in
18 Canterbury as it is here? In other words, post-
19 judgment and a default where you're post-judgment and
20 - - - I thought it was a different posture.

21 MR. KINGHAM: Well - - - well, Canterbury's
22 a different - - - Canterbury does not involve a
23 default judgment. It - - - it - - - it's the more
24 typical foreclosure on a loan - - - on a loan case.

25 JUDGE FAHEY: Right. So - - - so you see

1 the logical problem, then.

2 MR. KINGHAM: Yes, I do.

3 JUDGE FAHEY: Okay, all right.

4 MR. KINGHAM: I - - - I - - - I do, indeed.

5 And let me respond, if I may, a little more fully to
6 some of the court's questions about the - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

8 MR. KINGHAM: - - - so-called facts. As to
9 control, Rabobank was the sole creditor and certainly
10 the dominant and controlling creditor of this
11 company, Agra Canada.

12 JUDGE STEIN: Yeah. But as a matter of - -
13 - of procedure, court procedure - - -

14 MR. KINGHAM: Yes, Your Honor.

15 JUDGE STEIN: - - - what would have stopped
16 your client from when he was served, he knew this
17 action was pending, at some time before judgment was
18 entered and before he was removed as a director, what
19 would have prevented him from submitting something to
20 the court, even if Rabobank and everybody else were,
21 you know, having de facto control? How could the
22 court not have accepted that from him at that point
23 in time?

24 MR. KINGHAM: Well, if - - - if while he
25 was still an officer he was able to - - - to do that,

1 the court would have accepted whatever paper was
2 filed on behalf of Agra USA. But Chief Judge Lippman
3 said well, why wouldn't he do it, and the one answer
4 that you didn't hear from my colleague is that he was
5 essentially under the umbrella of Rabobank. Rabobank
6 was chasing him in Texas. Rabobank was sending
7 lawyers to his - - - letters to his lawyer in Texas
8 saying gather all the Agra USA stuff. That happened
9 before April 11th, Your Honor.

10 JUDGE PIGOTT: Well, I don't - - - I don't
11 understand - - -

12 JUDGE RIVERA: Even - - - even a better
13 reason to protect yourself.

14 JUDGE STEIN: Yeah, yeah.

15 JUDGE PIGOTT: Judge Pigott?

16 MR. KINGHAM: I'm sorry, Judge Pigott.

17 JUDGE PIGOTT: I don't understand why that
18 makes a difference. I mean even after the default,
19 you could move to vacate it. Of course, then you got
20 to show a reason for the vacator and an affirmative
21 def - - - you know, a - - - a - - - a reasonable
22 chance of success, which apparently didn't happen.

23 MR. KINGHAM: Well - - -

24 JUDGE PIGOTT: But the fact that he's
25 getting chase - - - you turn around and chase the

1 other person. I mean, they - - - they're out forty-
2 six million bucks. They're not - - - they're not
3 kidding.

4 MR. KINGHAM: But you asked - - - you asked
5 earlier, I believe, Your Honor, that the - - - the
6 question procedurally - - -

7 JUDGE PIGOTT: Um-hum.

8 MR. KINGHAM: - - - what would happen with
9 respect to Agra USA and what defense did Agra USA
10 have. Agra US - - - USA had the same Canterbury-
11 based condition-precedent defense that Mr. Herrera
12 has, because Agra USA signed the identical guaranty.
13 And their default judgment is against Agra USA on the
14 very same guaranty that Mr. Herrera signed. I see my
15 time is up. I thank the court very much.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. KINGHAM: And ask the court to reverse
18 the decision of the Appellate Division and let's send
19 this case back to Justice Ramos for trial.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. KINGHAM: Thank you.

22 CHIEF JUDGE LIPPMAN: Thank you both.
23 Appreciate it.

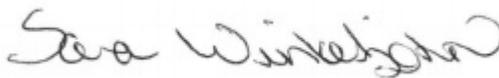
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. C. v Herrera Navarro, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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