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COURT OF APPEALS

STATE OF NEW YORK

SIEGMUND STRAUSS, INC.,

Respondent,

-against-

No. 162

EAST 149TH REALTY CORP.,

Appellant.

20 Eagle Street
Albany, New York 12207
September 6, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Siegmund Strauss v.
2 East 19th (sic) Realty.

3 Counselor, do you want any rebuttal time?

4 MR. HORN: Yes, Your Honor. Three minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

7 MR. HORN: Good afternoon, Your Honors.
8 May it please the court. My name is Scott Horn,
9 counsel representing the appellants in this matter.

10 It's our contention that the appellate
11 division erred in determining that the two
12 interlocutory orders did not necessarily affect the
13 final judgment, while concomitantly - - -

14 JUDGE CIPARICK: Can I ask you - - -

15 MR. HORN: Yes, Your Honor.

16 JUDGE CIPARICK: - - - if any of the
17 counterclaims - - - if they bore any relation to the
18 rights of the parties under the lease, because isn't
19 that what the primary action is about?

20 MR. HORN: The counterclaims - - -

21 JUDGE CIPARICK: The settlement.

22 MR. HORN: - - - all stemmed from the
23 contractual relationship between the parties. The
24 original claims were pleaded as tort claims. My
25 clients sought to interpose the breach of contract

1 claims which the parties - - -

2 CHIEF JUDGE LIPPMAN: Why didn't you try to
3 do that earlier?

4 MR. HORN: Pardon me, Your Honor?

5 CHIEF JUDGE LIPPMAN: Why didn't you try to
6 amend earlier to get - - -

7 MR. HORN: Well - - -

8 CHIEF JUDGE LIPPMAN: - - - the breach of
9 contract?

10 MR. HORN: - - - Your Honor, the original
11 request to amend was actually made a little bit over
12 a year after the action was commenced. It wasn't
13 that long of a period of time. Now, I'm not going to
14 say that the lawyering in this case was stellar. In
15 fact, my client's trial attorney tripped over his
16 feet a number of times. But the fact of the matter
17 is, is that the parties and the court all knew from
18 the very beginning that they possessed breach of
19 contract claims.

20 CHIEF JUDGE LIPPMAN: How long after the
21 note of issue did they - - -

22 MR. HORN: Well, the motion for leave to
23 amend it was several days after the note of issue was
24 filed. However, we're claiming error in the initial
25 dismissal of the tort claims by not granting leave to

1 replead at that point in time. The case law holds
2 that the issue is not how the claims are pleaded but
3 whether claims are possessed. And that's the Leon
4 case decided by this court.

5 JUDGE CIPARICK: But your client, after the
6 dismissal of the claims, appealed but did not perfect
7 the appeal.

8 MR. HORN: That is correct, Your Honor. At
9 that point in time, they determined that they were
10 going to pursue their claims from the prior
11 interlocutory orders on the appeal from the final
12 judgment, being guided by a body of case law, I might
13 add, Your Honor, which I've cited to in my brief,
14 emanating from the Second Department, all of which
15 specifically hold that the denial of claims earlier
16 in the litigation is reviewable on appeal from a
17 final judgment - - -

18 JUDGE SMITH: What's your - - -

19 MR. HORN: - - - and another body - - -

20 JUDGE SMITH: What's your best case on
21 that?

22 MR. HORN: Well, those cases are the Talon
23 case, the Meerabux case and the CSEA case, all from
24 the Second Department, involving dismissal of claims
25 earlier in the litigation.

1 JUDGE SMITH: But is there a distinction
2 between dismissal of a claim and denial of leave to
3 amend?

4 MR. HORN: Well, again, Your Honor, we're
5 trying to appeal two interlocutory orders. The first
6 order did dismiss the underlying claims, so that's
7 why that line of precedent clearly applies - - -

8 JUDGE SMITH: Does it - - -

9 MR. HORN: - - - to that interlocutory
10 order.

11 JUDGE SMITH: But you never - - - your
12 breach of contract claims, as I understand it, never
13 got into the case.

14 MR. HORN: Well, that's correct, Your
15 Honor.

16 JUDGE SMITH: Is - - -

17 MR. HORN: That is correct.

18 JUDGE SMITH: Is there a distinction, for
19 jurisdictional purposes, between an order that throws
20 a claim out of the case and an order that refuses to
21 let a claim into the case?

22 MR. HORN: We submit that there is not,
23 Your Honor. And we further submit that there is - -
24 -

25 JUDGE SMITH: Is there any authority - - -

1 MR. HORN: - - - a dearth of case law - - -

2 JUDGE SMITH: Is there any authority you
3 know of that establishes that point?

4 MR. HORN: Sure, and again, I'll cite to
5 the two lines of Second Department authority that are
6 in my brief. The first three cases I just mentioned
7 to you involving cases where claims were dismissed
8 earlier in a litigation. There's a whole separate
9 and distinct and more fully developed body of case
10 law, I might add, in the Second Department, that
11 stand for the proposition that the denial of leave to
12 amend may be reviewed on appeal from the final
13 judgment under 5501(a)(1). That's the Silverman case
14 but it's also the Glassman case, the Bogal case,
15 Marini, Oakwood, Sunride (sic) Plaza. It goes on and
16 on. This is a very well developed body of case law
17 extending from 1995 in the Hunan 7 case.

18 JUDGE SMITH: There are - - -

19 MR. HORN: This is not - - -

20 JUDGE SMITH: There are cases in our court
21 that seem to say the opposite, aren't there?

22 MR. HORN: Well, I don't know which case
23 you're referring to. If you're referring to Matter
24 of Aho I'd be happy to discuss that case - - -

25 JUDGE SMITH: No, I'm - - -

1 MR. HORN: - - - because I think Aho
2 supports the interpretation of 5501 - - -

3 JUDGE SMITH: No, I - - -

4 MR. HORN: - - - and - - -

5 JUDGE SMITH: - - - I know you're happy to
6 talk about Aho.

7 MR. HORN: Yeah, I'd love to talk about the
8 Matter of Aho.

9 JUDGE SMITH: But I'll make him talk about
10 Aho. But there are these - - - there's a little
11 footnote here and there, and I don't know - - - I
12 mean, there's a case called Arnac (sic). Are you
13 familiar with these?

14 MR. HORN: I'm not familiar with the
15 footnote in Arnac (sic), Your Honor, but - - -

16 JUDGE SMITH: Arnac - - - Arnow.

17 MR. HORN: - - - but Matter of Aho is a
18 landmark decision from this Court.

19 JUDGE GRAFFEO: Just from a policy
20 standpoint, why should they be treated the same?

21 MR. HORN: Well - - -

22 JUDGE GRAFFEO: Because in one, the court's
23 making a determination that the cause of action
24 should be dismissed. In the other, there's different
25 considerations.

1 MR. HORN: Well, I think from a pol - - -

2 JUDGE GRAFFEO: There's the passage of
3 time, there's prejudice, there's - - - you know,
4 there's - - -

5 MR. HORN: I think from a policy standpoint
6 - - -

7 JUDGE GRAFFEO: - - - different
8 considerations.

9 MR. HORN: Excuse me, Your Honor. I think
10 from a policy standpoint the thought process is the
11 same. And the thought process is that the court has
12 a longstanding - - - and there's a longstanding
13 policy in this state to have claims adjudicated on
14 their merits. And to apply 5501 and Matter of Aho in
15 a circuitous way to prevent parties from gaining
16 appellate review is simply inequitable. It's unjust.
17 Okay? And that's what we're faced with here.

18 JUDGE CIPARICK: We would probably agree
19 with you - - -

20 MR. HORN: We're faced with this very
21 narrow interpretation - - -

22 JUDGE CIPARICK: - - - but your client did
23 very little to put those claims before the courts:
24 not perfecting an appeal, waiting for such a long
25 time to make a new motion to amend a pleading. I

1 mean, you know - - -

2 MR. HORN: Well, Your Honor - - -

3 JUDGE CIPARICK: - - - it's probably better
4 to have everything decided on the merits, but it has
5 to come before the court in a timely fashion.

6 MR. HORN: Well, it's certainly an appeal
7 from a final judgment would be in a timely fashion,
8 Your Honor. I mean, again, there's a raft of
9 authority which stand for the proposition that I'm
10 standing here - - -

11 JUDGE GRAFFEO: But they - - -

12 MR. HORN: - - - advocating.

13 JUDGE GRAFFEO: But they didn't interpose a
14 breach of contract claim.

15 MR. HORN: Well, again, they did not
16 interpose a breach of contract claim. There is no
17 question about that. I am not here arguing
18 otherwise. Did they possess a breach of contract
19 claim? The court said yes. Not Mr. Cozier - - -

20 JUDGE GRAFFEO: Well, I think the - - -

21 MR. HORN: - - - but my adversary in the
22 trial said yes.

23 JUDGE GRAFFEO: - - - judge tried several
24 times to suggest to them that they had a breach of
25 contract claim, and apparently they didn't make a

1 motion to amend.

2 MR. HORN: Well, Your Honor, they did
3 several things short of making a motion to amend
4 before they made their motion to amend. They made
5 motions to clarify, in which part of their request
6 for relief was we would like to amend. Then they
7 made a motion for reargument in which a claim for
8 relief was to amend. Both of those were denied for
9 procedural reasons.

10 CHIEF JUDGE LIPPMAN: Yeah, but doesn't
11 there - - -

12 MR. HORN: Granted - - -

13 CHIEF JUDGE LIPPMAN: - - - come a point
14 when you sit on your hands that it's prejudicial.

15 MR. HORN: Again - - -

16 CHIEF JUDGE LIPPMAN: You just want to do
17 this forever and then at the last second say, all
18 right, we haven't really exercised our rights earlier
19 on, but now, please, now that it's over, let us do
20 it?

21 MR. HORN: Well - - -

22 CHIEF JUDGE LIPPMAN: Is there something
23 inconsistent with doing it?

24 MR. HORN: I don't think it's inconsistent,
25 Your Honor, and I do find myself in the uncomfortable

1 position - - -

2 CHIEF JUDGE LIPPMAN: It's inconsistent
3 with getting a decision on the merits that there
4 comes a point - - -

5 MR. HORN: The fact that they - - - the
6 fact that they took missteps during the course of the
7 litigation before finally realizing what it was that
8 they were supposed to do - - -

9 CHIEF JUDGE LIPPMAN: And at the very end
10 saying, Judge, help me.

11 MR. HORN: Well, Your Honor, again, it's
12 not at the end. It's five days after the note of
13 issue has been entered.

14 JUDGE GRAFFEO: That's pretty late, though,
15 after - - -

16 MR. HORN: It's only two years into the
17 litigation.

18 JUDGE GRAFFEO: That's pretty late after
19 the note of issue.

20 MR. HORN: Well, again, Your Honor, I
21 think, respectfully, the thing that should have been
22 - - -

23 CHIEF JUDGE LIPPMAN: So then change the
24 theory. I mean, this gets ridiculous after a point.

25 MR. HORN: Well, no, that's the point. It

1 didn't change the theory because the parties and the
2 court were operating under the understanding all
3 along that this was a breach of contract claim. The
4 plaintiffs wouldn't have - - -

5 CHIEF JUDGE LIPPMAN: And you've been told,
6 in effect, to make it a breach of contract.

7 MR. HORN: Essentially, yes. And
8 essentially, they tried and - - -

9 CHIEF JUDGE LIPPMAN: And failed to do so,
10 so at - - -

11 MR. HORN: - - - that was denied twice.

12 CHIEF JUDGE LIPPMAN: - - - at what point
13 do we say, well, the hell with you, you know, and
14 just - - -

15 MR. HORN: Well, Your Honor - - -

16 JUDGE GRAFFEO: I guess the question is why
17 should we, jurisdictionally, treat that situation
18 identical to the situation where a party does
19 interpose the cause of action and it's dismissed?

20 MR. HORN: Well, again, I think that - - -

21 JUDGE GRAFFEO: That's what you're asking
22 us to do, right?

23 MR. HORN: I'm asking you to do two things.
24 I'm asking you to hold that the interlocutory order
25 which dismissed their claims, despite the fact,

1 knowing and stating that they possessed contract
2 claims, was error, and that it necessarily affects
3 the final judgment and therefore is brought up for
4 review - - -

5 JUDGE SMITH: Do we have to - - -

6 MR. HORN: - - - from the final judgment -
7 - -

8 JUDGE SMITH: Do we have to decide whether
9 it was error? I mean, don't - - - I thought we were
10 just deciding whether the appellate division had
11 jurisdiction to consider.

12 MR. HORN: That's precise - - -

13 JUDGE SMITH: But I mean, the appellate
14 division could substitute its own - - - if it had
15 jurisdiction, could presumably substitute its own
16 discretion for Justice Fried's. We can't do that.

17 MR. HORN: That's correct, Your Honor.

18 JUDGE SMITH: So if you prevail, I would
19 think the most you could get would be for us to send
20 it back to the appellate division for the appellate
21 division to consider whether it was going to reverse
22 Judge Fried or affirm him.

23 MR. HORN: Whether this court could render
24 that determination or not, you're right. Ultimately,
25 the threshold issue is one of jurisdiction. It's one

1 of appellate jurisdiction. And getting into policy
2 issues and whether or not an attorney acted
3 diligently - - -

4 JUDGE SMITH: And am I also - - -

5 MR. HORN: - - - or harmfully on behalf of
6 a client - - - excuse me, Your Honor.

7 JUDGE SMITH: Am I also right in thinking
8 that, you know, I mean, that all these things to be
9 said are whether Justice Fried was right or wrong in
10 allowing - - - in not allowing you to amend. But
11 even if we had before us a case where the judge had
12 been totally, hopelessly wrong, where - - - and there
13 was nothing to be said in his defense, the appellate
14 division decision here would still stand for the
15 proposition that you're stuck with, that there's no
16 jurisdiction.

17 MR. HORN: That's absolutely right. The
18 appellate division decision here does not look at the
19 foibles of trial counsel. The appellate division
20 decision here is a narrow interpretation of the CPLR.
21 It is an exaltation of form over substance. It's
22 ripe with circuitous reasoning. And at the end of
23 the day - - - at the end of the day, after all that,
24 it's unjust. You have to discuss and consider these
25 other elements before you even get to the issue of

1 problem?

2 MR. HORN: I wasn't trial counsel, so I - -

3 -

4 JUDGE SMITH: Oh, that's reason one.

5 MR. HORN: That's not going to fall on my
6 doorstep.

7 JUDGE SMITH: But what's reason two?

8 MR. HORN: I don't think there would have
9 been a statute of limitations issue at that point. I
10 guess the question would have been, potentially, res
11 judicata. And then the issue would have been, well,
12 was that prior determination or determination on the
13 merits. And that would have opened up a whole nother
14 can of worms and it would have opened up a whole - -
15 -

16 JUDGE SMITH: Here's another thing - - -

17 MR. HORN: - - - nother front of
18 litigation.

19 JUDGE SMITH: There's another thing,
20 though, if you'd have been trial counsel that's what
21 you'd have done?

22 MR. HORN: Perhaps that would have been - -
23 - well, certainly with hindsight, that would have
24 been the more prudent thing to do. However, again,
25 and I want to stress this, there's this fully

1 developed body and there's this split in authority,
2 and it's not something where this is completely
3 coming out of left field, and it's not something
4 where we're just saying mea culpa, please do us this
5 - - - you know - - -

6 JUDGE GRAFFEO: So - - -

7 MR. HORN: - - - please come to our rescue.

8 JUDGE GRAFFEO: So what's the rule or the -
9 - - what do you want us to articulate?

10 MR. HORN: Well, I think that the - - - and
11 this was surprising to me, but the concept of
12 necessarily affects, which appellate litigators are
13 well versed in, is really undefined. You have Matter
14 of Aho from - - -

15 JUDGE GRAFFEO: How do you want us to
16 define - - -

17 MR. HORN: - - - twenty-five years ago.

18 JUDGE GRAFFEO: - - - necessarily affects?

19 MR. HORN: I think that necessarily affects
20 should be defined in the - - - you know, at page 20
21 in the respondent's brief, the respondents
22 acknowledge specifically that CPLR 5501 is to be
23 "liberally interpreted".

24 The hornbook Krager (ph.) on the Powers of
25 the Court of Appeals specifically says 5501 is to be

1 liberally interpreted - - -

2 JUDGE SMITH: What's the - - -

3 MR. HORN: - - - citing Matter of Aho. So
4 I think that the contradistinction between the two
5 competing interests and sides here is that on one
6 hand it's a hypertechnical exaltation of form over
7 substance. If there's not specific - - -

8 JUDGE SMITH: I'm not sure you're answering
9 Judge Graffeo's question - - -

10 MR. HORN: I'm sorry.

11 JUDGE SMITH: - - - about liberally
12 interpreted. What's the liberal interpretation?

13 MR. HORN: Well, as I was getting to, if
14 it's going to impact - - -

15 JUDGE GRAFFEO: What are we saying
16 necessarily affects means?

17 MR. HORN: Necessarily affects means that
18 it would impact upon the judgment, not that it would
19 require vacator of a decretal paragraph, not that it
20 would - - -

21 CHIEF JUDGE LIPPMAN: Does that clarify the
22 situation?

23 MR. HORN: I think it certainly would. I
24 think it - - -

25 CHIEF JUDGE LIPPMAN: To say impacts, isn't

1 that a pretty - - -

2 JUDGE CIPARICK: Yeah.

3 MR. HORN: I think it - - -

4 CHIEF JUDGE LIPPMAN: - - - gray way to
5 make a rule?

6 MR. HORN: No, because if it would amend a
7 judgment, whether by adding language or taking it
8 away, it necessarily affects.

9 JUDGE CIPARICK: Let me go back to my
10 original question, which was what did the fraud, the
11 tortious interference contract, conversion claims, et
12 cetera, how did that relate to the rights of the
13 parties under the lease, which is all that was being
14 litigated here?

15 MR. HORN: Well, the interesting thing is
16 that, originally, it related directly. And I guess
17 maybe that's the best way to answer it. Originally,
18 at the very beginning of this controversy, the lease
19 that was being litigated was the lease between my
20 client and the landlord. And in fact, that was at
21 issue when the plaintiffs originally received their
22 injunctive relief and they said we have the business
23 and we don't have to pay anything for the business,
24 and we're going to litigate it in court. That was
25 what was at issue. And the argument was that they're

1 not entitled to be there because they've breached the
2 contract. They're not entitled to be there because
3 they don't have a contract - - -

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. HORN: - - - with us that the parties -
6 - -

7 CHIEF JUDGE LIPPMAN: Okay, coun - - -

8 MR. HORN: - - - executed.

9 CHIEF JUDGE LIPPMAN: Well - - -

10 MR. HORN: So it was directly related. The
11 way that it ultimately evolved was that the plaintiff
12 and the landlord went off and executed their own
13 lease down the road.

14 CHIEF JUDGE LIPPMAN: Okay, counselor,
15 you'll have rebuttal time.

16 MR. HORN: Thank you, Your Honor.

17 CHIEF JUDGE LIPPMAN: Thank you.

18 Counselor?

19 MR. COZIER: Good afternoon, Your Honors.
20 May it please the court. Barry A. Cozier, counsel
21 for the respondent.

22 CHIEF JUDGE LIPPMAN: Counsel, what's the
23 rule that you would put forth in this case? Why
24 shouldn't they be allowed the relief that they want?

25 MR. COZIER: They should not be allowed the

1 relief that they are requesting because that relief
2 would be a derogation of both the Constitution,
3 Article 6, Section 3(b), 5501(a) of the CPLR and the
4 decisional law of this court, including Matter of
5 Aho. And that's because the critical issue here, and
6 the only thing I agree with that my adversary has
7 said this afternoon is that the issue is
8 jurisdictional. The issue concerns both the scope of
9 the court's review as well as the issue of finality.

10 JUDGE SMITH: And so you agree with him
11 that even - - - I mean, here there's no doubt
12 something to be said in favor of what Justice Fried
13 did, but even if we had an absolutely, hopelessly
14 indefensible wrong trial court decision, neither we
15 nor the appellate division could touch it in this
16 case?

17 MR. COZIER: I certainly do agree with
18 that, and I agree with that because, of course, the
19 jurisdiction of the court of appeals is on questions
20 of law. And its discretion is limited - - -

21 JUDGE SMITH: Well, we - - -

22 MR. COZIER: - - - to extraordinary
23 circumstances.

24 JUDGE SMITH: I mean, we could not review a
25 discretionary decision but the appellate division

1 can.

2 MR. COZIER: That's correct.

3 JUDGE SMITH: And they even hinted that if
4 they could review it here, at least as I read it, the
5 appellate division is saying, gee, I wish we could
6 review this because we're not happy with what
7 happened below. But they say we can't - - - we can't
8 touch it.

9 MR. COZIER: Exactly.

10 JUDGE SMITH: And you say they were right?

11 MR. COZIER: Yes, they said - - -

12 JUDGE GRAFFEO: And why is that a good
13 rule?

14 MR. COZIER: It's a good rule because it
15 promotes finality. And if we subscribe - - -

16 JUDGE SMITH: Well, you could abolish the
17 courts of appeal - - - you could abolish all of the
18 appellate courts if you promote finality. I mean,
19 why - - - we've got to distinguish between some
20 appeals that are taken and some aren't.

21 MR. COZIER: Well, absolutely. You have to
22 distinguish between those appeals which decide final
23 determinations, orders or judgments, from those
24 which, of course, decide nonfinal orders or
25 determinations which do not necessarily expect - - -

1 JUDGE SMITH: Let me suggest a comparison
2 of two possible cases to you. One is where the
3 plaintiff pleads three causes of action. The Court
4 says the third cause of action is insufficient in law
5 and the court dismisses it. There's a final
6 judgment, there's an appeal. That's reviewable,
7 isn't it, on the appeal from the final judgment?

8 MR. COZIER: Yes, it would be.

9 JUDGE SMITH: Second case, the plaintiff
10 pleads two causes of action, moves to amend to add a
11 third. The Court says that third cause of action is
12 insufficient in law; I deny amendment. Why shouldn't
13 that be just as reviewable on appeal?

14 MR. COZIER: Because in that circumstance
15 the third cause of action is never before the court.
16 The third cause of action was never interposed.

17 JUDGE SMITH: So what? I mean, well, yes,
18 in the other case it was and it was thrown out.
19 What's the difference?

20 MR. COZIER: As in this case - - - and I
21 think this case is very distinct for this reason - -
22 - this is not even close to the Aho - - - Matter of
23 Aho situation, and that's because in the first
24 instance we have, I believe, a fatal technical
25 defect. And that defect concerns the fact that

1 neither of the prior nonfinal orders of the Supreme
2 Court, of course, were the subject of a direct appeal
3 at the time that the final judgment was entered. And
4 therefore, the only matter in which they can be heard
5 is if they necessarily affect the final judgment.
6 Here, the final judgment is predicated solely upon
7 the declaration of an entitlement to possession of
8 the premises. It has - - -

9 JUDGE SMITH: But isn't - - -

10 MR. COZIER: - - - no relationship to the
11 contract claims.

12 JUDGE SMITH: But isn't that circular? The
13 reason it's predicated totally upon it is they
14 wouldn't let the other claim into the case.

15 MR. COZIER: That's correct. That's
16 correct. But I think - - -

17 JUDGE SMITH: And then let me ask a
18 different question a little bit - - -

19 MR. COZIER: - - - that that's consistent
20 with the ruling, Your Honor.

21 JUDGE SMITH: Indeed, isn't there something
22 - - - I mean, you can say a lot of things about how
23 the trial counsel should have handled it, but isn't
24 the bottom line here terribly unfair. I mean, you
25 get to - - - there's a contract between the parties

1 and you get to enforce your - - - you get what you
2 bought and you don't have to pay for it.

3 MR. COZIER: Well, I would say, as a matter
4 of equity, it may very well be unfair. But not every
5 right is entitled to a remedy. And in this
6 particular circumstance, there is no way that the
7 appellate could innocently and inadvertently find
8 themselves in this circumstance. They charted their
9 own litigation course here. They charted their own
10 course. They had opportunities at various junctures
11 during the litigation to make timely applications and
12 they failed to do so.

13 Now, my adversary makes reference to the
14 first application to amend. In the first application
15 to amend, they, of course, pleaded no breach of
16 contract cause of action, and in fact indicated that
17 there was no claim for breach of contract. It's
18 after the note of issue has been filed that finally
19 the light goes on and they move to amend to include
20 the counterclaims alleging breach of contract.

21 JUDGE GRAFFEO: Were you prejudiced at that
22 point? I mean, you had to know that this was all
23 floating out there, so to speak?

24 MR. COZIER: I certainly agree with the
25 appellate division here and with Justice Fried that

1 arguing a point we can't decide.

2 MR. COZIER: Well, I think that you can
3 decide the issue to the extent that you want to make
4 a finding that the final - - - that again, the
5 nonfinal orders necessarily affected the final
6 determination.

7 CHIEF JUDGE LIPPMAN: What about his - - -

8 MR. COZIER: Notwithstanding that they're
9 based upon alternative theories that are totally
10 unrelated.

11 CHIEF JUDGE LIPPMAN: What about his test
12 where he says it should be - - - it means impacts on.
13 What do you think it means, necessarily affects?

14 MR. COZIER: Well, even giving it its plain
15 meaning - - - and the plain meaning of affect is to
16 have an influence on or to effect a change in - - -
17 it cannot meet that standard.

18 CHIEF JUDGE LIPPMAN: Even given his test,
19 would you still win?

20 MR. COZIER: Given his test, and that is in
21 terms of the plain language, it certainly cannot meet
22 that requirement. And given the test in Aho,
23 obviously a reversal of the final judgment here would
24 in no way - - - and a reversal or a modification of
25 the final judgment would in no way impact upon - - -

1 JUDGE SMITH: Well, what about the other
2 way around?

3 MR. COZIER: - - - any contract causes of
4 action.

5 JUDGE SMITH: What about the other way
6 around? If we reverse the denial of a motion to
7 amend, that impacts the final judgment, doesn't it?

8 MR. COZIER: Assuming it goes back to the
9 appellate division.

10 JUDGE SMITH: Yeah, I shouldn't have said
11 "we". If the appellate division reverses the denial
12 of the motion to amend, that would impact the final
13 judgment?

14 MR. COZIER: No, it would not. It would
15 only - - -

16 JUDGE SMITH: Well, the judge denied the
17 motion to amend and therefore entered a judgment only
18 on the claim before him. If the denial of a motion
19 to amend was error, then the judgment's got something
20 wrong with it, doesn't it?

21 MR. COZIER: Well, not necessarily, because
22 the judgment itself is predicated on totally
23 independent grounds. It would not change the nature
24 of the judgment before this Court with respect to the
25 issue of possession. It would have no impact

1 whatsoever. It would reinstate - - -

2 JUDGE SMITH: Well, wouldn't - - - I mean,
3 if the contract claim had been in the case, wouldn't
4 - - - couldn't the judgment have said yeah, you have
5 a right to possession conditioned on your paying him
6 what you owe him?

7 MR. COZIER: That's possible, but it seems
8 to me, Your Honor, the difficulty there is then we
9 are moving into the area of speculation.

10 JUDGE SMITH: Well, what about this as the
11 test for what necessarily affects means? Maybe they
12 all come out circular; maybe this one's circular too,
13 but what about saying that if a reversal of the
14 interlocutory order would result in a reversal or a
15 modification of the final judgment, then one
16 necessarily affects the other?

17 MR. COZIER: I don't - - - I still don't -
18 - - I don't believe that that standard, Your Honor,
19 would satisfy the 5501(a)(1) standard, again, of what
20 necessarily affects - - -

21 JUDGE SMITH: Let me - - -

22 MR. COZIER: And I think, ultimately - - -

23 JUDGE SMITH: Go ahead.

24 MR. COZIER: - - - it would open the
25 floodgates here. There would really be no standard,

1 as almost every nonfinal order - - -

2 JUDGE SMITH: Let me point out to you - - -

3 MR. COZIER: - - - would in fact be - - -

4 JUDGE SMITH: - - - something about the
5 language of 5501, if I can find it, which struck me.

6 "An appeal brings up for review: (i) any nonfinal
7 judgment or order which necessarily affects", et
8 cetera, et cetera, "including any order which was
9 adverse to the respondent on appeal from the final
10 judgment and which, if reversed, would entitle the
11 respondent to prevail in whole or in part on that
12 appeal".

13 In other words, an order that necessarily
14 affects the final judgment includes - - - includes,
15 according to the legislature, an order favorable to
16 the respondent and which would require a result
17 favorable to - - - in other words an affirmance. How
18 can - - - if you have - - - if the rule is that
19 something that would - - - that an order that would
20 require you to affirm necessarily affects, why not
21 also one that would require you to reverse or modify?

22 MR. COZIER: Because it seems to me, Your
23 Honor, even reading that phrase in 5501(a)(1), the
24 reference is, again, to from an appeal from the final
25 judgment which, if reversed, would entitle the

1 respondent to prevail, in whole or in part, on that
2 appeal. And it seems to me it does not change the
3 nature of the final judgment here.

4 CHIEF JUDGE LIPPMAN: Okay, anything else,
5 counsel?

6 MR. COZIER: No, unless there are any
7 further questions.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. COZIER: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you.

11 Rebuttal?

12 MR. HORN: Yes, Your Honor. Thank you very
13 much. Very briefly, I think that the hypothetical
14 that was posed by Justice Smith is right on. I think
15 that that, in and of itself, is the distinction
16 between the Second Department's approach on this and
17 the First Department's approach on this. It doesn't
18 have to be just that a reversal of the interlocutory
19 order would necessarily vacate the language that's in
20 that judgment as it was drafted by the victorious
21 party. It's would it result in a modification or a
22 reversal of that judgment. A judgment can be
23 affected, not only by removing language, but also by
24 adding language. Not only by vacating a decretal
25 paragraph but by adding a decretal paragraph.

1 CHIEF JUDGE LIPPMAN: So where do you draw
2 the line? Anything that, in your words, impacts,
3 that's the - - -

4 MR. HORN: Well, Your Honor, I thought
5 about that while I was sitting there and I want to -
6 - -

7 CHIEF JUDGE LIPPMAN: Amend - - -

8 MR. HORN: - - - further address the
9 question that was - - -

10 CHIEF JUDGE LIPPMAN: You want to amend?

11 MR. HORN: Yeah, yeah.

12 CHIEF JUDGE LIPPMAN: Okay, go ahead.

13 MR. HORN: So it doesn't - - - the court
14 can approach it in several different ways. It can
15 say - - - it can broadly say anything that impacts
16 upon the final judgment necessarily affects the
17 judgment. Or, if the court's not comfortable with
18 that, in the context of this case you have,
19 specifically, dismissal of prior claims, right, an
20 order dismissing claims that would necessarily affect
21 the judgment. The court could simply say that. The
22 court could also apply the Second Department rule
23 that I cited to earlier that says denial of leave to
24 amend to add a claim necessarily affects. Again,
25 these are not discovery orders or - - -

1 CHIEF JUDGE LIPPMAN: Would that - - -

2 MR. HORN: - - - ancillary orders.

3 CHIEF JUDGE LIPPMAN: Would that hold in
4 all such situations?

5 MR. HORN: I would submit, Your Honor - - -

6 CHIEF JUDGE LIPPMAN: In other words, we're
7 doing a rule that affects other cases and it's got to
8 be something that can apply more broadly.

9 MR. HORN: Yes, and I would submit, Your
10 Honor, respectfully, that whether you allow a party
11 to pursue a claim, or whether you dismiss their
12 claim, necessarily affects - - -

13 CHIEF JUDGE LIPPMAN: Or - - -

14 MR. HORN: - - - a judgment.

15 CHIEF JUDGE LIPPMAN: Or do we get into a
16 situation where the exception becomes the rule?

17 MR. HORN: Well, Your Honor, I don't think
18 so because I don't think you're engendering a
19 situation where any ancillary order that's handed
20 down during the course of litigation, if you pursue
21 that line, would necessarily affect the judgment.

22 Second point I'd like to make on rebuttal,
23 my adversary acknowledged, under hypothetical one
24 from Justice Smith, that dismissal of a claim does
25 necessarily affect the final judgment. Well, that's

1 what we have here. Again, it's two interlocutory
2 orders that we're - - -

3 JUDGE CIPARICK: But again - - -

4 MR. HORN: - - - asking this court - - -

5 JUDGE CIPARICK: - - - you could have - - -

6 MR. HORN: - - - to exercise jurisdiction.

7 JUDGE CIPARICK: You did appeal. You filed
8 a notice of appeal and you didn't perfect the appeal.
9 I mean, it's - - -

10 MR. HORN: That was on the second one. The
11 first one was specifically dismissal of the claims.
12 We're claiming that that should have been reviewed
13 because the dismissal of those claims, under the
14 circumstances, and particularly without granting
15 leave to replead under the circumstances, necessarily
16 affects the - - -

17 JUDGE SMITH: But you're not saying - - -

18 MR. HORN: - - - final judgment.

19 JUDGE SMITH: You're not arguing that those
20 claims were good; you're just saying you should have
21 been given a chance to amend.

22 MR. HORN: Or it should have been - - -
23 yes, it should have been denied because we possessed
24 those claims under Leon, or it should have been
25 granted with leave to replead.

1 Second - - - the further point I'd like to
2 make - - - so that's, I submit, a concession, on the
3 part of the respondents that jurisdiction would be
4 appropriate under that particular interlocutory
5 order.

6 Now, the last point I'd like to make, and
7 this gets back to - - -

8 CHIEF JUDGE LIPPMAN: Last point,
9 counselor.

10 MR. HORN: Last point I'd like to make, and
11 this gets back to the actions of trial counsel, is
12 that there was a misstatement by my colleague when my
13 colleague stated that the request for relief in the
14 formal leave to amend was not made until after the
15 note of issue was filed. That's incorrect.

16 And if you look at page 1069 in the
17 appendix, you'll see that in October of 2007, which
18 is not that far into the litigation - - - now, the
19 preliminary conference issue had just been determined
20 in September of 200- - - - of the prior year. And so
21 at that point there was an affirmative request, and
22 you'll see, permitting defendants to amend their
23 counterclaims to add a counterclaim for breach of
24 contract. It's in black and white. This is well
25 before - - - well before - - -

1 CHIEF JUDGE LIPPMAN: Okay, couns - - -

2 MR. HORN: - - - the note of issue was ever

3 filed.

4 CHIEF JUDGE LIPPMAN: We'll take a look.

5 MR. HORN: Thank you very much, Your

6 Honors.

7 CHIEF JUDGE LIPPMAN: Thanks. Thank you

8 both.

9 MR. HORN: Good afternoon.

10 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Siegmund Strauss, Inc. v. East 19th Realty Corp., No. 162 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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