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COURT OF APPEALS
STATE OF NEW YORK

FARAGE,

Appellant,

-against-

NO. 95
AIM CORP.,

Respondent.

20 Eagle Street
Albany, New York
October 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MATTHEW C. HUG, ESQ.
HUG LAW, PLLC
Attorney for Appellant
21 Everett Road Extension
Albany, NY 12205

KEVIN F. BUCKLEY, ESQ.
HOWARD S. KRONBERG, ESQ.
MOUND COTTON WOLLAN & GREENGRASS, LLP
Attorney for Respondent
1 New York Plaza
44th Floor
New York, NY 10004

Alexander Reaves
Official Court Transcriber

1 CHIEF JUDGE WILSON: First case on the calendar
2 is Farage v. AIM Corporation. Counsel?

3 MR. HUG: Good afternoon, Your Honors. May I
4 reserve three minutes for rebuttal?

5 CHIEF JUDGE WILSON: Yes, sir.

6 MR. HUG: Your Honors, I think we must be mindful
7 of the procedural posture of this case, a fact that
8 Respondents are keen to overlook. This is a 3211 motion.
9 The entirety of their brief is attempts to resolve issues
10 of fact that haven't even been raised at this stage. The
11 lower courts decided this pursuant to 3211(a)(1),
12 documentary evidence, and you would not find that in any of
13 the - - - mention of that in any Respondent's briefs.

14 The standard here is quite high. It is limited
15 to the four corners of the insurance contract and requires
16 that the document itself establish that my client's claim
17 needs to be dismissed. And that is impossible because
18 there is a condition that must be fulfilled in order for
19 her to have the right to sue under the contract. That
20 condition requires the property to be fully rehabilitated,
21 repaired. This court stated in Executive Plaza - - -

22 JUDGE TROUTMAN: During the time that passed,
23 what, if anything, did your client do to indicate whether
24 or not there were impediments to the condition preceding
25 being satisfied?

1 MR. HUG: Sure. Again, with - - - with a mind to
2 that we are at a 3211 stage, she alleged in her complaint
3 that the repairs were complex and that they would have
4 required multiple years of construction under the best of
5 circumstances - - -

6 JUDGE TROUTMAN: How much time had passed at that
7 point?

8 MR. HUG: How much time had passed at what point?

9 JUDGE TROUTMAN: When she asserted that it was
10 going to take multiple of years?

11 MR. HUG: Well - - -

12 JUDGE TROUTMAN: Had she alerted them in the
13 interval of any obstacles or concerns that they weren't
14 holding up to their part?

15 MR. HUG: Yes, it's throughout the complaint.
16 There are several - - -

17 JUDGE TROUTMAN: No, I'm not just saying
18 throughout the complaint. You're saying that these actions
19 were actually taken by her during the interval of time that
20 passed?

21 MR. HUG: Yes. She alleged that she did those
22 things in the complaint, so she alleged that they - - -
23 that the insurance company assigned a succession of claims
24 adjustors, none of whom would take responsibility. They
25 forbade her from commencing - - - commencing in the repairs

1 until their expert inspected the property. They sent
2 inspectors that had no capacity to understand the
3 engineering challenges posed by the structural damage.

4 JUDGE GARCIA: That all goes to me - - - I'm
5 sorry, here. That seems to me to all go to whether it
6 could be completed in a reasonable time, and it doesn't
7 seem to me that that's really the issue, here. Executive
8 Plaza, which I think is a motion to dismiss - - - a
9 certified question here, but it's a motion to dismiss in
10 federal court.

11 It seems to me the issue is, what did the insured
12 do to alert the insurance company that this was taking
13 longer, right, or and the reasons why it was taking longer,
14 to give them notice in some way that the two-year period
15 wouldn't be complied with, because I think Executive Plaza,
16 as I read it, doesn't say the two-year period's
17 unreasonable.

18 MR. HUG: Right.

19 JUDGE GARCIA: It just says, in a particular
20 case, it may be unreasonable to complete the repairs within
21 that time, but this case seems to be a little bit different
22 because it's not - - - I don't think they're arguing
23 couldn't complete their repairs. I think they're arguing,
24 we didn't know what you were doing until six years later.

25 MR. HUG: Well, they haven't answered the



1 complaint. I mean, again, we are - - - if you're looking
2 at 3211(a)(1), documentary evidence, they don't have it.
3 The lower courts are obviously incorrect, so then you must
4 proceed to an issue that the lower courts did not decide,
5 which is 3211(a)(7), which is, did she fail to state - - -
6 did her pleadings fail to state a cause of action. We
7 aren't - - -

8 JUDGE GARCIA: Well, they've put in a document
9 that is you have a two-year limitation period, here, which
10 would apply. I mean, there's nothing on its face that says
11 that two-year limitation period's unreasonable as I read
12 Executive Plaza, so what have you shown to show, to
13 demonstrate, that that application of the two-year period
14 here in these circumstances would be unreasonable?

15 They've put in a document showing the limitation.
16 What have you put in to counter that that would be
17 unreasonable to enforce, here?

18 MR. HUG: Well, they put - - - they put in the
19 contract, which is what we're looking at, right?

20 JUDGE GARCIA: And that has a two-year
21 limitation?

22 MR. HUG: It has a two-year limitation, and it
23 requires all repairs to be completed before suit can be
24 commenced. In that regard, the contract almost mirrors the
25 contract in Executive Plaza.

1 JUDGE GARCIA: Right. And what is the
2 circumstances that you have raised to show it's
3 unreasonable to enforce that here?

4 MR. HUG: Okay. So we're talking about a
5 3211(a)(7) issue.

6 JUDGE GARCIA: Right.

7 MR. HUG: Not (a)(1), right? Okay. So then you
8 just look at the four corners of the pleading, and she's
9 adequately pleaded it. It's - - - it's throughout the
10 brief, so that was - - -

11 JUDGE GARCIA: I guess to Judge Troutman's point,
12 though, where in that complaint specifically does it
13 indicate that she preserved her rights or she notified the
14 company?

15 MR. HUG: Okay.

16 JUDGE GARCIA: Where is that?

17 MR. HUG: So in her pleading, she states that
18 immediately upon the - - - the incident, she notified the
19 insurance company that she wanted to pursue a replacement
20 value recovery. She alleges that the insurance company
21 immediately responded that according to their estimate,
22 full replacement value would be 1.4 million dollars to - -
23 - to complete, evidencing through her pleading that they
24 knew that she wanted a full replacement value. That's what
25 she was going for.

1 They used their estimate of 1.4 million dollar
2 replacement value from the start to say she's underinsured,
3 and that - - - that began the long, steady drip of
4 frustration and unfair business practices, so they were on
5 notice from the beginning. She - - - she alleges
6 throughout her pleadings. We tried to hire people to come
7 in to do the work. There were liens placed on the building
8 because the Tower Insurance company refused to pay the - -
9 -

10 JUDGE GARCIA: And did they know that? Is there
11 anything in the record that the insurance company knew
12 that?

13 MR. HUG: It doesn't matter at this stage.

14 JUDGE GARCIA: It doesn't?

15 MR. HUG: Because we're looking at the pleading.

16 JUDGE GARCIA: So once you say, I want a
17 replacement value, you could come back ten years later and
18 say, done?

19 MR. HUG: No. I think that the six-year statute
20 of limitations would be applicable, and - - - and no, I'm -
21 - -

22 JUDGE GARCIA: So any time within six years, you
23 could just come back and say, done?

24 MR. HUG: To avoid 3211 dismissal. If you allege
25 that the repairs were complex and weren't going to be able

1 to be completed within two years, which she did, and lay
2 out a - - - a series of allegations that their entire
3 arguments have been disputing the veracity of those
4 allegations - - -

5 JUDGE RIVERA: Let me ask it directly. Does she
6 allege somewhere that she notified them, I can't complete
7 these repairs in two years?

8 MR. HUG: In so many words, I can't complete
9 these repairs in two years, no, but if you look at the - -
10 -

11 JUDGE RIVERA: But could one liberally construe
12 that from the complaint?

13 MR. HUG: Oh, yes, you certainly could.

14 JUDGE RIVERA: Where would - - - I'm asking.

15 MR. HUG: Oh, okay. Appendix - - - I'll just
16 give you the citation.

17 JUDGE RIVERA: Yes.

18 MR. HUG: 20, 22, 27, and 28.

19 JUDGE HALLIGAN: Would you say those numbers
20 again, please?

21 MR. HUG: 20, 22, 27, and 28.

22 JUDGE SINGAS: So is your argument that there was
23 sufficient notice if you read the pleadings or there
24 shouldn't - - - there's no notice requirement at all?

25 MR. HUG: No, there's clearly notice was given

1 because she alleged that immediately after the fire
2 destroyed her building, a series of events took place
3 between her and Tower Insurance Company. That is
4 sufficient to say that they are on notice. They aren't
5 claiming that they weren't on notice. They are claim - - -

6 JUDGE RIVERA: Well, notice of - - - of the
7 damage. The question is whether or not there's notice that
8 it won't be repaired, if that's what she's looking for,
9 full replacement, within two years.

10 MR. HUG: Right. I mean - - -

11 JUDGE RIVERA: And that's what you're saying. If
12 we look, go to 20, 22, 27, 28 - - -

13 MR. HUG: Um-hum. You will see a history - - -

14 JUDGE RIVERA: Liberally construe those
15 paragraphs and that satisfies this requirement?

16 MR. HUG: Now. At this stage, now.

17 JUDGE RIVERA: Yeah, no, no.

18 MR. HUG: Right.

19 JUDGE RIVERA: On the motion to dismiss liberal
20 construction. I agree.

21 MR. HUG: Right. Once we get - - -

22 JUDGE RIVERA: Assuming all facts asserted true.

23 MR. HUG: Yes, which is what you did - - - well,
24 what the federal court did in Executive Plaza was to say,
25 you know, this is a motion to dismiss. Let's send it back

1 for discovery to take place to - - - to see if the factual
2 allegations that they want this court to resolve are borne
3 out, or my client's are borne out, or there are internal
4 emails or documents, and now we're dealing with an
5 insurance company and we need to consider the public policy
6 of a decision like this.

7 Are we going to make it this easy? If only we
8 drag our feet and all we have to do is frustrate the
9 claimant at every turn and that there's a secret menu item
10 of - - - that is not in the contract, that you need to
11 bring an essentially frivolous lawsuit before you're
12 entitled to bring it to show us that you really are
13 serious. Otherwise, you can't ultimately sue.

14 JUDGE SINGAS: But in Executive Plaza, the
15 plaintiff alleged the actions that they took, right, to
16 allow the court to make an assessment if it could, in fact,
17 be completed in two years? I mean, they laid out what they
18 did to restore the property, and we don't have that, here.

19 MR. HUG: You do have that. She lays out that
20 she spent 1.3 million dollars of her own money. She lays
21 out that she was hiring and being frustrated by hiring
22 vendors that required preapproval. Then they weren't paid,
23 then liens were put against the property, then she can't do
24 anything until their appraisers that they send out there.

25 JUDGE TROUTMAN: But prior to her complaint,

1 what, if anything, do you believe she was required to do to
2 keep the insurance company, if at all, informed that the
3 condition preceding could not reasonably be completed?

4 MR. HUG: Sure. I think that we need to look at
5 this from a practical standpoint of how people deal with
6 their insurance companies, all right, instead of an
7 esoteric assertion that, you know, there are certain
8 benchmarks that people have to take.

9 She's alleging she's keeping in constant contact
10 with these people. She's being bounced around, likely
11 bounced around in phone trees as we're all used to doing.

12 JUDGE HALLIGAN: But where is there a specific -
13 - - right here.

14 MR. HUG: Oh.

15 JUDGE HALLIGAN: Where is there something
16 specific in the record you can point us to which says that
17 she notified them that it was going to take more than two
18 years?

19 MR. HUG: I think that if you liberally construe
20 the complaint and the allegations that she's making as to
21 the allegations - - -

22 JUDGE HALLIGAN: But specifically - - - you
23 definitely - - - I take it you are referring to the
24 allegations that she tried to call them and it was
25 difficult and there were phone trees, but is there - - -

1 are there any allegations about the contact of those
2 communications which indicate that she was apprising them
3 that it would take more than two years, or is it your
4 position that she doesn't have to do that?

5 MR. HUG: What I'm saying is is that at this
6 stage, not only do you take what is alleged to be true, you
7 draw every favorable inference, so the only inference that
8 can be had from her allegations is that she's in constant
9 contact with these people.

10 JUDGE HALLIGAN: She may be in constant contact,
11 but I'm asking whether there's anything - - - or there may
12 be allegations to that effect, whether there's anything
13 that specifically goes to the content of those
14 communications and whether it included any reference to how
15 long it would take?

16 MR. HUG: But Your Honor, again, we need to look
17 at this from the ground level.

18 JUDGE HALLIGAN: I'm just asking what the record
19 reflects. It may be no.

20 MR. HUG: Right. So as two years passes, and
21 she's still in communication with these people about why
22 isn't this getting done, it's self-evident that the repairs
23 have taken longer than two years. Otherwise, she wouldn't
24 be constantly keeping in touch with them.

25 JUDGE HALLIGAN: Right, okay. And do you agree

1 that she has to apprise them that it's going to take more
2 than two years, whether she has done that in light of the
3 communications or not, but if she had not been in contact
4 with the insurance company at all, but she could allege
5 that it, in fact, took more than two years, what would your
6 position be then?

7 MR. HUG: Under that hypothetical, I mean, I
8 would need to know what the allegations were. I - - -

9 JUDGE HALLIGAN: Well, let's assume the
10 allegations are that she is not in contact with the
11 insurer, but she has alleged that, in fact, the repairs or
12 replacement took more than two years.

13 MR. HUG: And they're trying to dismiss strictly
14 on a statute of limitations defense?

15 JUDGE HALLIGAN: Um-hum. Yeah. I'm asking - - -
16 I'm asking whether she has to notify them in any way that
17 she can't do it within two years?

18 MR. HUG: No. I don't think - - - that's not in
19 the contract.

20 JUDGE HALLIGAN: So - - -

21 MR. HUG: Even if it's in the contract, you have
22 to notify us properly.

23 JUDGE HALLIGAN: So the two-year limitation
24 cannot be applied in any case where she can show down the
25 road that it took more than two years to actually complete

1 the repairs? Sorry. I see your light's on.

2 MR. HUG: Can I complete the - - -

3 CHIEF JUDGE WILSON: Yeah. Please do.

4 MR. HUG: Yeah. So if the contract says that you
5 need to notify them within a certain amount of time, I
6 think that would present a different issue. That isn't the
7 issue present before the court. What's present before the
8 court are allegations that it was an immediate notification
9 and a constant battle with these people for over six years.
10 Now, they weren't battling with her because they thought
11 that it was - - - the repairs were done. And she sued
12 promptly within the normal statute of limitations shortly
13 after she completed the repairs.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. BUCKLEY: May it please the Court. Kevin
16 Buckley. Mound Cotton Wollan & Greengrass on behalf of the
17 insurance company, Respondents. This court has laid out a
18 framework for what an insured should do when coming up
19 against a contractual suit limitation, period, and that
20 begins with your decision in Blitman.

21 In Blitman, the insured, like here, said it was
22 unreasonable to have to sue the insurance company within
23 the twelve-month period. It was commercially impractical
24 is what the court said, and this court rejected that
25 argument and said, you have to do something as an insured

1 to protect your rights.

2 CHIEF JUDGE WILSON: Well, the difference between
3 this case and Blitman is this case has a provision that
4 precludes suit until a certain event happens, right? That
5 wasn't present in Blitman.

6 MR. BUCKLEY: Well, in Blitman, you had the two-
7 year suit limitation provision like you do here, and in
8 Blitman, the insurance company did not deny the claim.
9 They were continuing to investigate, so arguably, you could
10 say there was nothing to sue upon, yet this court said, you
11 have options in Blitman.

12 And the options were - - - and they're very
13 reasonable, and I'll explain why. The options were, you
14 can approach the insurance company and request an extension
15 on the suit limitation provision. The contractual
16 provision. You're asking the insurance company, can we
17 extend this? Or you can commence suit.

18 So let's go to the first one. If you approach an
19 insurance company and ask them, can you extend the suit
20 limitation provision because I am diligently working on
21 repairing my property. I've contacted the building
22 department, I've done X, Y, and Z, this is all I've done,
23 but I cannot complete the repairs within two years, would
24 you extend it by six months?

25 The insurance company would have to be crazy to



1 say no, because the alternative is you're going to sue
2 them, so they would extend it, and because of that, the
3 insurance company is on notice that you're continuing to
4 assert this right. You're going to go after the whole back
5 and the replacement cost, and if you don't - - - if they do
6 not extend the limitation period for a reasonable period of
7 time, you commence suit.

8 You request either a breach of contract,
9 declaratory judgment, anticipatory breach, because if
10 you're not going to extend the suit limitation period,
11 basically, what you're saying is, your rights may accrue
12 after the two-year period, but we're not going to pay you.

13 JUDGE HALLIGAN: So your position is that - - - I
14 take it your position then is that notice is not
15 sufficient. In other words, if the insurer declines to
16 extend the two-year period, that you have to bring a suit
17 within the two-year period even if the repairs have not
18 been completed and you've been diligently attempting to do
19 that; is that - - - is that the bottom line?

20 MR. BUCKLEY: Yes, Your Honor. That's my
21 position, and that I believe was the position of this court
22 in Blitman, and as the court recognized in Executive Plaza,
23 when it said, this is why this case is different in
24 Executive Plaza, because the insured in Executive Plaza did
25 what we told them in Blitman.

1 JUDGE GARCIA: So - - -

2 MR. BUCKLEY: They protected their rights and
3 they commenced suit - - -

4 JUDGE GARCIA: To the Chief - - -

5 MR. BUCKLEY: - - - and that was thwarted by the
6 insurance company, which was unfair.

7 JUDGE GARCIA: To the Chief Judge's point - - -

8 MR. BUCKLEY: Yes.

9 JUDGE GARCIA: - - - is there anything in this
10 contract specifically that we have in this case that would
11 prevent the insured from doing that?

12 MR. BUCKLEY: Prevent - - -

13 JUDGE GARCIA: Bringing a suit?

14 MR. BUCKLEY: Not that I'm aware of.

15 JUDGE CANNATARO: What do you say to your
16 adversary's argument that at the pleading stage, 3211
17 motion stage, that suit would have been eminently
18 dismissible because the contract also requires completion
19 of the work prior to an action?

20 MR. BUCKLEY: Right. Because if you commence
21 suit before the repairs were completed and you made an
22 allegation that it is impossible to complete the repairs
23 during this period of time, I'm seeking a declaration that
24 this suit limitation provision is not reasonable and fair -
25 - -

1 JUDGE CANNATARO: Oh, it's a different - - - it's
2 a declaratory judgment action?

3 MR. BUCKLEY: Declaratory judgment or
4 anticipatory breach. If the insurance company tells you,
5 we're not going to extend the suit limitation provision.
6 Basically, your rights may accrue later, but we're going to
7 prevent you from suing and acting on it.

8 JUDGE HALLIGAN: But is that what Executive Plaza
9 requires, or does Executive Plaza say that the period isn't
10 reasonable if you can't complete the repairs within that
11 time?

12 MR. BUCKLEY: Well, I think it says both, Your
13 Honor. I think it's been - - -

14 JUDGE HALLIGAN: Well, if it says - - - if it
15 says that the period isn't reasonable, if it can't be
16 completed, then I'm not sure why you would need to bring an
17 action along those lines. Doesn't Executive Plaza make
18 that unnecessary?

19 MR. BUCKLEY: I don't think so, and the problem
20 that gets caused by that is what I think was alluded to
21 earlier, is that if someone comes six years later and says,
22 well, it took more than two years to complete the repairs,
23 so - - -

24 JUDGE TROUTMAN: But what if, during the course
25 of trying to get the repairs, the property owner sends in

1 updates? These are the actions that I have taken. I have
2 been unable to get approval or inspections, and I've had
3 some obstacles with your processing department, and names a
4 person. That's not enough, if they're not giving you
5 information establishing that there's an impediment to
6 proceeding in that timely fashion?

7 MR. BUCKLEY: Well, I would say, reasonably, that
8 would be enough for the insurance company to say, yes,
9 let's extend the suit limitation provision, and if the
10 insurance company is not reasonable, then commencing suit,
11 and I think the next step after that is when the insurance
12 company thwarts your rights by moving to dismiss the claim
13 as either premature or untimely.

14 As this court says, it's premature a day before
15 it expires, and it's untimely a day after it expires in
16 Executive Plaza, that's just not fair. That's when we go
17 to - - -

18 CHIEF JUDGE WILSON: I mean, you seem to - - -

19 JUDGE HALLIGAN: I'm having a hard time, though,
20 seeing how you can square - - - but let's assume, as Judge
21 Troutman suggests, that you are on notice. I realize you
22 might say here it's not the case.

23 MR. BUCKLEY: Yes.

24 JUDGE HALLIGAN: But you're on notice, clear
25 notice from the insured that the repairs can't be completed

1 within two years, and that that's a reasonable fact. I'm
2 not sure how needing to go to court prophylactically is - -
3 - is something that is right under Executive Plaza. Maybe
4 you can help me understand that?

5 MR. BUCKLEY: Yes, because either getting the
6 extension or going to court, it - - - it shortens the time
7 line. It keeps hold of the repair.

8 JUDGE HALLIGAN: Okay, but getting the extension
9 - - -

10 MR. BUCKLEY: Yes.

11 JUDGE HALLIGAN: - - - I appreciate it, and there
12 may be all kinds of business reasons why that's practical
13 and you're suggesting that's the case, but what I'm asking
14 is, if an extension is denied, how do you square your view
15 that that insured, having provided notice, having requested
16 an extension, reasonably having repairs or replacement that
17 take more than two years still have to bring a suit with
18 Executive Plaza and why that's not unreasonable under
19 Executive Plaza?

20 MR. BUCKLEY: Because I believe Executive Plaza
21 pulls in and says, Blitman supports the position here
22 because they did in Executive Plaza what Blitman said.
23 They commenced suit, and it was only when they were
24 presented with the catch-22 of the suit being dismissed and
25 then being found untimely later, that you need the

1 exception that Executive Plaza provided. It was - - -

2 JUDGE CANNATARO: So it is an exception in
3 Executive Plaza? To the last question, it would be an
4 exception that excuses the claimant from having to go
5 through the rigamarole of filing a suit, getting it
6 dismissed as being untimely or premature, and says, if you
7 could provide a notice - - - if you can show notice to the
8 carrier that completion within the limitations period is
9 unreasonable, we'll let you go on that. We'll let it slide
10 under those circumstances?

11 MR. BUCKLEY: Yes, Your Honor.

12 JUDGE CANNATARO: So I think what we keep going
13 back to about this requirement of a suit, under Executive
14 Plaza, it's not really an absolute requirement of notice,
15 rejection, suit. It can be notice, rejection, and then you
16 know, you told them, you can sue later. Isn't that what
17 Executive Plaza says?

18 MR. BUCKLEY: I believe so, if I follow you, Your
19 Honor, but it - - -

20 JUDGE CANNATARO: I'll just say it one more time,
21 and then we don't have to belabor this, but you seem to be
22 implying that you can give notice to the carrier that it
23 cannot reasonably completed - - - the work cannot be
24 completed within the limitations period.

25 They say no, and you seem to be implying that



1 there is then a subsequent requirement that you also
2 commence an action, and my reading of Executive Plaza and I
3 think some of the questions you've been hearing say, no,
4 that second component, the commencement of a subsequent
5 action is not necessary if you can later show that it
6 wasn't reasonable to expect work to be done within two
7 years?

8 MR. BUCKLEY: I do believe the action commencing
9 the action or getting an extension is a necessary and
10 reasonable requirement under Blitman.

11 CHIEF JUDGE WILSON: So suppose the two-year
12 limit in the contract had been a two-day limit?

13 MR. BUCKLEY: Yeah.

14 CHIEF JUDGE WILSON: Would you still need to go
15 to the insurer and ask for an extension?

16 MR. BUCKLEY: If that's what's written in the
17 contract - - -

18 CHIEF JUDGE WILSON: Yep.

19 MR. BUCKLEY: - - - and you're trying to modify
20 the contract, I would say following Blitman, yes, you
21 should ask for an extension and explain, this is
22 unreasonable, and the insurance company would say, either,
23 yes, we agree because you can't repair, or no, and then
24 it's time to go to the court and say, court declaratory
25 judgment or anticipatory breach of contract. We cannot

1 complete these repairs - - -

2 CHIEF JUDGE WILSON: So there's no way you could
3 make the unreasonableness argument on the face of a
4 contract? You always are going to have to either get an
5 extension and then have to go to court because they say no,
6 or you're going to have to get an extension and they say
7 yes?

8 MR. BUCKLEY: Yes, Your Honor. As the first step
9 in a multi-step process, and then the next step in
10 executive - - -

11 CHIEF JUDGE WILSON: And that's not - - - we
12 don't find that in the contract? You're drawing that from
13 Blitman and Executive Plaza?

14 MR. BUCKLEY: Yes, Your Honor, and then I would
15 like to just touch upon the exception, which seems to be
16 what my adversary was focusing on here, is the exception is
17 that we couldn't complete the repairs within the two-year
18 period, and therefore, you cannot enforce that provision.

19 The allegations within the complaint do not
20 identify anything that would alert the insurance company
21 that within two years, the repairs could not be made,
22 unlike in Executive Plaza, where there were pages and pages
23 of paragraphs 14 to 23 in the Executive Plaza complaint set
24 forth dates - - -

25 JUDGE RIVERA: Can I ask you? What if the nature

1 of the actual damage and the nature of the necessary
2 repairs would, on their face, make clear that no one could
3 complete it in two years. Would that matter?

4 MR. BUCKLEY: I believe the same requirements
5 would apply, Your Honor, because without some guide rails
6 for the parties to follow, this could be a lawsuit that
7 commences six years or ten years after the loss because it
8 just takes more time.

9 JUDGE RIVERA: Let's say the damage is to a
10 building that's fifty floors.

11 MR. BUCKLEY: Yep.

12 JUDGE RIVERA: Very large space, right, square
13 footage on each floor. It's hollowed out. It's obvious,
14 on its face, that this cannot be done in two years, even
15 working around the clock.

16 MR. BUCKLEY: Right.

17 JUDGE RIVERA: You still say that they cannot
18 proceed, just making that kind of an argument. They just
19 asserted that in their complaint; given the nature of these
20 damages, it's unreasonable to expect that this would be
21 repaired within two years.

22 MR. BUCKLEY: I don't believe so, Your Honor. I
23 believe there needs to be more factual allegations as to
24 why it could not be repaired within the two years.

25 JUDGE RIVERA: So if it's included in the

1 complaint, I went to two different construction companies.
2 I went to an engineer. They all confirmed this would not
3 be completed within two years; what if she just said that
4 in the complaint?

5 MR. BUCKLEY: I believe that would be closer to
6 the standard.

7 JUDGE RIVERA: Okay.

8 CHIEF JUDGE WILSON: But in that circumstance,
9 would she still have to put you on notice as you review and
10 ask for an extension?

11 MR. BUCKLEY: Yes, Your Honor. I believe so.

12 CHIEF JUDGE WILSON: And what if it's your own,
13 let's say, adjuster who's gone there and sends a report
14 back to you and says, this is going to at least take five
15 years minimum; does she still have to come and ask for an
16 extension?

17 MR. BUCKLEY: I believe so, Your Honor, and
18 because - - - and this is the reason why. The claims are
19 adjusted and paid on an actual cash value basis. That
20 means you're paid for the damage to your property, less
21 depreciation. That's what gets paid up front. Most of the
22 time, insureds make the claim, get the actual cash value
23 payment, and you never see them again.

24 Either the actual cash value payment was enough
25 for them to make the repairs, or they decide not to make

1 the repairs and use the money for something else, so you
2 don't know until a claim is made for a replacement cost
3 coverage and what someone says, we're making the claim for
4 replacement cost coverage, or we're commencing suit to get
5 the replacement cost hold back.

6 And that's an important right for - - -

7 CHIEF JUDGE WILSON: She did notify you, right?
8 The complaint alleges she notified you that she's seeking
9 replacement cost?

10 MR. BUCKLEY: She did not make a request within
11 the 180 date period for the replacement cost, and then she
12 didn't do anything within the first two years to alert us
13 to the fact that she was making the repairs and that she
14 was going to seek the replacement cost hold back. There's
15 nothing specific in the allegations in this complaint, and
16 she did not put in an affidavit - - -

17 JUDGE RIVERA: Well, she's alleging, I regularly,
18 if not daily, was in contact with the insurance company to
19 try to move this forward, and I was obstructed ninety-nine
20 percent of the time.

21 MR. BUCKLEY: Yes.

22 JUDGE RIVERA: What about that kind of an
23 allegation?

24 MR. BUCKLEY: I don't believe that would do it,
25 Judge Rivera.



1 JUDGE RIVERA: Why not?

2 MR. BUCKLEY: Because that's a conclusory
3 allegation that pretty much any plaintiff attorney could
4 copy and paste and thwart the provision in the policy.

5 JUDGE RIVERA: If she details every attempt?

6 MR. BUCKLEY: If she detailed the attempts and
7 the attempts - - -

8 JUDGE RIVERA: Are factual assertions?

9 MR. BUCKLEY: Factual assertions and they
10 reasonably link to causing a delay, that's different.

11 JUDGE RIVERA: A different story? Okay.

12 MR. BUCKLEY: Yes, Your Honor. Thank you.

13 MR. KRONBERG: May it please the court. Howard
14 Kronberg for the Respondent, brokers. Your Honor, I'm
15 happy to say that I'm kind of a bystander on this. It's
16 been ably argued by both sides. I've submitted kind of a
17 me too brief, so if the court has no questions for me, I
18 will yield my time, and I thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. KRONBERG: Thank you, Your Honors.

21 MR. HUG: I guess I'm baffled by the necessity of
22 providing a notice on top of working with your insurance
23 company, because this notice claim that is so important
24 doesn't find its way into the insurance contract with a
25 layperson, who most people, when they're dealing with their

1 insurance company when they're getting their building
2 repaired after a four-alarm fire that completely destroyed
3 it, structurally, through fire and water damage - - -

4 JUDGE RIVERA: So in your view under the
5 contract, what, if anything, did she have to do?

6 MR. HUG: She just had to pursue the repairs of
7 the building within a reasonable period of time.

8 JUDGE RIVERA: Um-hum.

9 MR. HUG: That is it. The insurance company knew
10 full well, as per the allegations, because they were
11 working with her throughout. Nickel and dime her - - -

12 JUDGE SINGAS: You said within a reasonable
13 period of time. There's no time allegations about when
14 this happened, right? We don't know - - -

15 MR. HUG: She says immediately.

16 JUDGE SINGAS: Everything immediately? She can
17 just blanket that?

18 MR. HUG: Well, yes. I mean, you immediately - -
19 - she immediately began the process of repairing the
20 building. The first step was setting it boarded up, and
21 what did the insurance company do? They sent vendors to
22 board the building up, and they didn't pay them, so there
23 were liens put on the building. Then she couldn't - - -
24 then that frustrated her ability to get financing. She was
25 - - -

1 JUDGE SINGAS: I mean, what she characterizes as
2 immediate might not be what somebody else characterizes as
3 immediate. It might not even have been within the two
4 years.

5 MR. HUG: That's what discovery is for, Judge.

6 JUDGE SINGAS: Is it?

7 MR. HUG: Yes.

8 JUDGE SINGAS: I mean, we're supposed to just
9 adopt that it could have been within two years? It could
10 have been within five years? It could have been within
11 twenty-four hours?

12 MR. HUG: That's right.

13 JUDGE SINGAS: We're supposed to guess?

14 MR. HUG: No, you're not guessing. Immediately
15 means immediately, and she - - - she obviously had
16 immediate - - - her allegations are that they boarded it
17 up. I mean, when are you boarding up a fire - - - a burnt
18 out fire building? You're boarding up the windows
19 immediately. She - - - the appraisers are there. The
20 inspectors are there. It's immediately. You must construe
21 this pleading liberally and grant her every possible
22 inference.

23 I would note also that this court decided
24 Executive Plaza before all this happened, so if you - - -

25 JUDGE RIVERA: So if I can just clarify? Your

1 position here is that the reason - - - if I'm understanding
2 you correctly. One, doing liberal constructions of that
3 complaint, doing all the inferences that one could in favor
4 of the nonmovant. Accepting all the facts as asserted as
5 true, someone would read this complaint to say that whether
6 or not she could have done it within two years, put that
7 apart for one moment.

8 They obstructed her ability to even attempt to do
9 so; am I understanding - - -

10 MR. HUG: That's the gravamen of the complaint.

11 JUDGE RIVERA: So your position is not that she -
12 - - without that obstruction, that she couldn't do it
13 within two years. You're not taking that position?

14 MR. HUG: Well, she does allege that. In the
15 complaint, it says, even under the best of circumstances,
16 this was a multiyear construction project.

17 JUDGE RIVERA: Okay.

18 MR. HUG: So yes, she covers it both ways, and I
19 would note that Executive Plaza isn't an exception to
20 anything. We know what the holding is because the court
21 clearly stated, we hold that such a contractual limitation
22 period applied to a case in which the property cannot
23 reasonably be replaced in two years is unreasonable and
24 unenforceable.

25 That means you look at it in the rear view. Was

1 it - - -

2 JUDGE HALLIGAN: Well, we also know though - - -
3 I'm over here.

4 MR. HUG: I keep getting - - -

5 JUDGE HALLIGAN: No worries. I - - - yeah.

6 MR. HUG: It's my fault, the speaker.

7 JUDGE HALLIGAN: But we also know that there was
8 a suit brought there, right?

9 MR. HUG: In Executive Plaza?

10 JUDGE HALLIGAN: Yeah.

11 MR. HUG: Yes, and in dicta, at the end, I think
12 what the court was simply saying was, this decision can
13 stand beside the other without inconsistency because we
14 know what the holding is. The holding doesn't say in
15 Executive Plaza that we hold that a contractual limitation
16 period can be deemed unenforceable if you bring a frivolous
17 lawsuit before - - - before it can be actually brought
18 under the terms of the contract.

19 It simply says, in this case, as an example of
20 how absurd the result ordinarily would be, the - - - it's
21 basically the insurance company spoke out of both sides of
22 their mouth. It's too early to sue, it's too late. It was
23 simply an example that was given as one of many examples, I
24 would imagine, that would be raised in order to demonstrate
25 to this court that the repairs could not be reasonably

1 completed within a time.

2 She has alleged that in her complaint. I think
3 that's sufficient. That's the end of the story. That
4 doesn't mean that she wins. We have discovery, and they
5 could make a summary judgment motion, but all of this I
6 think is premature.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. HUG: Thank you.

9 (Court is adjourned)

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

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of Farage v. AIM Corp., No. 95 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Alexander Reaves

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: October 19, 2024

