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COURT OF APPEALS
STATE OF NEW YORK

1995 CAM LLC,

Respondent,

-against-

NO. 72

WEST SIDE ADVISORS,

Appellant.

20 Eagle Street
Albany, New York
September 9, 2025

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:

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Donna Gould
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar
2 is 1995 CAM LLC v. West Side Advisors.

3 MR. SHACKMAN: Good afternoon, Your Honors.
4 May it please the court, my name is Steve Shackman, of
5 Lambert & Shackman, here for the defendants-appellants.

6 Your Honor, may I please reserve two minutes for
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MR. SHACKMAN: Thank you. The guarantee here,
10 which is the subject of this case, was a limited guarantee,
11 and the condition which must be met to effectuate the
12 limitation of the guarantor's personal liability is that
13 the tenant had to surrender the premises in a prescribed
14 manner, and the key word is surrender. The error of the
15 court below, we maintain, is construing paragraph 25 of the
16 lease, which is the no-waiver clause, in a manner which
17 conflates surrender and acceptance, which are two separate
18 facts and two separate legal concepts.

19 JUDGE TROUTMAN: How does the lease impact your
20 argument?

21 MR. SHACKMAN: I'm sorry, judge?

22 JUDGE TROUTMAN: How does the terms of the lease
23 impact that?

24 MR. SHACKMAN: Well, because - - - and this is
25 the - - - this is the whole point of the case, that - - -



1 that the guarantee says that the tenant must surrender - -
2 - surrender possession pursuant to the terms of the lease.

3 JUDGE TROUTMAN: Uh-huh.

4 MR. SHACKMAN: And the landlord's argument, and
5 what the court adopted, is that the - - - that was not met
6 because there was no acceptance of the surrender under the
7 no-waiver clause, paragraph 25. In all other respects,
8 it's undisputed by everyone that the surrender by the
9 tenant complied with all the terms of the lease.

10 CHIEF JUDGE WILSON: So factually, what - - -
11 sorry. Straight ahead of you. Factually, what did the
12 tenant do to surrender?

13 MR. SHACKMAN: Okay. The first thing the tenant
14 did was it served a thirty-day notice of its intention to
15 surrender.

16 CHIEF JUDGE WILSON: That in itself, isn't
17 surrender, right?

18 MR. SHACKMAN: No.

19 CHIEF JUDGE WILSON: Okay.

20 MR. SHACKMAN: That was part of the process. In
21 other words, the guarantee, the good guy provision of the
22 guarantee - - -

23 CHIEF JUDGE WILSON: I'm just asking the facts.

24 MR. SHACKMAN: Okay.

25 CHIEF JUDGE WILSON: What are the facts that you



1 would point to, the - - -

2 MR. SHACKMAN: Well, we - - -

3 CHIEF JUDGE WILSON: - - - the things that
4 constituted the surrender, what the tenant did?

5 MR. SHACKMAN: The tenant first served a thirty-
6 day notice - - -

7 CHIEF JUDGE WILSON: Okay.

8 MR. SHACKMAN: - - - on the landlord, and that
9 notice said, we intend to - - - pursuant to paragraph 9 of
10 the Second Amendment, which is their guarantee - - -

11 CHIEF JUDGE WILSON: Okay. So would you have to
12 do that to - - - to be a lawful surrender, would you have
13 had to do that, to send the notice?

14 MR. SHACKMAN: To comply with the limitation in
15 this particular guarantee, yes.

16 CHIEF JUDGE WILSON: Okay. So then, the next
17 thing that was done - - - but that's not sufficient, I take
18 it?

19 MR. SHACKMAN: That's not sufficient.

20 CHIEF JUDGE WILSON: Okay. So then - - -

21 MR. SHACKMAN: That's the first step - - -

22 CHIEF JUDGE WILSON: Okay.

23 MR. SHACKMAN: - - - under the language of the
24 guarantee.

25 CHIEF JUDGE WILSON: Next?

1 MR. SHACKMAN: The next - - - the tenant
2 completely vacated the premises, broom clean - - -

3 CHIEF JUDGE WILSON: That's essential?

4 MR. SHACKMAN: - - - free - - - that is
5 essential, also, under the - - -

6 CHIEF JUDGE WILSON: And it's sufficient?

7 MR. SHACKMAN: - - - under the language of the
8 guarantee. Yes, that's sufficient.

9 CHIEF JUDGE WILSON: So that's all you had to do
10 was to send the notice and vacate?

11 MR. SHACKMAN: That's correct.

12 CHIEF JUDGE WILSON: That's it?

13 MR. SHACKMAN: That's correct. Correct that - -
14 -

15 CHIEF JUDGE WILSON: Did they do anything else?

16 MR. SHACKMAN: No, they - - - no.

17 CHIEF JUDGE WILSON: Okay. So then how - - -

18 MR. SHACKMAN: Well, they also delivered the
19 keys, but that's not essential to our argument.

20 CHIEF JUDGE WILSON: Okay. So how do you deal
21 with the end of paragraph 25, the no-waiver provision, that
22 says, no employee of owner or owner's agent shall have any
23 power to accept the keys of such - - - said premises prior
24 to the termination of the lease, and delivery of keys to
25 any such agent or employee shall not operate as a

1 termination of the lease or a surrender of the premises.

2 MR. SHACKMAN: Good point.

3 CHIEF JUDGE WILSON: It doesn't say an
4 acceptance. It says it's not a surrender.

5 MR. SHACKMAN: That's a good point. But that's -
6 - - that's not all we did. In other words, we served the
7 notice - - -

8 CHIEF JUDGE WILSON: Well, I just asked you
9 everything you did, and you gave me two things that were -
10 - - that were legally sufficient to constitute a surrender.

11 MR. SHACKMAN: That's right. Under the
12 guarantee, what we had to do to get out and eliminate the -
13 - - the continuing obligations of the guarantor - - -

14 CHIEF JUDGE WILSON: Yeah.

15 MR. SHACKMAN: - - - was to serve that notice and
16 vacate - - -

17 CHIEF JUDGE WILSON: But I thought your argument
18 - - -

19 JUDGE RIVERA: Did you give them the keys?

20 MR. SHACKMAN: Yes.

21 CHIEF JUDGE WILSON: Your argument is, as I
22 understood it, that under the terms of the lease, a
23 surrender and acceptance are different legal concepts?

24 MR. SHACKMAN: Correct.

25 CHIEF JUDGE WILSON: Right. So the thing that



1 you, I think, in your papers, didn't address is that last
2 sentence I read you, which - - - which doesn't talk about
3 acceptance. It says, it is not a surrender to simply
4 deliver the keys. That's not a surrender.

5 MR. SHACKMAN: That's correct. But that's not
6 all we did.

7 CHIEF JUDGE WILSON: You mean, you also vacated
8 and sent the notice?

9 MR. SHACKMAN: We also vacated, and we also
10 delivered the notice, which is the limitation set forth in
11 the guarantee of what the guarantor had to cause the tenant
12 to do to end the liability of the guarantor. So the
13 acceptance - - - the delivery of the keys - - -

14 CHIEF JUDGE WILSON: Yeah.

15 MR. SHACKMAN: - - - alone, for sure, that's not
16 a surrender. It says it right there in the lease. You're
17 a hundred percent correct.

18 JUDGE GARCIA: So what is a surrender under the
19 lease? What's a surrender?

20 MR. SHACKMAN: A surrender is the delivery up by
21 the tenant, the yielding up by the tenant of exclusive
22 possession of the premises. That's what's - - -

23 JUDGE CANNATARO: Is that a surrender under the
24 lease, or is that a surrender under the Good Guy Guarantee?

25 MR. SHACKMAN: That's a surrender under the lease



1 and a surrender under the law and, in this case, pursuant
2 to the language of the Good Guy Guarantee.

3 JUDGE CANNATARO: Well, what about the language
4 in the lease that requires acceptance of the surrender?

5 MR. SHACKMAN: It doesn't require acceptance of
6 the surrender to eliminate the liability of the guarantor,
7 and that's - - -

8 JUDGE HALLIGAN: Well, that's the question, right
9 - - -

10 JUDGE CANNATARO: No, the - - -

11 JUDGE HALLIGAN: - - - is what does pursuant to
12 the terms of the lease mean.

13 JUDGE CANNATARO: He asked you if that was a
14 surrender under the lease, and you said it was, but there's
15 language - - -

16 MR. SHACKMAN: Well, it was. It was the - - -

17 JUDGE CANNATARO: - - - in the lease that
18 requires more.

19 MR. SHACKMAN: Well, it would require more to
20 eliminate the liability of the tenant.

21 JUDGE HALLIGAN: Well, that's the question before
22 us.

23 MR. SHACKMAN: That's - - - that is the entire
24 question.

25 JUDGE HALLIGAN: Okay. So - - -

1 MR. SHACKMAN: In paragraph 25 of the lease - - -
2 excuse me, Judge. Sorry.

3 JUDGE HALLIGAN: Go ahead.

4 MR. SHACKMAN: Paragraph 25 of the lease, in what
5 it says and, also what it doesn't say, is the key. What
6 paragraph 25 of the lease doesn't say is that there can be
7 no valid surrender unless the landlord signs a writing
8 accepting the surrender.

9 JUDGE HALLIGAN: Well, it does say, pursuant to
10 the terms of the lease. Yes?

11 MR. SHACKMAN: What - - - the guarantee, yes.

12 JUDGE HALLIGAN: Yes.

13 MR. SHACKMAN: And that's paragraph 22 - - -

14 JUDGE HALLIGAN: Yes. Right.

15 MR. SHACKMAN: - - - which talks about the
16 delivery.

17 JUDGE CANNATARO: Does every Good Guy Guarantee
18 incorporate the lease in that manner, pursuant to the terms
19 of the lease?

20 MR. SHACKMAN: I can't speak to every Good Guy
21 Guarantee, Judge.

22 JUDGE HALLIGAN: Well - - -

23 MR. SHACKMAN: No. I would say no.

24 JUDGE CANNATARO: Well, can you - - - can you - - -

25 -

1 MR. SHACKMAN: I would assume no.

2 JUDGE CANNATARO: I mean, wouldn't the case be
3 substantially different if that pursuant to the language of
4 the lease language weren't in the guarantee?

5 MR. SHACKMAN: Yeah, for sure, it would be a
6 different case.

7 JUDGE HALLIGAN: Well, your adversary says - - -

8 JUDGE RIVERA: But doesn't - - - doesn't the
9 paragraph suggest because it requires an acceptance - - -
10 and I don't see anything in there that says the - - - this
11 paragraph, maybe I missed it, is limited to the tenant, but
12 if - - - if it requires an acceptance, doesn't that mean
13 that all you have is an offer - - - an offer of a
14 surrender?

15 MR. SHACKMAN: Yeah, it does. And so what we're
16 talking about - - - we're talking about two different
17 things, and I think that's - - - this is the fundamental
18 issue. Surrender and acceptance are two different things.
19 Surrender is the tendering, the yielding up by the tenant
20 of exclusive possession. If the tenant does that, the
21 landlord has an option. The landlord can say, okay, that's
22 nice, and I'm going to sue you for the rent. That's the
23 Holy Properties case - - -

24 JUDGE HALLIGAN: Right.

25 MR. SHACKMAN: - - - and the Centurion case. Or



1 the landlord can accept the surrender - - -

2 JUDGE HALLIGAN: Right.

3 MR. SHACKMAN: - - - accept the tender and
4 thereby convert that bilateral - - -

5 JUDGE HALLIGAN: Right.

6 MR. SHACKMAN: - - - unilateral act of the tenant
7 into a bilateral agreement between the landlord and the
8 tenant terminating the lease. And that is what the court
9 below said would have been necessary in this case to
10 eliminate the liability of the guarantor. Now, it would
11 have been necessary to eliminate the liability of the
12 tenant, for sure, but not so for the guarantor.

13 JUDGE GARCIA: So your main - - - your main point
14 is that the guarantee requires surrender - - - the
15 provision in section 25 of the lease goes to acceptance of
16 a surrender, so when you surrender, you surrender.
17 Acceptance is a separate issue?

18 MR. SHACKMAN: That's right. But in paragraph -
19 - -

20 JUDGE GARCIA: Okay. But why, then, would it say
21 - - - then you would have to read it as completely vacated
22 and surrendered. Completely only applies to vacated,
23 right?

24 MR. SHACKMAN: Well, no. Surrender - - -

25 JUDGE GARCIA: But what's completely surrender,



1 then?

2 MR. SHACKMAN: No, the surrender is the tender of
3 possession. That's what the - - - that's what the good guy
4 clause required the tenant to do.

5 JUDGE GARCIA: What's completely surrendered?

6 MR. SHACKMAN: I'm sorry?

7 JUDGE GARCIA: What's completely surrendered?

8 Add to that, then.

9 MR. SHACKMAN: It just means - - - it means to
10 completely get out, lock, stock, and barrel, move out - - -
11 all your subtenants out.

12 JUDGE GARCIA: But you just told me surrender
13 means something different than that. You just - - - what's
14 your definition of surrender?

15 MR. SHACKMAN: Surrender is the yielding up of
16 vacant possession - - -

17 JUDGE GARCIA: So then what's complete surrender?

18 MR. SHACKMAN: Well, I think, when - - - when
19 this lease talks about - - - this lease talks about
20 completely vacated and surrendered. I'm - - - I'm - - -

21 JUDGE GARCIA: So you think that only modifies
22 vacated?

23 MR. SHACKMAN: Excuse me, Judge, please. It
24 doesn't - - - I misspoke. It doesn't say, completely
25 surrendered. It said, completely vacated and surrendered.

1 So the tenant has to be completely out and all the persons
2 who are in the premises by, through, and under the tenant
3 have to be out.

4 JUDGE RIVERA: Yes, but paragraph 25 says the
5 surrender has to be accepted.

6 MR. SHACKMAN: Okay.

7 JUDGE RIVERA: There - - - that's why I asked
8 you.

9 MR. SHACKMAN: Yeah. No, I - - -

10 JUDGE RIVERA: It doesn't, if the paragraph says,
11 acceptance of a surrender, imply that there is an offer of
12 an - - -

13 MR. SHACKMAN: Right.

14 JUDGE RIVERA: - - - of a surrender.

15 MR. SHACKMAN: But - - - but paragraph 25 doesn't
16 say that the absence of an acceptance negates the surrender
17 or voids the surrender. What - - -

18 JUDGE HALLIGAN: So what meaning, then, do the
19 words - - -

20 JUDGE RIVERA: Well, how can that be? How can
21 that be? No act or thing done - - -

22 MR. SHACKMAN: Well - - -

23 JUDGE RIVERA: - - - during the term hereby
24 demised shall be deemed an acceptance of a surrender.

25 MR. SHACKMAN: Acceptance of a surrender.



1 JUDGE RIVERA: There's no surrender.

2 MR. SHACKMAN: Well, look at what it says. It
3 says that, no agreement to accept such surrender - - -

4 JUDGE RIVERA: Right.

5 MR. SHACKMAN: - - - shall be valid unless in
6 writing. So that - - - that language assumes - - -

7 JUDGE RIVERA: So I think it - - - I agree it
8 would, perhaps, have been, technically, more accurate to
9 have said, offer of a surrender.

10 MR. SHACKMAN: Well - - -

11 JUDGE RIVERA: I don't disagree with you there.

12 MR. SHACKMAN: Well, call - - - call it what you
13 may. The term - - -

14 JUDGE RIVERA: Otherwise, I don't know what - - -
15 and you agreed with me that, yes, if it says acceptance,
16 then there is an offer.

17 MR. SHACKMAN: Yeah. It's - - - the surrender is
18 an - - - is an act, and it's also an - - - it's an offer,
19 and it can be accepted by the landlord and, thereby,
20 terminates the liability of the tenant, but that's not what
21 was required - - -

22 JUDGE HALLIGAN: It says, surrender pursuant to
23 the terms of the lease. Yes?

24 MR. SHACKMAN: Yes.

25 JUDGE HALLIGAN: Okay. So what meaning, under



1 your reading, do the words pursuant to the terms of the
2 lease mean?

3 MR. SHACKMAN: It means paragraph 22 of the
4 lease, which talks about - - - well, it's entitled End of
5 Term, but that's the paragraph that talks about what the
6 tenant must do - - -

7 JUDGE HALLIGAN: And why does the no-waiver - - -

8 MR. SHACKMAN: - - - to surrender the premises.

9 JUDGE HALLIGAN: Why does the no-waiver clause
10 not also count as terms of the lease?

11 MR. SHACKMAN: Because the no-waiver clause
12 doesn't go to - - - has nothing to do with a surrender.

13 JUDGE HALLIGAN: Well - - -

14 MR. SHACKMAN: It only speaks to acceptance of a
15 surrender. And so in other words, if you look at paragraph
16 25, it says, no agreement - - - and this is the whole - - -
17 this is the whole thing right, though.

18 JUDGE HALLIGAN: No. It says, no act or thing
19 shall be deemed an acceptance of a surrender - - -

20 MR. SHACKMAN: Yeah.

21 JUDGE HALLIGAN: - - - and no agreement to accept
22 shall be valid unless in writing, signed by the owner.

23 MR. SHACKMAN: Paragraph 25 has nothing to do
24 with the requirements for a surrender. It has to do with
25 the requirements for acceptance of a surrender. It does

1 not say - - - and this is the error. It does not say that
2 there can be no valid surrender unless there's a writing
3 signed by the landlord. What it says is that - - -

4 JUDGE HALLIGAN: What does a valid - - - what
5 does a valid surrender mean if it is a surrender - - -

6 MR. SHACKMAN: Excuse me. I misspoke. It says
7 that there can be no acceptance of a surrender.

8 JUDGE HALLIGAN: It's just that - - - if I can
9 ask the question.

10 MR. SHACKMAN: Yeah.

11 JUDGE HALLIGAN: What does a - - - what is a
12 valid surrender if there is no acceptance of the surrender?

13 MR. SHACKMAN: It just - - -

14 JUDGE HALLIGAN: What does that mean
15 conceptually?

16 MR. SHACKMAN: Conceptually, it depends on the
17 parties' agreement, and in this case, it means that - - -

18 JUDGE HALLIGAN: Well, under this agreement.

19 MR. SHACKMAN: Under this agreement, it means
20 that the tenant is certainly on the hook for the rent. The
21 lease has not been canceled or terminated. The lease
22 continues. But the guarantor is off the hook, and that - -
23 -

24 CHIEF JUDGE WILSON: Where in the the lease do
25 you see that the acceptance of the surrender terminates the

1 lease?

2 MR. SHACKMAN: I don't see that in the lease.

3 That's just the law. Acceptance of a - - -

4 CHIEF JUDGE WILSON: Well, the lease says that
5 you've got to pay for the full term, and the term is seven
6 and a half years.

7 MR. SHACKMAN: Right.

8 CHIEF JUDGE WILSON: And there's nothing in there
9 that says the acceptance of the surrender relieves you of
10 the obligation to pay for the term, is there?

11 MR. SHACKMAN: Not in the lease, but I would,
12 respectfully, refer you to the case law. It's the Holy
13 Properties case and the Centurion case, which says that if
14 the landlord accepts the tenant's tender of surrender, the
15 lease is, thereby canceled, and the tenant has no further
16 liability. That's the requirement to end the liability of
17 the tenant, an acceptance of a surrender. Paragraph 25
18 talks about what's required - - -

19 JUDGE RIVERA: But otherwise, the landlord has
20 the property and the money.

21 MR. SHACKMAN: That's right.

22 JUDGE RIVERA: And that's at the foundation of
23 that case law.

24 MR. SHACKMAN: And the - - - and the incentive -
25 - - the reason for a Good Guy Guarantee is it incentivizes

1 the guarantor, who's typically a human being who's - - -
2 who has some control over the tenant - - -

3 JUDGE RIVERA: Yeah.

4 MR. SHACKMAN: - - - to make - - - to ensure that
5 if the tenant is not paying and not able to pay, the tenant
6 gets out, and the landlord has the space back. The tenant
7 doesn't - - - and that way, a good guy, so to speak, and it
8 doesn't hold up the landlord. It holds up and stay in
9 possession. The reading by the court below - - -

10 JUDGE RIVERA: You can agree that, perhaps, it
11 might have been crystal clear if the paragraph above - - -
12 what the guarantor guarantees, right, about completely - -
13 - and the tenant shall have completely vacated and
14 surrendered the premises - - - the demised premises to
15 owner. It could have said, regardless of whether the owner
16 accepts the surrender.

17 MR. SHACKMAN: I mean, a lot of - - - yes, Judge,
18 but a lot of things could be negotiated in leases.

19 JUDGE RIVERA: No, but you pointed out - - - oh,
20 yes, but you - - -

21 MR. SHACKMAN: Yes.

22 JUDGE RIVERA: - - - pointed out, I thought, or
23 for some other paragraph, that we should be concerned not
24 only with what is written but what is not written - - -

25 MR. SHACKMAN: Well, that's right.

1 JUDGE RIVERA: - - - so I'm suggesting that,
2 perhaps - - -

3 MR. SHACKMAN: What I - - -

4 JUDGE RIVERA: - - - the failure to include that
5 language does not support your argument.

6 MR. SHACKMAN: I think that what - - -

7 JUDGE RIVERA: And it would have been easy to
8 include it.

9 MR. SHACKMAN: Where the lease - - - Judge, that
10 may be true. And I can't speak to the drafting and what
11 went into that and what was negotiated and what - - - what
12 - - - but - - -

13 JUDGE RIVERA: But these are REBNY forms? Was
14 this - - -

15 MR. SHACKMAN: But this is - - -

16 JUDGE RIVERA: - - - was this language at all
17 changed from the REBNY form?

18 MR. SHACKMAN: Exactly. This is a REBNY form.

19 JUDGE RIVERA: Okay.

20 MR. SHACKMAN: And - - -

21 JUDGE HALLIGAN: Wait a minute. Your adversary
22 says that the guarantee itself is not a standard REBNY
23 form. Do you - - -

24 MR. SHACKMAN: That's correct.

25 JUDGE HALLIGAN: Okay. So - - -



1 MR. SHACKMAN: The guarantee.

2 JUDGE HALLIGAN: Okay.

3 MR. SHACKMAN: Yeah.

4 JUDGE RIVERA: But that's what we're concerned
5 with.

6 JUDGE HALLIGAN: Yes.

7 MR. SHACKMAN: Well, what - - -

8 JUDGE RIVERA: What's different in this - - -
9 from - - - is there a REBNY guarantee form?

10 MR. SHACKMAN: Well - - - I'm sure there is, but
11 this is not the - - - this is not what they use. And this
12 is - - - the REBNY guarantee form is typically a full-blown
13 guarantee, not a good guy - - - not a limited guarantee.
14 Everybody - - - and by the way, everybody agrees - - -

15 JUDGE RIVERA: So REBNY doesn't include a Good
16 Guy Guarantee in its forms?

17 MR. SHACKMAN: I - - - I don't know offhand,
18 Judge. I have no - - - maybe they - - - perhaps there is
19 one, perhaps there isn't. I don't know.

20 JUDGE RIVERA: It's there. Okay.

21 MR. SHACKMAN: But - - - but what I do know is
22 that the language of this guarantee, the limitation
23 language where it talks about a thirty-days' notice, and it
24 goes on to the say, the condition of the premises, that
25 language, like any language in an agreement, must mean

1 something. It can't just be superfluous.

2 And the reading of the court below makes it
3 superfluous. What the reading of the court below does is
4 say the - - - the guarantor is not off the hook unless the
5 landlord, at its whim, decides to sign a new writing
6 releasing the tenant. That, of course, would,
7 incidentally, release the guarantor, whose liability is
8 secondary to the tenant.

9 JUDGE RIVERA: You mean that this - - - this
10 paragraph - - - this language would be unnecessary - - -

11 MR. SHACKMAN: It would be - - - well, it must
12 have been - - -

13 JUDGE RIVERA: - - - under the reading of the
14 lower court?

15 MR. SHACKMAN: I don't think it's a matter of
16 being unnecessary. The parties had language in there.

17 JUDGE RIVERA: Well, it's - - -

18 MR. SHACKMAN: It must have meant something.

19 JUDGE RIVERA: Well, you're arguing that the - -
20 - under the lower court's reading, the guarantor's
21 liability rises and falls with the tenants.

22 MR. SHACKMAN: Yeah.

23 JUDGE RIVERA: That's the nature of the
24 guarantee, and so you wouldn't need this paragraph.

25 MR. SHACKMAN: Well, why is it in there, then, is

1 my question. I mean, the parties put language in there
2 that was quite - - -

3 JUDGE RIVERA: I'm saying that's my understanding
4 of your argument.

5 MR. SHACKMAN: Right. Exactly. The parties have
6 language in there that's quite extensive, and the holding
7 of the court below renders that language - - -

8 JUDGE RIVERA: Is there any other work that the
9 paragraph may be doing?

10 MR. SHACKMAN: I'm sorry?

11 JUDGE RIVERA: Is the paragraph only doing the
12 work that you have argued, that it's this Good Guy
13 Guarantee?

14 MR. SHACKMAN: I think so, yes.

15 JUDGE RIVERA: Is there anything else it may be
16 doing?

17 MR. SHACKMAN: It's - - - all it is is a
18 limitation on the liability of the guarantor. It's an
19 escape hatch for the guarantor that if - - - if the
20 guarantor causes the tenant to send the notice and get out
21 - - -

22 JUDGE RIVERA: Well, it is the guarantee, right?
23 I mean, it's doing that work.

24 MR. SHACKMAN: Yeah. Well, I'm - - - I'm talking
25 about the portion - - -

1 JUDGE RIVERA: Oh, I'm sorry. Was there other
2 language - - -

3 MR. SHACKMAN: I'm - - - I'm - - -

4 JUDGE RIVERA: - - - that the guarantor signed
5 off on?

6 MR. SHACKMAN: No. Judge, I thought you were
7 talking about the - - - the portion of the guarantee, which
8 starts - - - after paragraph 9, it's the - - - guarantor
9 guarantees to owner - - -

10 JUDGE RIVERA: Right. Right.

11 MR. SHACKMAN: - - - the payment of all accrued
12 rent.

13 JUDGE RIVERA: Right. All I'm saying - - -

14 MR. SHACKMAN: Actually, if - - - if the court's
15 - - - if the reading of the court below was correct, it
16 could have just stopped there. It could have said, the
17 guarantee guarantors to the owner the payment of all rent
18 by the tenant under the lease, period. All that language
19 that comes after about the tenant giving thirty days'
20 notice and getting out, what's the purpose of that
21 language? The only purpose of that language is it's a
22 limitation on the liability of the guarantor if the
23 guarantor causes the tenant to perform those acts. That's
24 the parties' agreement. The holding of the court below is
25 that no, no, no, that language is superfluous. It doesn't

1 mean anything. It's - - - it's without effect. And that's
2 contrary to - - -

3 JUDGE RIVERA: It's because if the tenant is off
4 the hook, so is the guarantor.

5 MR. SHACKMAN: Well, the - - - I would - - -

6 JUDGE RIVERA: Is that your argument?

7 MR. SHACKMAN: - - - I would say it a little
8 differently. That's correct. What I would say is the
9 guarantor is only off the hook if the tenant is off the
10 hook, meaning that this guarantee - - - I'm sorry,
11 guarantor, but this guarantee, which you thought was a
12 limited guarantee and which the landlord, in its complaint,
13 alleged was a limited guarantee is a full-blown guarantee.

14 The tenant's and the guarantor's liability is co-
15 extensive. The tenant is not - - - the tenant and the
16 guarantor are only off the hook if the landlord - - - no
17 matter what the guarantor does, whether he follows the
18 procedure or not, if the landlord, thereafter, elects to
19 sign a new writing releasing the tenant and, thereby,
20 incidentally, the guarantor, that - - - that, I would say,
21 subverts - - - what, to me, is the obvious intention of
22 this language is to create a limitation on the liability of
23 the guarantor and make the liability of the guarantor
24 different than the guarantor of the - - - liability of the
25 tenant, which, by the way, the landlord agrees with because



1 they call it a limited guarantee.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. SHACKMAN: Thank you.

4 MR. ROSENBAUM: Good afternoon. My name is David
5 Rosenbaum. I represent the Respondent, 1995 CAM LLC.

6 Simply put, judges - - - Your Honors, there's no
7 reason, based on this record, to overturn seventy-six years
8 of well-reasoned contract precedent.

9 JUDGE HALLIGAN: So can I ask you - - - I take it
10 your reading is that until or unless the landlord consents,
11 that the obligation of the guarantor continues until the
12 lease is ended; is that right?

13 MR. ROSENBAUM: Correct.

14 JUDGE HALLIGAN: Okay. So why use all of the
15 verbiage in the guarantee as opposed to simply saying the
16 guarantor guarantees all obligations, period? What about
17 your adversary's argument that this is - - - is intended to
18 limit the liability of the guarantor? Because it sounds
19 like you're saying it doesn't.

20 MR. ROSENBAUM: It's a guarantee. Nowhere in - -
21 - first of all, this guarantee is in a body of an - - - an
22 amendment to the lease, so it's a lease. It's not a
23 separate document. It incorporates, by reference, the
24 original lease, which went back to 2004, so it includes
25 Article 25, which we believe is - - - is relevant here, not

1 Article 22.

2 JUDGE TROUTMAN: Then what is the point of the
3 thirty-day notice requirement? What effect, if any, does -
4 - -

5 MR. ROSENBAUM: In order for the guarantor to
6 have been relieved of full liability and limit its - - -
7 limit its - - - its liability to a certain point, the rent
8 would have had to have been paid through the date that it
9 gave notice, which was not; they would have had to return
10 vacant possession, which we concede did happen; and they
11 would have had to return the keys to the landlord, which
12 did not happen. The keys were returned to the super.

13 JUDGE HALLIGAN: So is that the reason that
14 you're arguing that there is continued liability? I
15 thought that you were saying that - - - that it was because
16 there was no acceptance of the surrender.

17 MR. ROSENBAUM: That's correct.

18 JUDGE HALLIGAN: Okay.

19 MR. ROSENBAUM: There's no written acceptance by
20 the landlord.

21 JUDGE HALLIGAN: Okay. So if that's - - - if
22 that's necessary under your reading, it seems to me that
23 perhaps it's not a meaningful limitation on the guarantor's
24 liability because it leaves that determination solely
25 within the landlord's prerogative, but - - - is that right?



1 MR. ROSENBAUM: I don't believe so, Judge. I
2 think - - -

3 JUDGE HALLIGAN: So how is it a limitation if the
4 landlord can continue to keep the guarantor on the hook by
5 refusing to accept the surrender?

6 MR. ROSENBAUM: Well, because the surrender has
7 to be in accordance with what the parties agreed to, and it
8 didn't happen here. Let's just - - -

9 JUDGE HALLIGAN: I understand that. Okay? I'm
10 just trying to understand something different, maybe, which
11 is, is there any way the guarantor can cut off liability if
12 the landlord refuses to accept surrender? Or does, under
13 your reading, the liability continue until the end of the
14 lease?

15 MR. ROSENBAUM: Because the language that's
16 specific here requires a writing - - - the - - - unless
17 there was a acceptance by the landlord of possession, there
18 would not be a surrender.

19 JUDGE HALLIGAN: Okay.

20 MR. ROSENBAUM: If there was a different writing,
21 I think that was hinted to before, with more clarity that
22 said, you would be released from personal liability beyond
23 this point if X, Y, and Z happen - - -

24 JUDGE RIVERA: Well, then - - - but that - - -

25 MR. ROSENBAUM: That didn't happen here.



1 JUDGE RIVERA: - - - that reading, as we were
2 saying before, renders the language in this guarantee
3 provision unnecessary and superfluous, the language about
4 surrendering the demised premises, because if - - - if you
5 are correct, if we adopted that, you would never need this
6 language. The guarantor is on the hook, right, until the
7 tenant is released. I mean, why would you even have this
8 language?

9 MR. ROSENBAUM: Because we want to make it clear
10 - - -

11 JUDGE RIVERA: If all this meant is once the
12 landlord accepts the surrender, the guarantor is released,
13 well, that was true without this.

14 MR. ROSENBAUM: Your Honor, you did not mince any
15 words in Cooperative Centrale when you said that when
16 sophisticated parties are charged with knowledge of
17 surrounding facts and consequences of an agreement, they
18 freely negotiate and assent. In this case, the language is
19 clear.

20 Then you went further in the Wu v. Uber Tech,
21 which was not a case involving sophisticated individuals,
22 it was involving the ordinary consumer, and even so, you
23 said that they still have an obligation to read the
24 contract, and if they don't, they're stuck with the failure
25 to do so. Ipso facto, here, you had a sophisticated - - -

1 JUDGE RIVERA: All right. So paragraph 25 says,
2 acceptance of a surrender. It just says surrender. So
3 then, perhaps, the guarantee's sole reference to surrender
4 means the offer of a surrender.

5 MR. ROSENBAUM: It says, shall be deemed an
6 acceptance of a surrender. You - - - the cases, up until
7 today, have always said - - -

8 JUDGE RIVERA: Right. But that - - - doesn't
9 that mean that there was a surrender?

10 MR. ROSENBAUM: It wasn't a surrender.

11 JUDGE RIVERA: Take it or leave it.

12 MR. ROSENBAUM: In order to - - - there to be - -
13 - no, there was an abandonment, judge. There's a great
14 distinction here. Abandonment is a unilateral act. A
15 surrender would be a bilateral act where the landlords are
16 saying, okay, tenant, I agree to take back possession and
17 I'll do what I got to do. That didn't happen here.

18 JUDGE RIVERA: Then why do you have acceptance?

19 MR. ROSENBAUM: That didn't happen here.

20 JUDGE RIVERA: If a surrender, by its very
21 nature, requires an acceptance, why do you need acceptance
22 of a surrender? Why do you need that?

23 MR. ROSENBAUM: Judge, I didn't write this, but I
24 think - - - I think that the intent of the language here,
25 okay, is to make it clear that unless there is a writing

1 that is received and written off by the - - - by the
2 landlord, you, guarantor, are not off the hook.

3 JUDGE HALLIGAN: Then why wouldn't it be written
4 that way? Because it seems to me, if I'm understanding
5 you, you're arguing that the words pursuant to the terms of
6 the lease are what do that work for you. Yes? That
7 require adherence to the acceptance.

8 MR. ROSENBAUM: Pursuant to terms of the lease
9 brings us back to 25.

10 JUDGE HALLIGAN: Yeah. Imports it, you're
11 arguing. Yeah. So why not simply write it as clearly as
12 you just laid it out?

13 MR. ROSENBAUM: I agree. I agree. But
14 nevertheless, there's no concession by the tenant that
15 there was a writing. There never was. And there wasn't an
16 acceptance of the keys - - -

17 JUDGE HALLIGAN: No, no. I mean, why not write
18 the language of the guarantee as straightforwardly as you
19 just explained it to us, which is that the guarantor is on
20 the hook until there is acceptance of - - - of the
21 surrender in writing?

22 MR. ROSENBAUM: My understanding of the case law
23 beforehand is that this language, and as otherwise required
24 by lease or in accordance to lease, means requires a signed
25 write-off from the landlord. Judge Cannataro, in two lower

1 court decisions, opined on that language the same way, and
2 I believe that Judge Rivera did the same thing in the
3 Centrale case. So I don't think we're deviating from - - -
4 from that. We're basically upholding what has been
5 precedent - - -

6 CHIEF JUDGE WILSON: So why - - - why is - - -

7 MR. ROSENBAUM: - - - for seventy-six years.

8 CHIEF JUDGE WILSON: - - - why is the guarantee
9 here any different - - - straight ahead of you. Why is the
10 guarantee here any different than a guarantee that just
11 says, I fully guarantee all of the obligations of the
12 tenant, period?

13 MR. ROSENBAUM: That - - - if - - - well, we'd
14 have to know what - - - that would be probably considered a
15 full guarantee.

16 CHIEF JUDGE WILSON: Yeah. And is this not a
17 full guarantee the way you're interpreting it?

18 MR. ROSENBAUM: It is a full. However, if X, Y,
19 and Z happened, then it would limit liability, but X, Y,
20 and Z did not happen.

21 JUDGE RIVERA: Yes, but for purposes of a
22 surrender - - - that was the point before. For purposes of
23 a surrender - - -

24 MR. ROSENBAUM: It wasn't - - -

25 JUDGE RIVERA: - - - if it requires acceptance

1 for the tenant to be released, once the tenant is released,
2 so is the guarantor.

3 MR. ROSENBAUM: But there was more that had to
4 happen here. Can I just put in, just for two seconds,
5 perspective? We're talking about - - - we're talking about
6 November 2020 in the height of COVID. Commercial premises.
7 The tenant wanted out badly. Okay? Sends a letter saying
8 - - - returns the key to the super even though it's very
9 clear that sending it back to the super was not - - - was
10 not in accordance with the language of 25.

11 More recently, the First Department in - - - in
12 Elk 33 v. Sticky went so far as to say that the failure to
13 obtain landlord's written acceptance of tenant surrender
14 warrants summary judgment in Plaintiff's favor irrespective
15 of the other conditions of the Good Guy Guarantee were met,
16 citing Sharapov.

17 But here, they weren't met. He didn't get a
18 signed guarantee - - - a signed - - - a sign-off from the
19 landlord, and the keys weren't returned to the landlord.

20 JUDGE RIVERA: Well, all it says is that giving
21 the keys to particular people, not the owner, doesn't
22 constitute a surrender. It doesn't say that - - -

23 MR. ROSENBAUM: That's correct.

24 JUDGE RIVERA: - - - anything else, right?

25 MR. ROSENBAUM: The key is that someone who's not



1 the landlord has no authority to basically give up the
2 landlord's rights under the lease. We don't - - - he - - -
3 he can't dispute that the tenant is still liable. The
4 end-of-the-lease clause that he's referencing in his - - -
5 in his brief - - -

6 JUDGE RIVERA: I'm sorry. Where does - - - where
7 does it say you have to give the owner the keys for a
8 surrender to be effective?

9 MR. ROSENBAUM: Paragraph - - - one moment.

10 JUDGE RIVERA: Oh, it's not in 25?

11 MR. ROSENBAUM: Owner's agent shall - - - it's
12 the last paragraph. No employee of owner or owner's agent
13 shall have any power to accept keys of said premises prior
14 to the termination of the lease, and leaving the keys to
15 any such agent or employee shall not operate as a
16 termination of the lease or surrender of the premises.

17 JUDGE RIVERA: Right, but - - -

18 MR. ROSENBAUM: It's pretty clear.

19 JUDGE RIVERA: Yes, but that doesn't mean that
20 you have to hand the keys to anyone in particular to - - -
21 this just means doing this won't get you a surrender.

22 MR. ROSENBAUM: That's right. But that's one of
23 the conditions. Go back to - - - if you go back to
24 paragraph 9 - - -

25 JUDGE RIVERA: Well, let me give you a



1 hypothetical. I'm the tenant. I've talked to the
2 landlord. I said, I'm going to surrender. I want to get
3 out of the lease. And the landlord says, I'm going to make
4 double the rent if you go. I accept your surrender. And I
5 say, okay. I can't leave until tomorrow. And the landlord
6 says, I'm not around, and I don't trust you. You're going
7 to give the keys to anybody. Just leave it on the counter.
8 Lock the door behind you.

9 MR. ROSENBAUM: It would seem to me, based upon
10 your set of facts - - -

11 JUDGE RIVERA: Yeah.

12 MR. ROSENBAUM: - - - if that's what the parties
13 agree to - - -

14 JUDGE RIVERA: Well, wouldn't, then, sir - - -
15 all I'm saying is this writing says giving the keys to
16 someone else doesn't effectuate a surrender. Put aside
17 whether or not it's accepted, but that's a different issue
18 right now. I don't necessarily read it as requiring
19 anything because I don't see where it says a surrender is
20 not effective unless the keys are turned in to the owner.

21 MR. ROSENBAUM: I understand. Your Honors, I - -
22 - the respondent here argues that for some reason, the
23 appellant is trying to conflate the words acceptance and
24 surrender. There was no acceptance. We understand
25 surrender to be what these - - - these courts and the

1 Appellate Division have said long and many times, and that
2 is if - - - it's whatever the parties agreed to in writing.
3 In this case, it makes fairly clear that it required a
4 sign-off by the landlord. There wasn't one.

5 JUDGE CANNATARO: But it sounds like you're sort
6 of saying that there was no surrender, either. It's not
7 just the - - -

8 MR. ROSENBAUM: Correct. That - - -

9 JUDGE CANNATARO: - - - it's not just the absence
10 of the acceptance.

11 MR. ROSENBAUM: That's correct. My opinion,
12 surrender is unila - - - is not unilateral. It's
13 bilateral. The parties have to agree to take back - - -

14 JUDGE CANNATARO: Yes.

15 MR. ROSENBAUM: - - - full possession.

16 JUDGE CANNATARO: I understand. It's a unified
17 concept.

18 MR. ROSENBAUM: Correct.

19 JUDGE CANNATARO: There can't be a surrender
20 without the acceptance under the terms of this agreement,
21 but - - -

22 MR. ROSENBAUM: Right. Which is - - -

23 JUDGE RIVERA: You understand it as an offer of a
24 surrender, and until the landlord, or whoever the landlord
25 may designate - - - here, let's just say the landlord or

1 the owner - - - accepts, it's not effectuated.

2 MR. ROSENBAUM: I would - - -

3 JUDGE RIVERA: It's merely an offer.

4 MR. ROSENBAUM: I would feel much better, Judge,
5 if you didn't use the word surrender, but maybe
6 relinquishment - - -

7 JUDGE RIVERA: I don't know. That's in the - - -
8 it's in the lease. I'm sorry.

9 JUDGE CANNATARO: I know. It's - - -

10 MR. ROSENBAUM: - - - relinquishment of
11 possession.

12 JUDGE RIVERA: I'm sorry. What?

13 MR. ROSENBAUM: Relinquishment of possession.

14 JUDGE RIVERA: Yes. Okay. Okay.

15 MR. ROSENBAUM: Okay? And then the question is,
16 what are the - - - what are the - - - what did the parties
17 negotiate and agree upon here, right? Here, it's pretty
18 clear that the guarantor is not released unless X, Y, and Z
19 was done. X, Y, and Z was not done here.

20 JUDGE RIVERA: The X, Y, and Z being you make the
21 offer - - - well, you - - -

22 MR. ROSENBAUM: An offer.

23 JUDGE CANNATARO: It's - - -

24 JUDGE RIVERA: - - - you surrender.

25 MR. ROSENBAUM: You - - - you - - -

1 JUDGE RIVERA: The - - - the owner, in writing -
2 - -

3 JUDGE CANNATARO: You give notice of intent to
4 vacate.

5 JUDGE RIVERA: The owner, in writing, accepts.
6 And I'm not so sure I'm persuaded, but I think you're
7 arguing and you turn in the keys to the owner.

8 MR. ROSENBAUM: Correct.

9 CHIEF JUDGE WILSON: X, Y, and Z are the things
10 that the tenant would have to do to relieve the tenant of
11 liability as well; is that right?

12 MR. ROSENBAUM: It's only the tenant. If the
13 tenant does what he's supposed to do, then the guarantor is
14 the one - - -

15 CHIEF JUDGE WILSON: Yes. It's just we've been
16 referring to them as X, Y, and Z, and X, Y, and Z are the
17 things that the tenant would have to do to relieve itself
18 of further liability.

19 MR. ROSENBAUM: Not the tenant. The tenant in
20 this case is always under - - - would be - - - the lease
21 wasn't over. The lease went on for another three years.

22 CHIEF JUDGE WILSON: No, no, I understand, but
23 what are X, Y, and Z, then? Maybe I'm confused.

24 MR. ROSENBAUM: Okay. In order for the guarantor
25 - - -

1 CHIEF JUDGE WILSON: Yes.

2 MR. ROSENBAUM: - - - to have his limitation of
3 liability - - -

4 CHIEF JUDGE WILSON: Yes.

5 MR. ROSENBAUM: - - - he - - - in this case, Mr.
6 - - - Mr. Gary Lieberman would have had to give notice - -
7 - thirty days' notice.

8 CHIEF JUDGE WILSON: Well, that's the tenant
9 giving the notice. Mr. Gary isn't occupying it himself.

10 MR. ROSENBAUM: Correct.

11 CHIEF JUDGE WILSON: The tenant.

12 MR. ROSENBAUM: Tenant give thirty days' notice.
13 Make sure the premises are returned in whatever the
14 conditions were.

15 CHIEF JUDGE WILSON: Right.

16 MR. ROSENBAUM: Return the keys to the landlord.

17 CHIEF JUDGE WILSON: Those are the tenant doing
18 those things, not the guarantor.

19 MR. ROSENBAUM: And in here, it talked about
20 payment of money through the date that they gave notice,
21 which was not done.

22 CHIEF JUDGE WILSON: Okay. But those - - - that,
23 again, the tenant doing that, right?

24 MR. ROSENBAUM: That's correct.

25 CHIEF JUDGE WILSON: So it's W, X, Y, Z, I guess.



1 We've got four things. But if those things, which are all
2 done by the tenant, had been done - - - which I understand
3 you're saying they hadn't been done, but if they had been
4 done, the tenant would, then, have no further liability?

5 JUDGE GARCIA: Is that true?

6 MR. ROSENBAUM: Not the tenant, no.

7 CHIEF JUDGE WILSON: No.

8 MR. ROSENBAUM: No, no.

9 JUDGE GARCIA: No, no, but is that - - - just is
10 that true? Because if all these things have been done, my
11 understanding from the case law, and maybe this lease is
12 different, is that the tenant only is relieved of the
13 liability to pay the rent if the landlord relets it, right,
14 and then they offset that amount that they're reletting.

15 MR. ROSENBAUM: This lease, the tenant walked out
16 in the middle.

17 JUDGE GARCIA: No, no, no, I'm not talking - - -

18 MR. ROSENBAUM: The tenant is not relieved of
19 liability - - -

20 JUDGE GARCIA: I'm sorry. I'm sorry. I'm not
21 talking about this lease. I'm talking generally. If a
22 tenant surrenders the premises, right, and they follow the
23 rules and accept the surrender - - - the landlord accepts
24 the surrender, my understanding, in a standard lease, is
25 that they are still liable for their lease payments unless

1 the landlord opts to relet those premises and can do that,
2 whereas the guarantor would be off the hook for liability
3 once the surrender is accepted.

4 MR. ROSENBAUM: So under Holy Name - - -

5 JUDGE GARCIA: Right.

6 MR. ROSENBAUM: - - - they own the properties,
7 there are the three options that the landlord would have,
8 right? In this case, we never got to that.

9 JUDGE GARCIA: No, I understand that. But just
10 looking at the difference between the liability of the
11 guarantor and the liability of the tenant, one thing or - -
12 - that happens releases the guarantor, which is accepted
13 surrender, no more liability. What releases the tenant is,
14 yes, you have to do all that, but to get out of the money
15 damages, it has to be relet.

16 MR. ROSENBAUM: Yes.

17 JUDGE CANNATARO: So that - - - that's what would
18 trigger the commercially reasonable efforts to relet
19 requirement?

20 MR. ROSENBAUM: We - - -

21 JUDGE RIVERA: What if the landlord chooses not
22 to relet and the tenant wants to regain possession?

23 MR. ROSENBAUM: I'm sorry. I don't understand.

24 JUDGE RIVERA: You're not going to relet, so I'll
25 take back possession. I don't want to be paying rent if I



1 don't have the benefit of the use of the property.

2 MR. ROSENBAUM: The - - - my - - -

3 JUDGE RIVERA: Must the owner allow them access
4 and - - - and let them take possession.

5 MR. ROSENBAUM: Are you saying - - - you're
6 saying that the landlord's going to allow the tenant back
7 into possession - - -

8 JUDGE RIVERA: Correct.

9 MR. ROSENBAUM: - - - and treat the notice as a
10 nullity? I assume the parties could - - -

11 JUDGE RIVERA: Well, I don't know about that.
12 Whatever agreement they wish to enter.

13 MR. ROSENBAUM: Right. But so in order to do
14 that, you're basically saying that you're going to retreat
15 the - - - treat the notice either as a nullity or enter
16 into - - - into a new kind of agreement.

17 CHIEF JUDGE WILSON: Sounds like a new lease.

18 MR. ROSENBAUM: I can't really speak to that.

19 JUDGE RIVERA: Well, all I'm saying is whether -
20 - - I'm asking you, could a tenant, who has properly
21 surrendered and it's accepted, but the landlord now just
22 says, I'm not making any money. I'm just going to - - -
23 I'm not going to get more money in rent if I relet it. I'm
24 going to keep this tenant on the hook and have them pay.
25 And maybe the landlord thinks they can actually collect

1 from that particular tenant. The tenant says, well, if
2 you're going to keep charging me, then I want the premises
3 back. Does the landlord have to allow them into the
4 premises under those circumstances?

5 MR. ROSENBAUM: If the - - - if the - - -

6 JUDGE RIVERA: If they're actually going to
7 charge the tenant as opposed to I'm not going to relet, but
8 I'm not going to go to court and try and charge this
9 tenant.

10 MR. ROSENBAUM: No. The landlord can decide,
11 based upon the Holy Properties, what - - - what to do.

12 JUDGE RIVERA: Holy Name.

13 MR. ROSENBAUM: Holy Name Property v. Kenneth
14 Cole. Right?

15 JUDGE RIVERA: Kenneth Cole.

16 MR. ROSENBAUM: I don't think they have to. If
17 the tenant - - - if the landlord wants to make an agreement
18 with that tenant and put them back in, and it works out,
19 and the parties come to an agreement, that's fine, but
20 that's not the facts here. The facts here is that the
21 tenant - - -

22 JUDGE RIVERA: Yes, I understand.

23 MR. ROSENBAUM: - - - walked out in the middle of
24 the lease, and he's - - - the tenant's still on the hook,
25 and the question is whether the guarantor should be

1 relieved of liability for the future rents, and we believe
2 since they didn't comply with the express language in the
3 lease, the guarantee incorporated by the amendment, that
4 the guarantor is liable, and we believe that the Appellate
5 Division decision should be upheld.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. SHACKMAN: Thank you, Judge. You know, this
8 was a summary judgment motion, and the facts were
9 undisputed, and it's undisputed that the tenant gave
10 landlord the thirty-day notice, as the tenant was required
11 to do under the terms of the Good Guy Guarantee.

12 And that notice, by the way, said that - - - it
13 said, quite - - - quite expressly, it said, pursuant to
14 paragraph 9 of the second amendment, this is the notice
15 from the tenant, guarantor shall be released from all
16 obligations to pay accrued rent and other charges accruing
17 from and after the surrender date. The landlord didn't
18 start shouting at that point, send a letter back saying,
19 uh-uh, the guarantor is going to be on the hook. No, the -
20 - - the landlord accepted that, didn't respond to the
21 letter.

22 And the tenant delivered the keys. And I don't
23 know how you can deliver the keys to an LLC other than
24 delivering it to some human being who's an agent of the
25 LLC, but that's - - - actually, the delivery of the keys

1 under - - - under article 9 of the second amendment and
2 paragraph 22 of the lease, which is - - - which governs
3 surrender pursuant to the terms of the lease, doesn't even
4 mention the keys.

5 And we got into that before, but I wanted to
6 clarify that. What - - - what article 9 says is the tenant
7 has to serve this thirty-day notice and then completely - -
8 - completely vacate free and clear of all subtenants and
9 occupants and surrender pursuant to the terms of the lease.

10 JUDGE SINGAS: Yeah, but - - - well, paragraph 25
11 does talk about the keys - - -

12 CHIEF JUDGE WILSON: Paragraph - - -

13 MR. SHACKMAN: I'm - - - but I'm talking about
14 paragraph - - -

15 JUDGE SINGAS: - - - very explicitly. I know
16 what you're talking about, but I'm saying that, very
17 explicitly, here, it says no employee of owner or owner's
18 agent shall have any power to accept the keys of said
19 premises prior to the termination of the lease.

20 MR. SHACKMAN: I understand. But what I'm saying
21 is that under - - - when you look at paragraph 9 of the
22 second amendment and then paragraph 22 of the lease, which
23 is the paragraph we say is what is referred to when it says
24 pursuant - - - you surrender pursuant to the terms of the
25 lease - - - and I, frankly, don't - - -

1 JUDGE SINGAS: I know it's what you say, but I
2 think it would - - - obviously, it would have been a lot
3 easier if it was more explicit in this lease, but - - -

4 MR. SHACKMAN: Well, perhaps - - -

5 JUDGE SINGAS: - - - the greatest intention of
6 what the parties want is what's written, and here, I - - -
7 I don't see how you get around there's no agreement to
8 accept unless in writing signed by the owner.

9 MR. SHACKMAN: We are not - - - we don't have to
10 get around that because we are not alleging that there is
11 an agreement to accept. The absence of a writing signed by
12 the landlord does not disprove surrender. Surrender is the
13 tender of possession. What it disproves is the acceptance
14 of a surrender, which has the effect of terminating the
15 lease and terminating the liability of the tenant.

16 JUDGE RIVERA: If you - - - if you do not accept
17 the - - - I won't call it the tender of surrender for the
18 moment. You'll see why. You do not accept the tenant's
19 offer of retaking possession - - - of giving up possession
20 in an effort to be released from the lease, isn't that just
21 an abandonment? That's - - -

22 MR. SHACKMAN: It's - - - it's - - -

23 JUDGE RIVERA: - - - that's Holy Name.

24 MR. SHACKMAN: It's - - -

25 JUDGE RIVERA: Holy Name is not about surrender.



1 MR. SHACKMAN: With regard - - -

2 JUDGE RIVERA: Holy Name is about abandonment.

3 MR. SHACKMAN: With regard to the tenant,
4 perhaps, but with regard to the guarantor in this case, it
5 is a fulfillment of the limit - - - conditions of
6 limitation in the guarantee. That - - - those conditions
7 were met here by the guarantor. And I should say,
8 paragraph - - -

9 JUDGE RIVERA: Well, let's say - - - let's say
10 we're persuaded what you all intended was a surrender
11 regardless of whether - - - right? An offer of a surrender
12 - - -

13 MR. SHACKMAN: That's - - - that's right.

14 JUDGE RIVERA: - - - regardless of whether the
15 landlord accepted it. But given, as Judge Singas points
16 out and, I think, several other members point out, that
17 language is missing, aren't we, then, just stuck with the
18 language the parties chose?

19 MR. SHACKMAN: Well, the language the parties
20 chose with regard to the manner of surrender - - - the only
21 language with regard to the manner of surrender is in
22 article 22 because article 25 is the no-waiver clause, and
23 that - - - that - - -

24 CHIEF JUDGE WILSON: 22 starts - - - 22 starts
25 off by saying, upon termination of the lease - - -

1 MR. SHACKMAN: That's correct, Judge.

2 CHIEF JUDGE WILSON: - - - termination or
3 expiration, which hasn't happened - - -

4 MR. SHACKMAN: Well - - -

5 CHIEF JUDGE WILSON: - - - hadn't happened?

6 MR. SHACKMAN: No, it has not happened, but
7 that's not the only time - - - that - - - that - - -

8 CHIEF JUDGE WILSON: Then why does it - - - then
9 why does it control?

10 MR. SHACKMAN: Because it's the only provision of
11 the lease which governs the manner of surrender. And by
12 the way, it also says, at the end of that paragraph, that
13 it - - - the obligations survive expiration of the term, so
14 it can be performed at other times - - - at times other
15 than the expiration of the term. But that's the only
16 clause in the lease that talks about the manner and the
17 method of surrender.

18 Paragraph 25 talks about the manner of acceptance
19 of a surrender. So the absence of a writing - - - and it
20 says, no agreement to accept such surrender. That's very
21 important because the - - - that - - - those words assume
22 the existence of, quote, "such surrender", end quote, and
23 they say that no agreement to accept such surrender, which
24 the language assumes exists - - -

25 JUDGE RIVERA: Well, all - - - all paragraph 22

1 does is say, when you quit and when you surrender, you have
2 to leave the apartment in this condition.

3 MR. SHACKMAN: Right.

4 JUDGE RIVERA: It doesn't - - - it would not mean
5 you didn't quit the apartment. It would mean you'll just
6 be liable for the landlord having to play to - - - pay to
7 clean it up.

8 MR. SHACKMAN: Well, it - - - what I would say is
9 that the condition of limitation of the guarantee is the
10 tenant surrendering pursuant to the terms of the lease. So
11 there's two ways - - - there's two requirements. One is
12 paragraph 22, and then there are the additional
13 requirements in article 9 of the second amendment, the
14 guarantee, which says that it also has to be delivered free
15 and clear of all occupants and subtenants. So that
16 requirement - - -

17 JUDGE SINGAS: Pursuant to the terms - - -

18 MR. SHACKMAN: - - - is added to paragraph 22.

19 JUDGE SINGAS: Pursuant to the terms of the
20 lease. You keep omitting that. I think you're trying to
21 make the point that surrender is stand-alone - - -

22 MR. SHACKMAN: Yes.

23 JUDGE SINGAS: - - - but in the lease, surrender,
24 I think, is only mentioned two times, and it's always in
25 connection with something, surrendering the condition of

1 the apartment and surrendering pursuant to the lease. It's
2 not a stand-alone.

3 MR. SHACKMAN: I think that's the whole point,
4 Judge, and that's the issue that Your Honors have to decide
5 because the question is - - - what I'm saying is that
6 article 25 doesn't talk about the manner of surrender.
7 When you - - - it talks about - - -

8 JUDGE RIVERA: So let - - - let me ask that.
9 What - - - what is your strongest argument - - -

10 MR. SHACKMAN: Well, I think the - - -

11 JUDGE RIVERA: - - - for why we should read
12 something that, otherwise, is not really the language of
13 the lease? Is it that it would otherwise render the
14 guarantee - - - that language - - -

15 MR. SHACKMAN: Yes. I - - -

16 JUDGE RIVERA: - - - that we're talking about in
17 the guarantee superfluous? Is that your strongest
18 argument?

19 MR. SHACKMAN: I think so, Judge. I think that's
20 the strongest part.

21 JUDGE RIVERA: Okay.

22 MR. SHACKMAN: And I would also say we have up
23 here at least eight very smart lawyers. I'm not counting
24 myself. But we're going back and forth about the meaning
25 of surrender and acceptance or surrender and acceptance,

1 and I would say this is - - - these terms are widely
2 misunderstood, wildly misconstrued among the bar, among the
3 courts, and it - - -

4 JUDGE RIVERA: Even more reason to have clarity
5 of the language chosen.

6 MR. SHACKMAN: All the - - - well, all the more -
7 - - I would say all the more reason to respectfully request
8 that this court give parties going forward some clarity
9 about what surrender means and what surrender and
10 acceptance mean, and that will, at best - - -

11 JUDGE RIVERA: Well, we only - - - only have to
12 give clarity as to what it means in the context of this - -
13 -

14 MR. SHACKMAN: Well, that's - - - yes.

15 JUDGE RIVERA: - - - particular language?

16 MR. SHACKMAN: Yes, but - - -

17 JUDGE RIVERA: So - - -

18 MR. SHACKMAN: - - - this language - - - and I'm
19 not talking about the guarantee. I'm talking about the
20 sections of the lease. 22 and 25 are in the standard Real
21 Estate Board of New York form that parties use all the time
22 when they make guarantees - - -

23 JUDGE RIVERA: The guarantee - - - you told me
24 the guarantee language was not in there.

25 MR. SHACKMAN: That's right.



1 JUDGE RIVERA: You certainly could have put - - -
2 or someone could have put surrender even if the owner
3 doesn't accept it, right? Or offer of a surrender even if
4 not accepted.

5 MR. SHACKMAN: I don't think it's necessary - - -

6 JUDGE RIVERA: However you wanted to write that.

7 MR. SHACKMAN: That - - - that's - - - that, I
8 think, is the essential point. I don't think - - - to me,
9 that language is not necessary because surrender has a
10 meaning at law, and that's shown in the Holy Properties and
11 Centurion cases. It surrenders the tender up of possession
12 to the landlord. There's no need in the lease to explain
13 what a surrender means because the law tells us what a
14 surrender means. It's just that some - - - it's just that
15 over the years, some lawyers and some other people have
16 gotten a little bit loose and casual about some of these
17 terms.

18 JUDGE RIVERA: Well, there is a difference
19 between abandonment and surrender.

20 MR. SHACKMAN: Yeah. Abandonment - - - no.

21 JUDGE RIVERA: Even if you might do it in the
22 same way.

23 MR. SHACKMAN: No. I would say abandonment - - -
24 a tenant is entitled to occupy his or her premises as it
25 chooses, so if the tenant just - - -

1 JUDGE RIVERA: That's right.

2 MR. SHACKMAN: - - - leaves, the tenant is still
3 on the - - - on the hook for the rent. The tenant doesn't
4 have to be - - -

5 JUDGE RIVERA: Sure. If they're paying - - - if
6 they're virtually paying - - -

7 MR. SHACKMAN: But a surrender is the yielding up
8 - - - Dear Mr. Landlord, I hereby surrender. I'm out.
9 Now, the landlord can - - -

10 JUDGE RIVERA: Or I just leave and never pay
11 again.

12 MR. SHACKMAN: That's an abandonment. That's not
13 - - - and that's not what happened here. We served the
14 notice.

15 JUDGE RIVERA: I know.

16 MR. SHACKMAN: The landlord didn't object. And
17 we told the landlord what we were going to do. And by the
18 way, article 25, the no-waiver clause, is designed to
19 prevent a situation of a gotcha. You know, you deliver the
20 keys to the super in the middle of the night. That's not
21 what happened here. We sent them a notice thirty days in
22 advance telling them exactly what we were going to do, and
23 then we did exactly that.

24 JUDGE CANNATARO: So keys are not a requirement
25 for the surrender?

1 MR. SHACKMAN: I'm sorry, Judge?

2 JUDGE CANNATARO: In - - - under that reading,
3 returning keys are not a requirement for a surrender?

4 MR. SHACKMAN: No, it's not - - - returning the
5 keys - - - and that's what I wanted to clarify from
6 earlier.

7 JUDGE CANNATARO: So you relate it to the
8 acceptance.

9 MR. SHACKMAN: With regard to Your Honor's
10 question, Mr. Chief Justice, it's not - - - the returning
11 of the keys, which we got into before and - - - is not set
12 forth in article 9 of the second amendment, and it's also
13 not set forth in paragraph 22. They did it. They said - -
14 - they sent the notice to the landlord. They did it. They
15 got out. They delivered the keys. The super took the
16 keys. They actually did a walkthrough. But all that is
17 not required.

18 JUDGE CANNATARO: But Counsel, would you agree -
19 - - would you agree that article 25 is a term of the lease?

20 MR. SHACKMAN: Of course.

21 JUDGE CANNATARO: So when you have the language
22 that says, pursuant to the terms of the lease, why is the
23 title of the paragraph so dispositive?

24 MR. SHACKMAN: Because the - - - there are a lot
25 of terms of the lease that don't have anything to do with

1 the issue that we're dealing with. And I would say article
2 25 doesn't have anything to do with the manner in which a
3 surrender is effectuated. It only has to do with the
4 manner in which an acceptance of a surrender may be
5 effectuated.

6 No agreement to accept such surrender shall be
7 effective unless it is in writing, signed by the landlord.
8 Doesn't mean that such surrender doesn't exist. In fact,
9 the parties know it - - - know it exists because they
10 called it such surrender, but the agreement to accept the
11 surrender can't be effective unless it's in writing - - -

12 JUDGE RIVERA: Is there anywhere - - -

13 MR. SHACKMAN: Yeah.

14 JUDGE RIVERA: - - - anywhere in the agreement
15 that it says the tenant must present the keys to the owner?
16 If I read this - - -

17 MR. SHACKMAN: No - - -

18 JUDGE RIVERA: - - - in the negative - - -

19 MR. SHACKMAN: No, I don't think so, Judge.

20 JUDGE RIVERA: - - - if you do this, that's - - -
21 that's not sufficient for a surrender?

22 MR. SHACKMAN: I don't think so, judge.

23 JUDGE RIVERA: Okay.

24 MR. SHACKMAN: It just says - - - just the
25 conditional limitation in the guarantee says what the

1 tenant must do to get the guarantor off the hook. Not the
2 tenant. The guarantor. The tenant did it, and that's the
3 end of it. That's our - - - that's our argument.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. SHACKMAN: Thank you.

6 (Court is adjourned)

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

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of 1995 CAM LLC v. West Side Advisors, No. 72 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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