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COURT OF APPEALS

STATE OF NEW YORK

TERESA SANCHEZ,

Appellant,

-against-

No. 76

NATIONAL RAILROAD PASSENGER CORP.,

Respondent.

20 Eagle Street
Albany, New York 12207
March 21, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

ARNOLD E. DIJOSEPH, III, ESQ.
THE LAW OFFICES OF ARNOLD E. DIJOSEPH, P.C.
Attorney for Appellant
50 Broadway
Suite 1601
New York, NY 10004

DAVID SAMEL, ESQ.
JEFFREY SAMEL & PARTNERS
Attorneys for Respondent
150 Broadway
20th Floor
New York, NY 10038

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Sanchez, number 76.
2 Counselor, do you want any rebuttal time?

3 MR. DIJOSEPH: Yes, two minutes, Your
4 Honor, please.

5 CHIEF JUDGE LIPPMAN: Two minutes? Go
6 ahead.

7 MR. DIJOSEPH: Two minutes, thank you.

8 CHIEF JUDGE LIPPMAN: You have it. You're
9 on.

10 MR. DIJOSEPH: Good afternoon. Arnold
11 DiJoseph for the plaintiff-appellants in this case.
12 I know I'm wearing my heart on my sleeve a little bit
13 about this, but I've been hoping to get a summary
14 judgment motion up here before this Court, and now I
15 have one. And I think, when you look at this case -
16 - - and this Court is the gatekeeper for everyone
17 else. And I think you have to look at what happened
18 in this case as far as how the pleadings were
19 treated, and how certain issues were treated with
20 respect to this case in particular - - -

21 CHIEF JUDGE LIPPMAN: So, counselor, what's
22 the significance of the verified complaint in terms
23 of your position?

24 MR. DIJOSEPH: Well, it's a verified - - -

25 CHIEF JUDGE LIPPMAN: Is that dispositive?

1 MR. DIJOSEPH: I think it is. I think once
2 you have a client in this case verify a pleading, the
3 purpose of having them verify it is to assert the
4 truthfulness of it. And that's why it's allowed
5 under the CPLR to be used as - - -

6 JUDGE SMITH: Well, I mean, I see the point
7 that normally it's just like an affidavit. But then
8 they take her deposition and say what day did this
9 happen? She says, I don't remember. Does that - - -
10 can you - - - can you really say that you've got an
11 issue of fact?

12 MR. DIJOSEPH: Well, yes, Your Honor,
13 absolutely I can say it, because at that point in
14 time, that's a question of fact for the jury to
15 determine what they're looking at. They're looking
16 at the witness, her credibility. And - - -

17 JUDGE SMITH: Humor me for - - - pretend
18 I'm the jury. Make an argument to me that this thing
19 happened on April 10th. Try to persuade me it
20 happened on April 10th.

21 MR. DIJOSEPH: Well, Judge, I would love to
22 do that - - -

23 JUDGE SMITH: I'm sorry, February - - -

24 MR. DIJOSEPH: - - - I would love to do
25 that. I haven't got to cross-examine Ms. Mendez. I

1 haven't gotten to look at the records. I haven't
2 gotten to question the - - -

3 JUDGE SMITH: I guess - - - I guess what
4 I'm suggesting to you is, that if you - - - we have a
5 summary judgment record, and what we're trying to
6 figure out is whether a rational jury with a similar
7 record before it could have found for the plaintiff.

8 MR. DIJOSEPH: But my whole - - - my whole
9 point to you is, is that there will not be a similar
10 record, because the way this happened - - -

11 JUDGE SMITH: Well, then - - - well, then
12 we shouldn't have summary judgment motions. Because
13 you'll never - - - of course, the trial's never going
14 to be identical to the summary judgment motion.

15 MR. DIJOSEPH: No, no, not - - - Judge, I
16 understand what you're saying to me. But you're - -
17 - you want to ask the question about this case. And
18 if you look at this case, the witness that testified
19 in this case, there was no explanation as to how the
20 February 10th date came into being. So you have the
21 employer - - - you have the employer in this case, a
22 representative of the employer, saying the accident
23 happened February 5th. And then you have the
24 employer themselves going to an administrative legal
25 tribunal and admitting that the accident happened on

1 February 10th.

2 JUDGE GRAFFEO: The Workers' Comp - - -

3 MR. DIJOSEPH: Correct.

4 JUDGE GRAFFEO: - - - documents?

5 MR. DIJOSEPH: And there's no - - -

6 JUDGE SMITH: Where is it admitted?

7 MR. DIJOSEPH: Well, look, in Workers'
8 Compensation, accident notice - - - ANCR, it's
9 called, Judge, Accident Notice and Causal
10 Relationship. And every compensation case, the first
11 thing they do is establish the accident, the day of
12 the accident, notice - - -

13 JUDGE SMITH: My question was, where did
14 the employer admit it?

15 MR. DIJOSEPH: Well, they've never - - -
16 everywhere. Because it's - - -

17 JUDGE PIGOTT: It's collateral estoppel
18 anyway, isn't it?

19 MR. DIJOSEPH: Yes, it's everywhere against
20 them. Everywhere through the whole record.

21 They've - - - the doctors did it. They do
22 it in the decisions. Their own - - -

23 JUDGE SMITH: I understand that the
24 Workers' - - - every document in the Workers' Comp
25 record has this accident date. Was there ever a

1 point at which that was material, where the
2 difference between the 5th and the 10th would have
3 made a difference?

4 MR. DIJOSEPH: It's absolutely material.
5 Because the date of her benefits starting to run, run
6 from the date of the accident. So because this is a
7 week prior, and it may be inconsequential in the real
8 world that it's only a week prior, but for the
9 purpose of this motion, it's very consequential,
10 because she would have gotten another week of
11 benefits.

12 And I'm not saying the employer did it on
13 purpose, and I'm not saying I would even win at the
14 trial. But I'm saying, on a summary judgment motion,
15 how did the defen - - - how do the defendants win
16 summary judgment and overcome their prima facie - - -

17 CHIEF JUDGE LIPPMAN: What are the - - -
18 what's the, on either side that makes it a denial of
19 summary? What's on one side and what's the other - -
20 -

21 MR. DIJOSEPH: Well, on here - - -

22 CHIEF JUDGE LIPPMAN: - - - for the 10th
23 versus the 5th?

24 MR. DIJOSEPH: - - - well here, there is no
25 question that the burden of proof to establish prima

1 facie entitlement lies with the defendant.

2 CHIEF JUDGE LIPPMAN: But - - - agreed, but
3 what do we have on each side here?

4 MR. DIJOSEPH: What do we have on each
5 side?

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. DIJOSEPH: On each side we have the
8 supervisor coming in and saying hey, these are the
9 payroll records I took down, and this is the record I
10 made, and this is the date I have. On the other
11 side, you have two verified pleadings from the
12 plaintiff saying the accident happened on a certain
13 date. She can be attacked, then, in the EBT because
14 she doesn't remember. But then you have an
15 administrative - - -

16 JUDGE SMITH: She could also - - - she
17 could have put in - - - I understand the verified
18 pleading is an affidavit. But she could have put in
19 an affidavit on summary judgment saying now I've been
20 able to refresh my recollection. I'm sure it
21 happened on February 10th, and this is why, and this
22 is the explanation for why I was working even though
23 it's my usual day off. There's none of that. I
24 mean, it's just - - - it just seems - - -

25 MR. DIJOSEPH: Well - - -

1 JUDGE SMITH: - - - just looking - - -
2 looking at this record, you think it had to be
3 February 5th.

4 MR. DIJOSEPH: Judge, but it doesn't have
5 to be February 5th, because it can be February 10th,
6 because there is no explanation. And I would - - -
7 if I - - - look, you have not had a chance to even
8 cross-examine. You're accepting that what Ms. Mendez
9 comes in as says, uncontradicted, without the benefit
10 of anybody asking her, hey, did you check this; did
11 you check - - -

12 JUDGE SMITH: Well, but it's not - - -

13 MR. DIJOSEPH: - - -- that - - -

14 JUDGE SMITH: - - - it's not - - - it's not
15 unusual to have on summary judgment an affidavit with
16 a custo - - - from a custodian of records with
17 documents attached. And you can't usually deny
18 summary judgment just because you haven't cross-
19 examined the person.

20 MR. DIJOSEPH: Very unusual to have a - - -
21 a custodian of records who's in complete disagreement
22 with the date of accident that was established by the
23 administrative tribunal, in which the very company
24 she's a part of admitted - - -

25 JUDGE SMITH: Is the - - - are the Workers'

1 Comp records admissible?

2 MR. DIJOSEPH: The Workers' Comp records?
3 The Workers' Comp records are absolutely admissible
4 as to what AMB (sic) agreed the date of accident was
5 in this case. No question about it.

6 JUDGE SMITH: You're saying that they're -
7 - - they're admissible as an admission by AMB (sic)?

8 MR. DIJOSEPH: By AMB (sic), not by the
9 defendant here. There's absolutely no - - -

10 JUDGE SMITH: Well, wait a - - - well, wait
11 a minute. But a - - - what good does that do you?
12 Suppose AMB (sic) said it was the 10th?

13 MR. DIJOSEPH: Because that proves - - -
14 it's AMB (sic) that's coming and saying the accident
15 didn't happen on that date. It's a representative
16 from AMB (sic) - - -

17 JUDGE SMITH: Well, but no, but isn't - - -
18 I'm making a technical point. But I agree; if you
19 have Amtrak admitting it, of course it's admissible.
20 Why is it an admission by a nonparty - - - well, how
21 does it get into evidence?

22 MR. DIJOSEPH: Well, how did this get into
23 evidence? This is the same admission. You have the
24 same - - - you can't get around that you have the
25 same company saying it's Febru - - - a representative

1 saying, hey, I - - - my records show February 5th,
2 and the company in the legal proceeding it
3 participated in, saying no, the accident's February
4 10th. And there's no explanation as to this
5 discrepancy.

6 JUDGE SMITH: I see. So you - - - I guess
7 what you're really saying is this is admissible to
8 impeach Sanchez?

9 MR. DIJOSEPH: Correct. From my end to
10 say, hey, listen, it's not. There's not prima facie
11 proofs here. Or there's a question of fact here that
12 warrants - - - that warrants further investigation
13 and a trial. And you know, I always say this about
14 summary judgment motions. I'm not saying I'm going
15 to win. All I'm saying is, give me the fair chance
16 to do what I'm supposed to do and what the courts are
17 supposed to allow us to do. The courts work for us.
18 We shouldn't be slaves to them because we have these
19 rules in place that have become so ironclad now,
20 okay, in certain situations - - -

21 JUDGE SMITH: Okay, but I mean, I just - -
22 - look, sometimes you grant summary judgment;
23 sometimes you don't. I mean - - -

24 MR. DIJOSEPH: Okay. Yes, Your Honor. I
25 understand.

1 JUDGE SMITH: - - - there are cases where
2 summary judgment can be granted. What makes this
3 different from those cases?

4 MR. DIJOSEPH: It's totally different,
5 because you have the plaintiff in - - - in two
6 verified pleadings saying February 10th. Then you
7 have an administrative tribunal, which this Court
8 very recently has come down with a decision that says
9 hey, on the plaintiff, it's totally binding - - -
10 binding as to how - - - whether you're disabled from
11 work and whether you're injured - - - it's binding on
12 the plaintiff. And now we're going to disregard that
13 that - - -

14 JUDGE SMITH: Well, that's a - - - that
15 case, that was a finding by the Workers' Comp order
16 on a contested issue.

17 MR. DIJOSEPH: Right.

18 JUDGE SMITH: The - - - nobody raised an
19 issue in this case as to the date before the board.

20 MR. DIJOSEPH: Well, that's right. But one
21 - - - but the party that's raising the issue now is
22 the same party in the compensation hearing - - - in
23 the compensation board, that said the accident's
24 February 10th. We're - - -

25 JUDGE RIVERA: So you're saying she says

1 it's the 10th, the employer at some point, somewhere
2 said it's the 10th - - -

3 MR. DIJOSEPH: Yes.

4 JUDGE RIVERA: - - - and then all of a
5 sudden, an employer's employee says it's not the
6 10th. Not because I personally know it, but because
7 I've got documentation - - -

8 MR. DIJOSEPH: Right.

9 JUDGE RIVERA: - - - to that effect.
10 Here's the documents. And in that kind - - -

11 MR. DIJOSEPH: Correct.

12 JUDGE RIVERA: - - - of a case - - -

13 MR. DIJOSEPH: Exactly.

14 JUDGE RIVERA: - - - you don't grant
15 summary judgment.

16 MR. DIJOSEPH: Correct. That - - - and I
17 think - - -

18 JUDGE RIVERA: At least you deny it now and
19 wait - - -

20 MR. DIJOSEPH: Correct.

21 JUDGE RIVERA: - - - do some more
22 discovery, then maybe grant summary judgment, if
23 there's another motion in front of them.

24 MR. DIJOSEPH: And I think that's exactly
25 what - - -

1 JUDGE GRAFFEO: Were you - - - were you - -
2 -

3 MR. DIJOSEPH: - - - the dissent is saying.

4 JUDGE GRAFFEO: - - - aware that the
5 records - - - that the Amtrak business records were
6 going to have the date five days earlier?

7 MR. DIJOSEPH: Was I aware?

8 JUDGE GRAFFEO: Yes.

9 MR. DIJOSEPH: Judge, if I was aware of it
10 - - -

11 JUDGE GRAFFEO: As counsel?

12 MR. DIJOSEPH: - - - no way. There is
13 nothing in the Comp file at all - - -

14 JUDGE GRAFFEO: Because I presume, if this
15 action had been started earlier, we wouldn't have the
16 statute of limitation problem.

17 MR. DIJOSEPH: Well, the action - - - you
18 know, I've discussed this with counsel today. I
19 never met him today to tell him this. The reason the
20 action wasn't started has nothing to do with waiting.
21 It had to do with trying to find out if there was a
22 subcontractor, and dotting all the I's and crossing
23 all the T's and then going to start the case, where
24 all the evidence was that the date was the 10th.
25 Because if you look at every document in the

1 plaintiff's file that I have, it's the 10th.

2 CHIEF JUDGE LIPPMAN: Okay, counselor,
3 thanks. You'll have your rebuttal.

4 Counselor?

5 MR. SAMEL: May it please the Court, David
6 Samel on behalf of the defendant-respondent.

7 CHIEF JUDGE LIPPMAN: Counselor, why do you
8 - - - why do you win here? Why isn't there at least
9 an issue based on the hearing, based on the verified
10 pleading? Why - - - why do you automatically win?

11 MR. SAMEL: Well, we have a contemporaneous
12 unequivocal document that says - - - that's dated
13 February 6th, says the accident occurred the day
14 before, which coincides perfectly - - -

15 JUDGE PIGOTT: You've got two sets of
16 documents that have two different dates. Why do we
17 have to pick one over the other?

18 MR. SAMEL: Well, the - - - there's
19 absolutely no indication where this February 10th
20 date came in.

21 JUDGE PIGOTT: Why do we have to pick one
22 over the other?

23 MR. SAMEL: But - - - well, the February
24 10th date, I would argue, first of all, it's - - -
25 since there's no indication of what the source of

1 that was - - -

2 JUDGE PIGOTT: Why do we have to pick one
3 over the other? I mean, you could make a very
4 articulate argument that - - - as you did in the
5 motion. But they make a very articulate argument, as
6 counsel pointed out. We just said the other day that
7 Workers' Comp, you know, is to be exalted over all
8 else. And they said February 10th. So I mean, it -
9 - -

10 MR. SAMEL: But - - - but - - -

11 JUDGE PIGOTT: - - - how do we decide one
12 over the other?

13 MR. SAMEL: Well, Mr. DiJoseph claims that
14 this was - - - this was litigated, this was contested
15 at Workers' Comp. It was not. Some - - -

16 JUDGE PIGOTT: Well, they are.

17 MR. SAMEL: There was a mistake made - - -

18 JUDGE SMITH: Well, is the February 10th
19 date there? I mean - - -

20 MR. SAMEL: The February 10th date - - -

21 JUDGE SMITH: - - - is there evidence - - -

22 MR. SAMEL: - - - is there.

23 JUDGE SMITH: - - - of the February 10th
24 date in the record?

25 MR. SAMEL: Well, is there evidence for the

1 February 10th date? I would say, no. There's no
2 evidence of the February - - - there's a listing - -
3 -

4 JUDGE SMITH: Because you say the - - -

5 MR. SAMEL: - - - of the February 10th date
6 - - -

7 JUDGE SMITH: - - - you say the Workers'
8 Comp records are not evidence?

9 MR. SAMEL: Well, the Workers' Comp - - -
10 the Workers' Comp records might be evidence for - - -
11 for some purposes. But without any indication of
12 what the source of the February 10th date is, I would
13 suggest that that's hearsay. We have - - -

14 JUDGE SMITH: What about - - -

15 MR. SAMEL: - - - no idea what the source
16 of - - -

17 JUDGE SMITH: - - - and what about the
18 verified pleading - - -

19 MR. SAMEL: - - - the February 10th date
20 is.

21 JUDGE SMITH: - - - is that not evidence?
22 Ordinarily, a verified pleading would be evidence,
23 wouldn't it?

24 MR. SAMEL: Well, the verified pleading,
25 yeah. Okay.

1 JUDGE PIGOTT: So that matches - - - that
2 matches Workers' Comp. You've got your documents
3 that say February 5th, right?

4 MR. SAMEL: Yes.

5 JUDGE PIGOTT: And then you've got the
6 equivocal testimony - - - the EBT, if I read it
7 right, she's speaking through an interpreter. She
8 said she did not review any documents prior to
9 coming, and it was about the fifth question out, you
10 know, what was the date of the accident. And I - - -
11 I was just picturing, maybe she didn't have her
12 coffee set yet, and somebody said, what was the date
13 of the accident; and she said I don't remember.

14 And maybe later in the same EBT, had she
15 been asked a second time, she would have. But that's
16 - - - that just seemed to me not something you grant
17 summary judgment on.

18 MR. SAMEL: Well, Your Honor, it was worse
19 than that. At the EBT, she not only said I don't
20 know what the date was, she said I don't know what
21 year it was, 2005, 2004 - - -

22 JUDGE PIGOTT: Exactly. Well, that's the
23 point.

24 MR. SAMEL: - - - was it February 2nd. She
25 - - - she clearly had no idea what date it was.

1 JUDGE PIGOTT: Isn't that the point? I
2 mean, it's not like she was making up something. I
3 mean, she was just being very candid, again, as I
4 say, through an interpreter. If you told her it was
5 2001, she may have agreed with you.

6 MR. SAMEL: Well, if the reasoning of the
7 dissent were upheld here, there would - - - it would
8 undermine many legitimate summary judgment motions.
9 For example, in rear-end motor vehicle accident
10 cases, plaintiffs are often granted summary judgment.
11 They say I was stopped at a red light - - -

12 JUDGE PIGOTT: I've lost a fair amount of
13 those, I mean - - -

14 MR. SAMEL: - - - the guy hit me - - -

15 JUDGE PIGOTT: No, the point, though, is,
16 Mr. DiJoseph's saying, go try it. I mean, maybe
17 you're right.

18 MR. SAMEL: But there is absolutely no
19 evidence of the February 10th date.

20 JUDGE PIGOTT: Okay.

21 MR. SAMEL: And the evidence with - - -

22 CHIEF JUDGE LIPPMAN: Counselor, why do you
23 ignore the - - - the evidence on the other side? Why
24 is it only your evidence that matters?

25 MR. SAMEL: Well, I don't there is really

1 any evidence - - - any genuine evidence from the
2 other side.

3 CHIEF JUDGE LIPPMAN: We've been talking
4 the whole time about the - - -

5 JUDGE PIGOTT: Did you go back and get the
6 benefits back that you say she un - - - you know, she
7 unfortunately took that she didn't deserve from
8 February 5th to February 10th?

9 MR. SAMEL: I'm - - -

10 JUDGE PIGOTT: I'm confident that - - -

11 MR. SAMEL: - - - I think she's claiming -
12 - - I think Mr. DiJoseph is claiming that she should
13 have gotten more benefits.

14 JUDGE PIGOTT: I'm sorry. Yeah, she got
15 Comp benefits from the 10th instead of the 5th. You
16 say she should have gotten them from the 5th.

17 MR. SAMEL: That's right.

18 JUDGE PIGOTT: That she was shortchanged on
19 her Workers' Comp.

20 MR. SAMEL: That's right.

21 JUDGE PIGOTT: So when you - - - when you
22 went back - - -

23 MR. SAMEL: That's right. But this is - -

24 -

25 JUDGE PIGOTT: - - - when you went back to

1 fix that, did they say that you couldn't or what?

2 MR. SAMEL: Well, nobody ever went back to
3 fix it. I mean, there was just one - - - one mistake
4 that was made originally, and it was repeated on more
5 than one document.

6 JUDGE PIGOTT: She made one on her EBT.

7 JUDGE RIVERA: What's the origin - - -

8 JUDGE PIGOTT: That's why - - - I don't
9 know how we figure this out.

10 JUDGE RIVERA: What's the origin of this
11 mistake?

12 MR. SAMEL: No one - - - absolutely no one
13 knows.

14 JUDGE RIVERA: You claim that - - - you
15 have no clue?

16 MR. SAMEL: Absolutely no one knows.

17 JUDGE RIVERA: The employer has no idea?

18 MR. SAMEL: No one knows. But the issue
19 which came up here, which was the issue of CPLR
20 105(u), whether or not the verified pleading counts
21 as an allegation of the February 10th date.

22 First of all, I would suggest that that's
23 not preserved for review. That argument was never
24 made below. It was never made in the motion court.

25 JUDGE SMITH: But well - - - but assume it

1 is. I mean, in general, he's right, isn't he? You
2 could rely on a verified pleading just as though it
3 were an affidavit.

4 MR. SAMEL: Well, it - - - you know, there
5 are - - - there's a rule which has been followed
6 hundreds of times in the courts, which is that an
7 affidavit which is submitted in opposition to a
8 summary judgment motion, but which is contradicted by
9 prior sworn testimony of the affiant, the affidavit
10 may be disregarded.

11 JUDGE SMITH: I understand. But the - - -

12 MR. SAMEL: Now, we have - - - we have a
13 different - - -

14 JUDGE SMITH: - - - but let me just - - -

15 MR. SAMEL: - - - we have a different - - -

16 JUDGE SMITH: - - - you do accept the basic
17 point that there's not really a difference between a
18 verified pleading and an affidavit?

19 MR. SAMEL: Well, I think that there are
20 certain circumstances in which a verified pleading or
21 a verified aff - - -

22 JUDGE SMITH: Okay.

23 MR. SAMEL: - - - or a sworn affidavit - - -

24 -

25 JUDGE SMITH: But he - - - humor me - - -

1 MR. SAMEL: - - - is demonstrably
2 contradicted.

3 JUDGE SMITH: - - - try my question. Is a
4 verified pleading the same as an affidavit?

5 MR. SAMEL: It can be used as an affidavit.
6 However, in this case, the question is whether or not
7 this issue was an actual issue as to the date of the
8 accident or a feigned issue. And I think that the
9 Appellate Division majority came to the correct
10 conclusion that it's a feigned issue.

11 CHIEF JUDGE LIPPMAN: On what basis? I'm
12 trying to understand what you're saying.

13 MR. SAMEL: Because the - - -

14 CHIEF JUDGE LIPPMAN: Why is the - - -

15 MR. SAMEL: - - - the - - - because of the
16 unequivocal document that is dated February 6th.
17 There's no way in the - - - there's no reasonable
18 view, there's no conceivable way that this accident
19 report could have been filled out on February 11th
20 and - - -

21 CHIEF JUDGE LIPPMAN: Counselor, but that's
22 - - - that's what you're going to figure out when
23 this case goes on, if it continues on.

24 MR. SAMEL: But if the case goes to trial,
25 I would suggest that the trial would have a

1 predetermined outcome. She can't testify now at
2 trial that oh, yeah, I remember it was February 10th.
3 She clearly didn't remember - - - she couldn't
4 remember - - - even remember the year. She - - -

5 CHIEF JUDGE LIPPMAN: Counselor - - -

6 MR. SAMEL: - - - there's no evidence that
7 she can - - -

8 CHIEF JUDGE LIPPMAN: - - - counselor - - -

9 MR. SAMEL: - - - that they can bring about
10 February - - -

11 CHIEF JUDGE LIPPMAN: - - - she's - - -

12 MR. SAMEL: - - - 10th.

13 CHIEF JUDGE LIPPMAN: - - - it's, I think,
14 as Judge Pigott indicated, it just goes that this
15 isn't some kind of a feigned, planned, this is my
16 strategy to say - - - this is a woman who's going
17 through an interpreter, that doesn't know what the
18 date - - - can't specify at that point what - - -
19 it's in her verified petition - - - verified
20 complaint - - - what more could you want - - - which
21 you say is the equivalent of an affidavit.

22 MR. SAMEL: Well, but then - - -

23 CHIEF JUDGE LIPPMAN: I don't know why - - -

24 - why do we determine it on a summary judgment

25 motion. That's - - - that's my lack of understanding

1 of how you get to that point that we grant your - - -
2 or allow your summary judgment grant to stand.

3 MR. SAMEL: Because in our view, there is
4 no reasonable dispute here. There's really no
5 triable issue of fact. It's just a feigned issue of
6 fact.

7 CHIEF JUDGE LIPPMAN: We should make that
8 judgment?

9 MR. SAMEL: Yes.

10 CHIEF JUDGE LIPPMAN: That it's feigned?
11 That we know - - - we could tell it's feigned?

12 MR. SAMEL: Well, when I say - - - well,
13 when I say "feigned", feigned implies some sort of
14 nefarious motive on the part of someone.

15 JUDGE SMITH: I mean, in fact - - -

16 MR. SAMEL: Perhaps illusory - - -

17 JUDGE SMITH: - - - she's - - - I mean, her
18 - - -

19 MR. SAMEL: - - - issue of fact.

20 JUDGE SMITH: - - - problem is that she's
21 truthful and not that she's feigning. I mean, if she
22 had said at her deposition, I remember the 10th, it
23 was my birthday - - - it was the day before my
24 birthday, I'll never forget it, it's engraved on my
25 recollection, you'd have an issue of fact, right?

1 MR. SAMEL: That's - - - that's perhaps
2 true. Feigned is probably - - -

3 JUDGE SMITH: So this is - - -

4 MR. SAMEL: - - - the wrong word.

5 JUDGE SMITH: - - - I mean, maybe this
6 isn't - - - this isn't news, but people who are
7 willing to perjure themselves, sometimes do better
8 than people who tell the truth.

9 MR. SAMEL: That's true. But feigned is
10 probably not the best word. But that was the word
11 that was used by the Appellate Division. But I think
12 illusory might be - - -

13 JUDGE GRAFFEO: If - - -

14 MR. SAMEL: - - - might be a better issue -
15 - - a better word.

16 JUDGE GRAFFEO: - - - if you had this
17 business record on February 6th, why didn't the
18 company representative correct the date of the
19 accident at the Workers' Compensation proceeding?

20 MR. SAMEL: Well, it's really unclear who
21 made the mistake - - - the original mistake that was
22 repeated over and over again of February 10th.

23 JUDGE GRAFFEO: Well, if it was repeated -
24 - -

25 MR. SAMEL: Certainly - - -

1 JUDGE GRAFFEO: - - - over and over, they
2 would have then more than one opportunity to correct
3 the date.

4 MR. SAMEL: Well, there's no question about
5 that. But this was an error that just sort of flew
6 under the radar. Nobody noticed it.

7 JUDGE SMITH: And nobody - - -

8 MR. SAMEL: I don't think it's that unusual
9 for - - -

10 JUDGE SMITH: - - - nobody much cared about
11 the date during Workers' Comp?

12 MR. SAMEL: Don't - - - definitely nobody
13 much cared. And like I said in my brief - - -

14 JUDGE SMITH: But did - - - is there a
15 document that can be used as an admission - - - at
16 least an admission by ABT - - - whatever the name is
17 - - -

18 MR. SAMEL: ABM.

19 JUDGE SMITH: - - - ABM, that can be used
20 as an admission by them as to the February 10th date?

21 MR. SAMEL: No. I don't think so. I think
22 ABM never - - - never made any real admission. There
23 was no position taken.

24 JUDGE SMITH: They just - - -

25 MR. SAMEL: There was no finding made.

1 JUDGE SMITH: - - - these are documents
2 that come out of the board with the February 10th
3 date on it; nobody knows where that date came from?

4 MR. SAMEL: And nobody knows where it came
5 from. And neither of us do - - - nobody knows where
6 it came from. But I - - - it didn't come from real
7 life.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,
9 thanks.

10 Counselor, rebuttal?

11 MR. DIJOSEPH: Your Honor, no, I don't need
12 to use my rebuttal time. Thank you.

13 CHIEF JUDGE LIPPMAN: Okay, thank you both.
14 Appreciate it.

15 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Teresa Sanchez v. National Railroad Passenger Corp., No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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