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COURT OF APPEALS

STATE OF NEW YORK

GURYEV,

Appellant,

-against-

No. 224

TOMCHINSKY,

Respondent.

20 Eagle Street
Albany, New York 12207
November 14, 2012

Before:

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

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Guryev v. Tomchinsky.
2 Counselor, would you like any rebuttal
3 time?

4 MR. MOLLICA: Two minutes, Your Honor.
5 Good afternoon, may it please the Court - - -

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. MOLLICA: Raymond J. Mollica, for the
8 appellant, Aleksey Guryev. In reversing the trial
9 court's denial of the summary judgment motion before
10 depositions, the Appellate Division erroneously
11 applied the Mangiameli case, inasmuch as, the
12 Mangiameli case is a case which deals with
13 neighboring land owners, where landowner B can't be
14 held vicariously liable for the Labor Law violations
15 of landowner A. At the - - -

16 CHIEF JUDGE LIPPMAN: What does the condo
17 have to do with the safety in the apartment?

18 MR. MOLLICA: Well, the condominium is an
19 owner of the land upon which the building stands and
20 the owner of the building.

21 CHIEF JUDGE LIPPMAN: What do they have to
22 do with the safety?

23 MR. MOLLICA: Well, they are - - - pursuant
24 to the statute, all owners are vicariously liable for
25 the - - - responsible for the safety of workers,

1 pursuant to 240 and 241 of the Labor Law.

2 CHIEF JUDGE LIPPMAN: Well, what does the
3 condominium itself have to do with it?

4 MR. MOLLICA: Well, more specifically in
5 this case, in addition to their ownership of the land
6 and the building, there was also an extensive
7 alteration agreement by which the unit owner had to
8 enter into.

9 JUDGE READ: Is that - - - that's what you
10 rely primarily on, is the alteration agreement?

11 MR. MOLLICA: I rely primarily upon their
12 ownership of the land and the building, and then
13 secondarily upon the alteration agreement.

14 JUDGE GRAFFEO: So how does - - -

15 JUDGE READ: How common is that type of an
16 alteration agreement, if you're making - - - I mean,
17 in New York City, and there are a lot of these
18 buildings.

19 MR. MOLLICA: Truthfully, I don't know how
20 common this type of alteration agreement is, but the
21 alteration agreement demonstrates the level at which
22 the condominium sought to retain control and
23 authority - - -

24 CHIEF JUDGE LIPPMAN: How so? How so?
25 What does it provide specifically - - -

1 MR. MOLLICA: Well, it - - -

2 CHIEF JUDGE LIPPMAN: - - - that gives them
3 control to the extent to keep them in here?

4 MR. MOLLICA: In the first place, you have
5 to ask the condominium's permission. You have to ask
6 my permission to even ask to do work, and then, you
7 have to submit plans and specifications to my
8 architect, and pay my architect for him to review it.
9 And then - - -

10 JUDGE READ: Well, is it important that
11 they're trying to protect, I guess, the - - - kind
12 of, the integrity of the building as a whole, and the
13 plumbing systems in the building as a whole? Does
14 that make a difference?

15 MR. MOLLICA: I think that goes directly to
16 the point.

17 JUDGE GRAFFEO: How does - - -

18 MR. MOLLICA: That means - - - that's
19 because they own the building.

20 JUDGE GRAFFEO: How does either one of
21 those, though, have anything to do with being able to
22 ensure the safety of the work that goes on in that
23 particular unit?

24 MR. MOLLICA: Well, in the first place,
25 just because - - - liability attaches at ownership.

1 That's Gordon. That's Gordon and the entire line of
2 Gordon cases.

3 JUDGE SMITH: But they didn't own this
4 apartment.

5 MR. MOLLICA: They didn't own this
6 apartment. But in Gordon, Eastern Rail Yard (sic)
7 didn't own the railcar that Gordon was working on.
8 When he fell - - -

9 CHIEF JUDGE LIPPMAN: Do they have the
10 ultimate say, is that what you're saying?

11 MR. MOLLICA: Well - - -

12 CHIEF JUDGE LIPPMAN: The condominium has
13 the ultimate say?

14 MR. MOLLICA: The condominium owns the
15 land, gets the benefit of the land, erects the
16 building - - -

17 CHIEF JUDGE LIPPMAN: But as to the safety,
18 is the relevance here of this - - - in this action?

19 MR. MOLLICA: They could have. They
20 actually did. In - - - on - - - I think it's - - - I
21 could be wrong, but I think in paragraph 6.4 - - -

22 CHIEF JUDGE LIPPMAN: So, in the end - - -
23 in the end, they have the ultimate say, that's your
24 argument, right?

25 MR. MOLLICA: Yes, that they could have

1 reentered at any time and said, I think that there's
2 a dangerous condition; I'm stopping the work; I'm
3 throwing the workers out.

4 JUDGE GRAFFEO: Are all the others - - -

5 JUDGE READ: Which of our cases is this
6 closest to?

7 MR. MOLLICA: I think this is - - -
8 personally, I think it's closest to Gordon. I think
9 Gordon is not a perfect, but a very strong analogy.
10 There is no - - - there is very little other case law
11 that - - - there's no other case law directly on
12 point with this. And I don't know why exactly. I
13 can't tell you. I could speculate that nobody ever
14 raised this defense - - -

15 CHIEF JUDGE LIPPMAN: But this is a - - -
16 but in answer to what you were asked before, I think
17 by Judge Read, this is a common provision, the
18 alteration agreement? This is the way business is
19 done by a condo? Or this particular condominium
20 wants to very much control what happens in that
21 apartment?

22 MR. MOLLICA: I cannot tell you that. I
23 don't know that. I don't know how often condominiums
24 assert these types of agreements in their - - - with
25 respect to work going on inside units, inside

1 buildings that they own. I don't know that. I do
2 know that this type of agreement wasn't in
3 Mangiameli, which is the case that's controlling the
4 Appellate Division Second Department's decision. I
5 do know that a big difference between this case and
6 Mangiameli is the defendant in Mangiameli didn't own
7 the land that the work was being done on.

8 JUDGE SMITH: If I own - - - if I own land,
9 and you rent it from me, and you build a building on
10 it - - - so, you're the ground - - - or tenant under
11 a ground lease, and you own the building. And
12 something happened, and there's a Labor Law 240
13 violation on the 28th floor. Am I liable for that
14 violation, because I own the land?

15 MR. MOLLICA: According to Gordon and a
16 myriad of other cases, I would say yes.

17 JUDGE SMITH: Well, you got anything closer
18 than - - - I mean, Gordon wasn't - - - Gordon wasn't
19 just the land. I mean, Gordon owned the property
20 that they brought the railroad car on to.

21 MR. MOLLICA: But they didn't own the
22 railroad car, and the railroad car was the structure
23 that was being worked on at the time of the accident.

24 JUDGE SMITH: Is there any case closer than
25 Gordon on its facts to what we're talking about here?

1 MR. MOLLICA: There is no - - - to be
2 honest, I extensively researched the body of case law
3 in this situation, and there is no key reference - -
4 -

5 CHIEF JUDGE LIPPMAN: Counselor, well, does
6 it matter whether this was a condominium or a co-op?

7 MR. MOLLICA: I feel that they should not
8 be distinguished under the Labor Law, because
9 outwardly the - - - it would - - -

10 CHIEF JUDGE LIPPMAN: Is there a different
11 relationship between a co-op and the co-op board and
12 the apartment, and a condominium owner and these
13 apartments?

14 MR. MOLLICA: There are differences in the
15 interplay between how members of a condominium and
16 the shareholders of a co-op board act. There is a
17 landlord/tenant relationship in a co-op - - -

18 CHIEF JUDGE LIPPMAN: I think there - - -
19 are there similar agreements in co-ops and condos - -
20 -

21 MR. MOLLICA: There - - -

22 CHIEF JUDGE LIPPMAN: - - - to this
23 particular kind of agreement?

24 MR. MOLLICA: Whether or not there is, I
25 don't know. Again, I don't know. I've never had

1 this kind of agreement in front of me in another
2 case, and I've handled many Labor Law cases, but - -
3 -

4 JUDGE PIGOTT: What's the practical effect
5 of this? You've got a 241(6) against the owner,
6 right, the actual condo owners, which I assume
7 they're then going to pass through to the contractor.
8 So, why do you need this condo - - - why do you need
9 the condo board?

10 MR. MOLLICA: The individual unit owners
11 are one or two family owners.

12 JUDGE PIGOTT: Oh, I see, okay.

13 MR. MOLLICA: So, there is no defendant.

14 JUDGE PIGOTT: Gotcha.

15 MR. MOLLICA: They - - - at the present
16 moment, they are mostly out of the case, except for -
17 - -

18 JUDGE GRAFFEO: Under your line of
19 analysis, are the other condominium owners also
20 responsible?

21 MR. MOLLICA: They are responsible inasmuch
22 that they're part - - -

23 JUDGE GRAFFEO: Because they're going to
24 have - - - they're going to have to pay the
25 assessments for the - - -

1 MR. MOLLICA: - - - of the collection - - -
2 the collective, communal - - -

3 JUDGE GRAFFEO: - - - condo board, correct?

4 MR. MOLLICA: But they - - - they are - - -
5 they're only responsible inasmuch as that they are
6 part of the condominium. A condominium, like a co-op
7 - - -

8 JUDGE SMITH: They're essentially the same.

9 JUDGE GRAFFEO: So, do you get to enforce
10 your - - -

11 MR. MOLLICA: - - - is a communal
12 arrangement.

13 JUDGE GRAFFEO: Do you get to enforce your
14 judgment against every one that owns a unit in the
15 condominium building?

16 MR. MOLLICA: No, because I get to enforce
17 my judgment against the condominium. Because the
18 condominium owns the building - - -

19 JUDGE GRAFFEO: Right, but the other owners
20 pay the assessments to the condo organization,
21 correct?

22 MR. MOLLICA: Right, but - - -

23 JUDGE GRAFFEO: So, on a practical level,
24 all the other owners are going to have to pay the
25 damages if you're successful.

1 MR. MOLLICA: But only through the
2 condominium.

3 JUDGE SMITH: Is the condominium
4 association a legal entity?

5 MR. MOLLICA: It is. It does - - - it owns
6 in fee, the land and the building and all the
7 communal accoutrements.

8 JUDGE SMITH: So you're saying - - - I
9 guess, I had trouble figuring out - - - I mean, I
10 couldn't find a statute that created this kind of a
11 thing. I thought they were maybe more like tenants-
12 in-common with a name.

13 MR. MOLLICA: No, the way it works, as far
14 as I've come to understand, is that every unit owner
15 owns their unit and a proportional amount of the
16 building. But it's indivisible; the common owner is
17 CHIEF JUDGE LIPPMAN: But they're - - -

18 JUDGE SMITH: So that's what tenants-in-
19 common do. They own property indivisibly.

20 MR. MOLLICA: Okay, but getting back to
21 what you were saying about - - -

22 CHIEF JUDGE LIPPMAN: But are they inter -
23 - - we're trying to understand the relationship. Are
24 they interrelated units? Are all the units related
25 by the nature of this entity, this condominium?

1 MR. MOLLICA: When you say "related", I
2 mean, do you mean - - -

3 CHIEF JUDGE LIPPMAN: Sort of Judge
4 Graffeo's question to you. That if something happens
5 to the condominium itself, doesn't it affect every
6 owner?

7 MR. MOLLICA: Well, inasmuch as they're in
8 it together, there is to an extent, that they're all,
9 you know - - -

10 CHIEF JUDGE LIPPMAN: But your argument - -
11 -

12 MR. MOLLICA: - - - but they get to govern
13 themselves via the board, and it's the board that
14 enforces their collective will. And the board
15 changes according to election.

16 CHIEF JUDGE LIPPMAN: But does - - - I
17 guess my question - - - does it matter that if the
18 condominium loses and has to pay out and that the
19 owners have to pay more in maintenance, does that
20 matter in terms of what - - - your claim here?

21 MR. MOLLICA: Well, I'm - - -

22 CHIEF JUDGE LIPPMAN: The thrust of Judge
23 Graffeo's question and - - - is if something happens
24 to the condo, the unit owners are going to pay the
25 cost in the end.

1 MR. MOLLICA: Well - - -

2 CHIEF JUDGE LIPPMAN: The increased
3 maintenance, whatever.

4 MR. MOLLICA: Sure.

5 CHIEF JUDGE LIPPMAN: Does that matter in
6 terms of this proceeding that you have, under the
7 Labor Law?

8 MR. MOLLICA: Well, inasmuch as, since they
9 all collectively own the building - - -

10 CHIEF JUDGE LIPPMAN: Yeah.

11 MR. MOLLICA: - - - they're collectively
12 responsible for it.

13 CHIEF JUDGE LIPPMAN: So, in your view,
14 that doesn't matter, right?

15 MR. MOLLICA: No.

16 CHIEF JUDGE LIPPMAN: Okay. You'll have -
17 - -

18 JUDGE READ: I - - -

19 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
20 Read.

21 JUDGE READ: Yes, one other question.
22 Would you still win if there weren't the alteration
23 agreement, in your view?

24 MR. MOLLICA: I think, yes.

25 JUDGE READ: Because of the ownership of

1 the land?

2 MR. MOLLICA: I think the alteration
3 agreement is a second line that I'm taking - - - I
4 think the land ownership alone should be enough.

5 JUDGE READ: Okay.

6 CHIEF JUDGE LIPPMAN: Okay, thanks,
7 counselor. Counselor?

8 MR. FISCHLER: Thank you. Good afternoon,
9 Your Honors.

10 CHIEF JUDGE LIPPMAN: Counsel, could there
11 be any doubt that the condominium in this particular
12 case had a direct say in terms of the safety
13 conditions during this work that was being done in
14 the apartment? Could there be anything clearer from
15 these provisions in the agreement?

16 MR. FISCHLER: Absolutely not.

17 CHIEF JUDGE LIPPMAN: Why not?

18 MR. FISCHLER: They had no control
19 whatsoever with regard to - - -

20 CHIEF JUDGE LIPPMAN: They could name the
21 contractor if they had to, right? They have the veto
22 - - -

23 MR. FISCHLER: No, no.

24 CHIEF JUDGE LIPPMAN: No?

25 MR. FISCHLER: No, no. They couldn't name

1 the contractor. They had the right, under the
2 alteration agreement, to approve or disapprove a
3 contractor.

4 CHIEF JUDGE LIPPMAN: So, they could veto
5 the contractor.

6 MR. FISCHLER: They can veto a contractor.
7 They can veto plans. They can request - - -

8 CHIEF JUDGE LIPPMAN: They could veto a
9 plan, because - - - could they do that because of
10 safety considerations?

11 MR. FISCHLER: They do that with regard to
12 preserving - - - I believe it was Judge Graffeo may
13 have indicated earlier - - - protecting the integrity
14 of the entire property.

15 CHIEF JUDGE LIPPMAN: So, the answer is
16 yes, they could do it if they thought there was a
17 safety concern, right?

18 MR. FISCHLER: Not a safety concern.
19 Safety concern possibly with regard to the entire
20 building.

21 JUDGE PIGOTT: Well, it says, "sole and
22 absolute discretion to approve or reject plans and
23 specifications of interior work; sole and absolute
24 discretion to approve or reject a condominium
25 apartment owner's choice of contractor; sole and

1 absolute discretion to approve or reject relocation
2 of electrical, water, gas lines, pipes or conduits;
3 sole and absolute discretion to restrict the use of
4 power tools for the comfort of neighbors; the right
5 to halt work for failure to comply with the
6 alteration agreement; and the sole and absolute
7 judgment to decide what repairs are necessary to
8 alleviate issues that might arise when work is
9 halted, and to carry out those repairs."

10 MR. FISCHLER: Correct.

11 JUDGE PIGOTT: That's pretty all-inclusive.
12 And of course, what they're looking for is a pass-
13 through. It's not so much that you're going to end
14 up paying this - - -

15 MR. FISCHLER: Exactly, because we don't
16 control the work.

17 JUDGE PIGOTT: - - - as it is that you're
18 going to sue that contractor.

19 MR. FISCHLER: But the important
20 distinction, even in this comprehensive alteration
21 agreement, like the one Your Honor just cited, is the
22 fact that nothing in that agreement gives the right
23 or the obligation - - - more important, nothing gives
24 the condo association the right to insist upon the
25 manner in which the work was done.

1 JUDGE PIGOTT: If it does - - - because it
2 seems to me in here it says that you have the right
3 to stop the work if you find a safety violation. So
4 if you were there when this guy lost his - - - or had
5 the eye injury because he wasn't wearing goggles, you
6 could have, and probably should have, stopped the
7 work.

8 MR. FISCHLER: I don't believe that's what
9 the alteration agreement concerns itself with. This
10 concerns itself with protecting the integrity of the
11 building. In other words, if the - - -

12 CHIEF JUDGE LIPPMAN: Counselor, but what
13 could be more important to the integrity of the
14 building than when there's work being done in one of
15 the apartments and whether it's being done safely
16 under the appropriate laws?

17 MR. FISCHLER: But - - -

18 CHIEF JUDGE LIPPMAN: What could be more
19 important than that?

20 MR. FISCHLER: But safety with regard to
21 how an individual worker conducts himself is not the
22 obligation or the right of the board.

23 CHIEF JUDGE LIPPMAN: But as Judge Pigott
24 just asked you, they could have stopped the work that
25 this particular person was doing when he hurt himself

1 under the agreement.

2 MR. FISCHLER: I don't think the agreement
3 concerns itself with that. I think the agreement
4 concerns itself - - -

5 CHIEF JUDGE LIPPMAN: Isn't that what the
6 agreement says?

7 MR. FISCHLER: I don't believe it's to be
8 interpreted - - -

9 JUDGE PIGOTT: Does that raise an issue of
10 fact, then, as to what the agreement means when it
11 says all of this stuff?

12 MR. FISCHLER: I think the agreement has to
13 do with safety concerns - - -

14 JUDGE PIGOTT: Right, and your opponent
15 argues the opposite and my question then is, why
16 don't we have a trial on these facts and find out?

17 MR. FISCHLER: Well, I think all of the
18 evidence shows that when the manager of the building
19 testified on behalf of the condo board, and when the
20 other representatives testified that they had the
21 right to inspect the work, check the progress of the
22 work, but not with regard to the means and methods of
23 an individual worker.

24 CHIEF JUDGE LIPPMAN: Counselor, isn't the
25 argument that you're making now divorced from

1 reality?

2 MR. FISCHLER: No, it's not divorced - - -

3 CHIEF JUDGE LIPPMAN: This is the way it
4 works in those buildings.

5 MR. FISCHLER: Oh, about inspecting - - -

6 CHIEF JUDGE LIPPMAN: And the condominium
7 owner is able to play a large role in terms of who
8 goes in there and does that work, the conditions that
9 they do that work, how it's being done. Isn't it at
10 variance with what seems so apparent from the
11 agreement and what that agreement means in practical
12 terms?

13 MR. FISCHLER: I think what the agreement
14 does - - - and again, this is not just in the Trump
15 Condos; this is many, many cases - - - with regard to
16 protecting - - -

17 CHIEF JUDGE LIPPMAN: Do you know the
18 answer to the question we asked before: is this a
19 typical agreement?

20 MR. FISCHLER: Yeah, I believe it is a
21 typical agreement. I think, in the many situations
22 where you have franchisees, co-ops, and condos where
23 the association has the right to reject or approve
24 contractors or plans - - -

25 CHIEF JUDGE LIPPMAN: Why do think those

1 provisions are put into place?

2 MR. FISCHLER: To protect the integrity of
3 the building. If somebody comes in and wants to do
4 work in an individual unit, but wants to bring a
5 payload of - - -

6 CHIEF JUDGE LIPPMAN: What if they want to
7 come in and do work in an unsafe fashion? They want
8 to come in and do a lot of hot wire things that might
9 threaten an apart - - - an apartment above, or drill
10 into the apartment above, and it'll cause some kind
11 of problem - - -

12 MR. FISCHLER: The condo board - - - the
13 condo - - -

14 CHIEF JUDGE LIPPMAN: Couldn't - - -
15 couldn't - - - if the condo becomes aware of that,
16 can they stop that work from happening?

17 MR. FISCHLER: If they became aware it, but
18 again, this is not the manner of the practice of the
19 condo board in this case or in any other case. They
20 - - -

21 JUDGE SMITH: Well, you would agree, that
22 if they're endangering the apartment above or below,
23 the condo board would care a lot.

24 MR. FISCHLER: Absolutely.

25 JUDGE SMITH: But isn't the more relevant

1 question, what if they're endangering the guy who's
2 holding the drill?

3 MR. FISCHLER: But - - -

4 JUDGE SMITH: I mean, apart from normal
5 human concern, does that mean anything to the condo
6 board?

7 MR. FISCHLER: But this alteration
8 agreement had nothing to do with that. And there was
9 nobody on behalf of the condo or the board or anybody
10 else on behalf of the building, who was in the
11 apartment and - - -

12 CHIEF JUDGE LIPPMAN: Yeah, yeah, but would
13 the condo be concerned - - - in answer to Judge
14 Smith's question - - - if this guy was endangering
15 himself? That if the condo board knew that they're
16 doing work in an unsafe fashion, is that a legitimate
17 concern, given the agreement that's in place here?

18 MR. FISCHLER: Well, I don't think it has
19 to do with the agreement, but I think Your Honor's
20 most important word in that hypothetical was the word
21 "if", if they knew. This is not a situation where -
22 - -

23 CHIEF JUDGE LIPPMAN: You think that
24 they're totally oblivious to what's happening in
25 these apartments?

1 MR. FISCHLER: Not totally oblivious, but
2 they don't have the means and the methods to control
3 how the work is done.

4 CHIEF JUDGE LIPPMAN: You don't think when
5 you have long-term work in these apartments that
6 someone comes up from the condominium or the co-op
7 and, in a general way, checks on what's going on
8 there?

9 MR. FISCHLER: They check to see what's
10 going on, but in this particular instance, where a
11 worker at the end of the day is - - -

12 CHIEF JUDGE LIPPMAN: What, they put a
13 blindfold on when the worker is doing something that
14 might endanger himself?

15 MR. FISCHLER: No, they wouldn't - - -

16 CHIEF JUDGE LIPPMAN: But in a general way,
17 they're interested in everything else?

18 MR. FISCHLER: No, they wouldn't put a
19 blindfold on, but this is not what this alteration
20 agreement gives them the right to do, and this is not
21 what the law is with regard to condominium
22 associations. They are not the owners of the
23 individual units. Those units are owned in fee-
24 simple, as the Court has stated in Mangiameli, as the
25 Second Department unanimously stated in this case,

1 and the whole line of cases from the Court of Appeals
2 and other Appellate Divisions in this state, to the
3 effect, when you make a non-titleholder to stand in
4 the shoes of an owner, you have to show that there is
5 some issue of control, the right to hire via contract
6 - - -

7 JUDGE PIGOTT: But Judge Pigott read you
8 the agreement. Could there be anything more all-
9 encompassing than that agreement?

10 MR. FISCHLER: That does not control the
11 means and methods of the work - - -

12 JUDGE READ: So what - - - so what if - - -

13 MR. FISCHLER: - - - that the individual
14 unit owners are engaging in. I'm sorry, Your Honor.

15 JUDGE READ: That's okay. What if, if you
16 lose this case, what's the practical effect? I guess
17 there are no more agreements like this?

18 MR. FISCHLER: Excuse me, if - - -

19 JUDGE READ: If you lose.

20 MR. FISCHLER: If we lose this case, then
21 the Court's ruling would be that these alteration
22 agreements as - - -

23 JUDGE SMITH: But what - - - what - - -
24 what do you tell your clients - - -

25 JUDGE READ: Yeah.

1 JUDGE SMITH: - - - to do to avoid it
2 happening again, I think is really the question.

3 MR. FISCHLER: Make an agreement that's not
4 as encompassing as this. But I believe that - - -

5 JUDGE SMITH: Whatever provisions we rely
6 on in our agreement, you tell your client to take
7 those out.

8 MR. FISCHLER: Well, I wouldn't want to do
9 that, because I still believe that the agreement,
10 really, is put into effect - - -

11 CHIEF JUDGE LIPPMAN: Do you think - - -

12 MR. FISCHLER: - - - to protect the rest of
13 the building.

14 CHIEF JUDGE LIPPMAN: Do you think that the
15 condominium would want a situation that even if they
16 couldn't - - - that this resulted in some liability -
17 - - do you think that they would want a situation
18 where they give away their right to have any
19 influence over alteration work that's being done in
20 their apartment?

21 MR. FISCHLER: I don't think they want to
22 give away their right. But I think if the Court
23 rules in the appellant's favor under these
24 circumstances, I think you're expanding the liability
25 where real property law did not intend to have that

1 effect. You're expanding the liability of the condo
2 association - - -

3 JUDGE READ: So, what happens then? Is
4 there insurance - - - is there an insurance issue
5 then? I mean, do you have to get more insurance or
6 something like that to - - -

7 MR. FISCHLER: It would be an insurance
8 issue. It would be an expansion of liability issue.

9 JUDGE PIGOTT: Well, well, well. You're
10 going to pass this through to XYZ Contracting (sic),
11 or whoever this - - -

12 MR. FISCHLER: Well, we're actually going
13 to pass it through to the unit owner, which would be
14 a situation in other condo associations as well,
15 because under the alteration agreement they do have
16 the obligation for contractual indemnity.

17 JUDGE PIGOTT: Right, and - - -

18 JUDGE SMITH: Do you - - -

19 JUDGE PIGOTT: Excuse me, Judge. But, and
20 the point being - - - the plaintiff makes - - - is
21 that the whole idea of 240 and 241 is protection of
22 workers. And we want to make sure that they're
23 properly protected. And the claim here is that he
24 was not, because he didn't have - - - wasn't provided
25 with the eye protection on a contractor that you had

1 the sole authority to, at least, reject.

2 MR. FISCHLER: We - - -

3 JUDGE PIGOTT: And the argument then is why
4 isn't this a question of effect?

5 MR. FISCHLER: Well, we had the sole
6 authority to reject based upon whether the contractor
7 provided insurance or didn't provide insurance, but
8 the bottom line is - - -

9 JUDGE PIGOTT: Had a poor safety history?

10 MR. FISCHLER: Well, we - - - I don't even
11 know if that would be something that would be, you
12 know, put in front of the board to either approve or
13 disapprove. But the situation is with the individual
14 unit owners, okay - - - this is no different than a
15 single- or double-family home. The purpose of the
16 Labor Law to protect workers, of course, the public
17 policy is construction work is "extraordinarily
18 dangerous work".

19 CHIEF JUDGE LIPPMAN: Yeah, but these
20 aren't single-family homes. They're a lot of
21 interrelated units, aren't they?

22 MR. FISCHLER: But they're each single
23 family owned units, okay. I would agree that this
24 would be a different situation if the worker was
25 being involved in extraordinary construction work on

1 the building as a whole, where extra protection would
2 be needed - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MR. FISCHLER: - - - and covered under - -
5 -

6 CHIEF JUDGE LIPPMAN: Judge Smith, one more
7 question.

8 JUDGE SMITH: Yeah, I'm sorry. Do you
9 happen to know the answer to the question I was
10 asking your adversary? What kind of legal entity is
11 this? Is it a corporation? Does it have a
12 certificate of incorporation? Does it have
13 shareholders? Does it have members?

14 MR. FISCHLER: It's - - - I believe it's a
15 - - - I believe it's a corporation. It's carved-out
16 specifically under the Real Property Law, as Your
17 Honor probably knows.

18 JUDGE SMITH: Yeah, well, I looked at the
19 Real Property Law, and I couldn't find the definition
20 of condominium association, so I was kind of puzzled.

21 MR. FISCHLER: Well, whether it's a
22 corporation or an association or a partnership, even
23 in cases such as the Frisch case, where they say,
24 comparing it to a cooperative association, as opposed
25 to a condo association - - - two fundamentally

1 different forms of ownership, and in Sanatass,
2 indicates that - - -

3 JUDGE SMITH: I think you've answered my
4 question.

5 CHIEF JUDGE LIPPMAN: Okay, thanks,
6 counselor.

7 MR. FISCHLER: - - - he could be considered
8 as a landlord.

9 CHIEF JUDGE LIPPMAN: Appreciate it.

10 MR. FISCHLER: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. MOLLICA: First, I just want to touch
13 on something that you were talking about, Your Honor
14 where - - -

15 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

16 MR. MOLLICA: - - - you said that the Labor
17 Law had to be interpreted in real life terms. Well,
18 in real life terms, the building that we're involved
19 with here, is a 40-something story, 400-unit
20 building, that from the outside you don't know if
21 it's a condominium or a co-op.

22 JUDGE PIGOTT: Yeah, but they're saying
23 it's all - - - that all this stuff that I rattled off
24 is cosmetic.

25 MR. MOLLICA: Well - - -

1 JUDGE PIGOTT: All they want to do is
2 protect the integrity of the building and within that
3 building are all these one- and two-family dwellings
4 that can do what they want within this now kind of
5 narrower, but still broad, frame.

6 MR. MOLLICA: Well, why do they want to
7 protect the integrity of the building?

8 JUDGE PIGOTT: To look nice.

9 MR. MOLLICA: Because they own it, okay.
10 But when you're standing outside - - -

11 JUDGE SMITH: Is there anything - - -

12 MR. MOLLICA: - - - you don't know if it's
13 a co-op or if it's a condominium. And if a worker is
14 walking in - - - when Mr. Guryev was walking in - - -

15 CHIEF JUDGE LIPPMAN: What does it mean to
16 protect the integrity? Your adversary keeps saying
17 protect - - -

18 MR. MOLLICA: Protect, I guess - - -

19 CHIEF JUDGE LIPPMAN: - - - what does that
20 mean to you?

21 MR. MOLLICA: I guess to keep the dirt out
22 of the hallway, or to make sure I don't chip into the
23 structural concrete or damage the elevator mechanics
24 or - - -

25 JUDGE SMITH: That's - - -

1 MR. MOLLICA: - - - all the other common -
2 - -

3 JUDGE GRAFFEO: So the liability - - -

4 MR. MOLLICA: - - - or drill into the floor
5 - - -

6 JUDGE GRAFFEO: The liability for an
7 injured worker is the same, whether it occurs in the
8 condo unit or in a common area of the condo?

9 MR. MOLLICA: In my - - -

10 JUDGE GRAFFEO: - - - of the condominium
11 building? You're saying that it's equivalent, right?

12 MR. MOLLICA: Well, in a cooperative
13 building, which from the outside could look the same
14 - - -

15 JUDGE GRAFFEO: No, I'm talking about - - -

16 MR. MOLLICA: - - - it would be the same.
17 It would - - -

18 JUDGE GRAFFEO: I'm talking about a
19 condominium building.

20 MR. MOLLICA: Right. I'm saying - - -

21 JUDGE GRAFFEO: I take it that you're
22 saying the liability is the same, whether the
23 accident happens in the unit or in the common area.

24 MR. MOLLICA: Yes, I'm saying - - -

25 JUDGE GRAFFEO: They're equivalent.

1 MR. MOLLICA: - - - it should be the same.
2 I'm saying it because it's all in the same building.
3 Yes, it should be the same, but - - -

4 JUDGE SMITH: Is there - - -

5 MR. MOLLICA: - - - just to draw a further
6 parallel, when you're looking outside from - - - in
7 real life, the difference between a cooperative
8 building and a condominium building from the exterior
9 is the same. When a worker is walking in - - -

10 JUDGE SMITH: Is there - - - just, if I
11 could ask you - - -

12 MR. MOLLICA: - - - he doesn't know the
13 difference.

14 JUDGE SMITH: If I could ask you about the
15 agreement, is there anything in the agreement that
16 you can point to that you say is designed for
17 workers' safety - - - to protect the safety of the
18 workers?

19 MR. MOLLICA: They never actually - - - to
20 be honest - - - they never actually say this workers'
21 safety - - -

22 JUDGE SMITH: And in fact - - - and - - -

23 MR. MOLLICA: - - - but they have a vague
24 term in, I think, I believe, paragraph 6.4 that says
25 they can stop the work, and during that time of

1 stopping the work, they could do any corrective
2 measures to protect other persons or the building.

3 JUDGE SMITH: But you would agree, no
4 doubt, their main concern would be with the other
5 tenants in the building itself, not with the people
6 who work there - - - who are doing the work.

7 MR. MOLLICA: I would - - - that is their
8 main concern, yes. But at the same time, why should
9 they not be concerned with workmen's safety?

10 CHIEF JUDGE LIPPMAN: I guess that's true.
11 Okay, thank you both. Appreciate it.

12 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of GURYEV v TOMCHINSKY, No. 224, were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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