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COURT OF APPEALS

STATE OF NEW YORK

JFK HOLDING COMPANY LLC,

Respondent,

-against-

No. 196

CITY OF NEW YORK, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
October 16, 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
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 196. Counsel, do you
2 want any - - - any rebuttal time?

3 MS. CHIN: Please, may I reserve two
4 minutes, Your Honor?

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
6 Go ahead, you're on.

7 MS. CHIN: May it please the court, my name
8 is Kathy Chin from Cadwalader, Wickersham & Taft.
9 I'm here representing defendant-appellant, the
10 Salvation Army.

11 This is an appeal from a decision of the
12 Appellate Division First Department that upends two
13 very basic principles critical to the resolution of
14 commercial disputes in this state. First, that a
15 contract must be enforced according to its terms; and
16 secondly, that when a defendant moves to dismiss a
17 complaint, the facts alleged by the plaintiff must be
18 accepted as true - - -

19 CHIEF JUDGE LIPPMAN: Counsel, let me ask
20 you first. Where - - - where does Salvation Army fit
21 in to this whole commercial transaction in leasing
22 this space. What's their role as opposed to the role
23 of DHS? Who negotiated this?

24 MS. CHIN: This deal was negotiated between
25 DHS, the City of New York, and JFK, the owner of the

1 property. The Salvation Army was only an
2 intermediary. The amended complaint describe - - -

3 CHIEF JUDGE LIPPMAN: Do they stand in the
4 shoes of the City?

5 MS. CHIN: They are essentially an agent of
6 the City in this situation. They really do stand in
7 the shoes of the City - - -

8 JUDGE ABDUS-SALAAM: Did they sign the
9 lease as an agent of the City?

10 MS. CHIN: No, they did not.

11 JUDGE ABDUS-SALAAM: So they signed it in
12 their own name?

13 MS. CHIN: They signed it in their own
14 name.

15 JUDGE READ: What about the - - -

16 JUDGE GRAFFEO: Did you have any - - -

17 JUDGE READ: - - - the services agreement?
18 What about the services agreement?

19 MS. CHIN: Services agreement was also
20 signed by the Salvation Army. But the intent of the
21 parties always was that the Salvation Army was to be
22 held harmless and was only an intermediary in this
23 transaction.

24 JUDGE GRAFFEO: You had some independent
25 obligations under the service agreement, didn't you,

1 in connection with the condition of the property?

2 MS. CHIN: The Salvation Army had
3 maintenance obligations under the services agreement,
4 but limited to the budget it received. That was the
5 consistent theme throughout - - -

6 JUDGE GRAFFEO: Well, didn't - - - didn't
7 paragraph 12 require you to keep the building in a
8 certain condition?

9 MS. CHIN: But only to the limit of the
10 budget. And the services agreement, the services
11 agreement refers specifically to the budget, which is
12 the amount of money that the City of New York agreed
13 to give the Salvation Army through rates that were
14 negotiated, not by the Salvation Army, but between
15 the City and JFK.

16 The lease also provides for maintenance
17 obligations. It's a typical lease. You're the
18 tenant, you do have maintenance obligations.

19 JUDGE SMITH: Under the terms - - - under
20 the terms of the lease, did the landlord have to
21 accept the termination if the property was not in the
22 condition which it should - - - which you got it?

23 MS. CHIN: If it was not in the condition
24 that was appropriate under the lease, then indeed,
25 the lease would not necessarily be terminated - - -

1 JUDGE SMITH: Okay.

2 MS. CHIN: - - - effectively.

3 JUDGE SMITH: But in fact - - - but
4 everyone seems to assume it is terminated. How did
5 it get terminated? Did they accept the termination
6 even though they say that - - - they say the place is
7 a mess?

8 MS. CHIN: Well, they accepted the ten
9 million dollars.

10 JUDGE SMITH: Um-hum.

11 MS. CHIN: But whether or not they - - -

12 JUDGE SMITH: I mean, could they - - -
13 could they have said, thank you for your ten million;
14 we're going to apply it to your rent; you're still
15 the tenant?

16 MS. CHIN: They could have. But would that
17 have been - - -

18 JUDGE SMITH: But they didn't?

19 MS. CHIN: They did not.

20 JUDGE SMITH: Um-hum.

21 MS. CHIN: No. I mean, they negotiated
22 with the City for almost two years after the
23 termination took place without the Salvation Army at
24 the table, trying to resolve their differences. They
25 were not able to, and JFK eventually sued the City.

1 JUDGE SMITH: - - - but you would agree
2 that the - - - the clause - - - that there's an
3 exception to the clause that says you have no
4 liability or no liab - - - no liability beyond the
5 rent. You do have liability beyond the rent if you -
6 - - if you have a right against the City that you
7 fail to pursue?

8 MS. CHIN: Well, the "in the event"
9 language is not a condition precedent to the
10 limitation of liability. It's a separate,
11 independent covenant, and it applies only in very
12 particular situations.

13 CHIEF JUDGE LIPPMAN: But the - - -

14 MS. CHIN: If indeed - - -

15 CHIEF JUDGE LIPPMAN: - - - ten million
16 dollars is your only obligation?

17 MS. CHIN: The ten million dollars - - -

18 CHIEF JUDGE LIPPMAN: You would have to
19 pursue them. Aside from that - - -

20 MS. CHIN: Right.

21 CHIEF JUDGE LIPPMAN: - - - you have no
22 particular obligation and therefore, you can't be
23 held liable?

24 MS. CHIN: Right. I mean, the ten million
25 dollars was all that the City had to pay pursuant to

1 the terms of the services agreement. And the
2 language that is being referred to here, "in the
3 event that the amounts due have not been paid", those
4 refer to the situation where something like the ten
5 million dollars had not been paid under the services
6 agreement. Here it was. There was no obligation for
7 us - - -

8 JUDGE SMITH: What remedy - - -

9 MS. CHIN: - - - to enforce against the
10 City.

11 JUDGE SMITH: - - - does the landlord have,
12 in the event that exactly what they say happened did
13 happen, that the place is returned and is completely
14 trashed?

15 MS. CHIN: Well, they should have - - -
16 there are many things that they could have done. I
17 mean, these documents were constructed in such a way
18 that - - -

19 JUDGE SMITH: Well, one of - - - one of
20 them, I suggest, is they didn't have to accept the
21 surrender. Is there anything else they could have
22 done?

23 MS. CHIN: They could, at an earlier point
24 in time, have said this building is going to wreck
25 and ruin. This is a - - - this is a default under

1 the lease, and we are terminating the lease.

2 JUDGE GRAFFEO: Do you disagree with their
3 representation in the complaint that the building is
4 inhabitable?

5 MS. CHIN: I don't believe there's actually
6 a representation in the amended complaint to that
7 effect. I know that the majority opinion states
8 that. I don't know what the situation of the
9 building is currently.

10 CHIEF JUDGE LIPPMAN: But your - - - but
11 your view is you don't have any responsibility for
12 that?

13 MS. CHIN: We don't have any
14 responsibility, because of the limitation of
15 liability provision.

16 JUDGE PIGOTT: So your - - - your argument
17 is that once you knew the City was going to be
18 responsible for a maximum of ten million dollars, you
19 could do what you wanted, when you wanted, to the
20 extent you wanted, in that building, and you were not
21 responsible at all?

22 MS. CHIN: No - - -

23 JUDGE PIGOTT: So if you - - - if you did
24 200 million-dollars'-worth of damage, which I guess
25 they're claiming you did, your answer is, that's too

1 bad. We can do anything we want, because the City's
2 going to pay them ten million dollars, and the rest
3 of it, that's too bad.

4 MS. CHIN: No. I mean, I don't think we
5 would say that, simply because this - - - this
6 provision was in place from the very beginning - - -

7 JUDGE SMITH: Well, if you had - - -

8 MS. CHIN: - - - of this deal.

9 JUDGE SMITH: - - - if you had a tort
10 liability for destroying the City - - - for
11 destroying the building, I assume that the lease
12 wouldn't protect you against that. If you burned it
13 down?

14 MS. CHIN: Well, to the extent that there
15 was - - - the limitation of liability provision would
16 apply no matter what. I mean, the intention - - -

17 JUDGE SMITH: No matter - - - you mean
18 literally, if you burn it down - - -

19 MS. CHIN: If - - -

20 JUDGE SMITH: - - - on purpose?

21 MS. CHIN: - - - if we committed some kind
22 of a crime that would be - - -

23 JUDGE SMITH: Or a tort? Or a tort?

24 MS. CHIN: - - - truly an issue. But
25 actually there's a provision in the lease provides

1 if, indeed, some kind of a criminal liability was
2 imposed on the Salvation Army because - - -

3 JUDGE PIGOTT: No, but - - -

4 MS. CHIN: - - - of this - - -

5 JUDGE PIGOTT: - - - most - - - most leases
6 - - - I mean, if the tenant, you know, to use Judge
7 Smith's phrase, trashes the place, they're
8 responsible. It doesn't make any difference whether,
9 you know, the lease ended or not. I mean, the
10 landlord goes in and realizes what's happened and
11 says, you know, you've done this damage. You're - -
12 - you know, you were the tenant, you're responsible,
13 and you have to pay.

14 MS. CHIN: But this - - -

15 JUDGE PIGOTT: And you're saying that
16 because you had a deal with the City to take care of
17 your lease and the payments and things like that,
18 that somehow you're absolved from any responsibility
19 for any activity that went on within the building.
20 You were - - - you had license to trash the building
21 up to ten million dollars.

22 MS. CHIN: This was an unusual situation.
23 I mean, there is language in the lease - - -

24 JUDGE PIGOTT: You started your argument
25 saying this is standard lease.

1 MS. CHIN: Well, it should be interpreted
2 in accordance with its terms, which is fairly
3 standard; and a motion to dismiss should be treated
4 in a fairly standard way. But, is this an unusual
5 situation? Yes, it is, in many ways, because we were
6 solely the intermediary here.

7 JUDGE PIGOTT: If you have a tenant who - -
8 - and you don't want to lease the property to them,
9 but they say, well, wait a minute, I have a relative
10 who's willing to pay the rent for me. So I have an
11 agreement with my uncle to see that my rent is paid,
12 and you nevertheless trash the tenancy, you can't
13 say, well, I had an agreement with my uncle to pay
14 and so you got to go after my uncle. I don't think
15 that's true. I think if you damage the property,
16 you're responsible. Isn't that logical in a standard
17 lease?

18 MS. CHIN: This isn't a standard lease,
19 because - - -

20 JUDGE PIGOTT: I thought that's the way you
21 opened your argument.

22 MS. CHIN: I opened the argument by saying
23 you had to enforce these contracts according their
24 terms. And these contracts specifically make out,
25 and the amended complaint confirms, that this is an

1 unusual situation. Salvation Army was solely the
2 intermediary. JFK and the City both understood that.

3 JUDGE ABDUS-SALAAM: If there had not been
4 the ten-million-dollar termination fee, and just the
5 standard lease form of you have to restore the
6 property to its pre-tenancy condition, would your
7 argument be the same?

8 MS. CHIN: Yes. I believe that it would
9 be. I mean, the situation is such that pretty much
10 whatever happened at the building, we were supposed
11 to be held harmless. That was the deal. We entered
12 into the lease solely because we were going to
13 fulfill the services agreement - - -

14 JUDGE PIGOTT: Is that provision in the
15 lease?

16 MS. CHIN: - - - with the City of New York.

17 JUDGE PIGOTT: Is there a provision in the
18 lease that said you're to be held harmless?

19 MS. CHIN: That's the limitation of
20 liability provision - - -

21 JUDGE PIGOTT: In the lease?

22 MS. CHIN: - - - in the lease. Yes. I
23 mean, that's the reference - - -

24 JUDGE PIGOTT: So Judge - - - what Judge
25 Abdus-Salaam suggested to you, that you promised to

1 restore it to condition pre - - - pre-tenancy, is not
2 there?

3 MS. CHIN: Oh, there is indeed a provision
4 in the lease that you should restore the building to
5 its pre-lease condition. Which does not involve
6 creating a new - - -

7 JUDGE SMITH: But you - - - but you say the
8 lease also says that if you breach that covenant,
9 your liability is limited to what you get from the
10 City?

11 MS. CHIN: Yes.

12 JUDGE PIGOTT: What - - - what section was
13 that?

14 MS. CHIN: The limitation of liability
15 provision is actually the focus of the - - -

16 JUDGE GRAFFEO: Is that paragraph 31,
17 you're talking about?

18 MS. CHIN: Yes, paragraph 31 of the lease,
19 at page 135 of the record.

20 JUDGE PIGOTT: And that's the provision
21 you're relying on?

22 MS. CHIN: Yes.

23 JUDGE PIGOTT: Okay.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 You'll have your rebuttal time. Thank you.

1 MS. CHIN: Thank you.

2 CHIEF JUDGE LIPPMAN: Counselor?

3 JUDGE GRAFFEO: What's your interpretation
4 of paragraph 31?

5 MS. RECINE: Our - - -

6 JUDGE GRAFFEO: Doesn't that somewhat
7 impose a limitation based on what the Salvation Army
8 received from DHS?

9 MS. RECINE: It imposes a limitation on - -
10 - on what the Salvation Army receives from DHS. To
11 the extent the Salvation Army acts reasonably in
12 attempting to enforce its rights - - - those are
13 exactly the words - - -

14 CHIEF JUDGE LIPPMAN: But what if they
15 don't have rights? Do - - -

16 MS. RECINE: Well, that's if they don't
17 have rights. But we can discuss that. They
18 certainly have rights under the services agreement
19 and otherwise.

20 JUDGE SMITH: They have - - - they have a
21 right to sue the City for the - - - the - - - for the
22 bad condition of the premises?

23 MS. RECINE: Correct. The - - -

24 JUDGE SMITH: Which - - - which clause is
25 that?

1 MS. RECINE: I would - - - I would point
2 you to Article 6 of - - -

3 JUDGE SMITH: Of the services agreement?

4 MS. RECINE: - - - of the services
5 agreement. And I would - - - I would - - - I would
6 explain the responsibilities this way. Under the
7 services agreement, there are responsibilities for
8 maintenance, and they fall both with the Salvation
9 Army - - - the Salvation Army is actually supposed to
10 execute on the maintenance - - - appropriate
11 maintenance for the building.

12 The City - - - and my adversary pointed
13 this out - - - is supposed to fund that. Now, what
14 happens if you're a normal party to an agreement and
15 part - - - the other side, the City in this case, is
16 not doing what they're required to do, which is
17 properly fund the money needed to maintain the
18 property. Well, you sue the City under the services
19 agreement.

20 JUDGE PIGOTT: So you're - - - you're
21 essentially agreeing with your opponent that the only
22 remedy here is through the City - - - that they - - -
23 that you can't levy on any Salvation Army property,
24 income, or assets. All they have - - - what they
25 have failed to do is to - - - to make commercially

1 reasonable efforts to collect money for you from the
2 City?

3 MS. RECINE: That's not entirely correct.
4 Our - - - our position is this, is that it's clear
5 from the limitation on liability that their limit - -
6 - their liability will be limited to that of the City
7 if - - -

8 JUDGE PIGOTT: Who - - - whose liability
9 would be limited?

10 MS. RECINE: The Salvation Army's liability
11 will be limited, but only to the extent that it acts
12 reasonably to enforce its rights.

13 JUDGE SMITH: And I have - - - they say
14 they have rights under Article 6, and I've now got it
15 in front of me. Which part of Article 6?

16 MS. RECINE: Article - - - this is just an
17 example, and it connects to a - - -

18 JUDGE SMITH: I'll take - - -

19 MS. RECINE: - - - different - - -

20 JUDGE SMITH: - - - one example is all I
21 need. Which part of - - -

22 MS. RECINE: Okay.

23 JUDGE SMITH: - - - Article 6?

24 MS. RECINE: So (C) says the contractor and
25 the Department - - - so this is on page 182 of the

1 record: "The contractor and the Department shall
2 review annually the amount of payments made pursuant
3 to this agreement to determine the appropriateness of
4 the rates based on any increase in the cost of
5 operating the facility."

6 So in this particular instance - - -

7 JUDGE SMITH: So you say that gave them a
8 right to sue the City for - - - for not - - - for
9 inappropriate - - - for inappropriate low - - -
10 inappropriately low rates, if they were paying per
11 person?

12 MS. RECINE: Clearly. And this is - - -
13 this is the position that the Salvation Army just
14 took when standing here. They said look, we had
15 maintenance obligations, no question; but only to the
16 limits of our budget. And if our budget was too low,
17 well, then too bad for you. Well, that's not true,
18 exactly. Not too bad for us.

19 There was an obligation on the part of the
20 City to fund this property appropriately.

21 CHIEF JUDGE LIPPMAN: Who's the real party
22 here? The Salvation Army or the City? If you want
23 to recover against the City, what - - - how do you -
24 - -

25 MS. RECINE: No, no - - -

1 CHIEF JUDGE LIPPMAN: - - - view Salvation
2 Army?

3 MS. RECINE: - - - no, we want to - - -

4 CHIEF JUDGE LIPPMAN: What is their role?

5 MS. RECINE: Their role is, they signed a
6 lease. They signed a lease with us. And when they
7 did that, they promised - - -

8 CHIEF JUDGE LIPPMAN: That you negotiated
9 with the City?

10 MS. RECINE: That's neither here nor there.

11 CHIEF JUDGE LIPPMAN: But that you
12 negotiated with the City?

13 MS. RECINE: Among - - - yes. We - - -
14 with the City as well as the Salvation Army read,
15 reviewed, signed it. They signed this as in their
16 own capacity. They didn't sign it as an agent of the
17 City.

18 JUDGE GRAFFEO: Well, you did accept the
19 ten-million-dollar termination fee from the - - -

20 MS. RECINE: Well, actually - - -

21 JUDGE GRAFFEO: - - - City. So did that
22 extinguish any of these claims?

23 MS. RECINE: Certainly not, and for two
24 reasons. One is that there's nothing in the
25 termination provision that says once you accept this

1 termination fee there are no other rights under this
2 agreement. In fact, contrary to that - - -

3 JUDGE GRAFFEO: Well, did you periodically
4 inspect the premises to determine that there wasn't
5 reasonable maintenance efforts being undertaken
6 before this termination?

7 MS. RECINE: Well, the - - - this happened
8 in sort of one fell swoop. If you read the
9 complaint, what happened was there were issues with
10 maintenance of the property. We knew that, the City
11 knew that. The City inspected. The City issued a
12 report. It said you're doing a terrible job,
13 Salvation Army, which should have been the Salvation
14 Army's first cue to sue the City if it wasn't getting
15 appropriate funding and that's why it wasn't
16 maintaining the property.

17 As a result, the City terminated the
18 services agreement. But under the services
19 agreement, even after termination, the Salvation Army
20 had six months in which to sue on the services
21 agreement. It opted not to.

22 Within that six-month period of time, we
23 wrote them three letters. We said we don't accept
24 your termination.

25 JUDGE SMITH: Well, you said you don't

1 accept them. And is it your position today that the
2 lease has been terminated or not?

3 MS. RECINE: I think that we ultimately
4 accepted the ten million dollars. But our position
5 has always been - - -

6 JUDGE SMITH: You seem to have trouble
7 answering that one yes or no. Has the lease been
8 terminated or not?

9 MS. RECINE: No, it hasn't been terminated.

10 JUDGE SMITH: You say the lease is still in
11 force, they should be paying monthly rent?

12 MS. RECINE: They should be doing a lot of
13 things that they haven't been doing.

14 JUDGE SMITH: Well, why aren't you just
15 suing for the rent if it's still in force?

16 MS. RECINE: We - - - we are suing for
17 rent. That's one of the things that we're suing for:
18 rent, maintenance payments, all of - - -

19 JUDGE SMITH: And you say you can take the
20 ten million and still keep the lease in force?

21 MS. RECINE: I don't re - - - as of the
22 date of the complaint, we hadn't accepted the ten
23 million.

24 JUDGE PIGOTT: As I - - - as I read the
25 record, and I could be wrong, I thought in August of

1 '05 the Salvation Army notified you that it was
2 terminating the lease effective in September.

3 MS. RECINE: It did. And in September we
4 wrote three letters. We wrote a letter on the 5th,
5 the 9th and the 30th. On the 5th, the 9th, and the
6 30th, we told them you have not met your conditions
7 precedent to terminating.

8 JUDGE ABDUS-SALAAM: Have you accepted the
9 ten million now? You said as of the date of the
10 complaint you - - -

11 MS. RECINE: I - - - I don't know the - - -
12 actually standing here, I don't know the answer to
13 that question. I would assume that we have at this
14 juncture. Many, many, many years have passed.

15 CHIEF JUDGE LIPPMAN: Isn't that pretty
16 important whether you've accepted the ten million
17 dollars, or is that irrelevant?

18 MS. RECINE: It's irrelevant. The - - -
19 the termination - - - this is - - - the fact - - -

20 CHIEF JUDGE LIPPMAN: You can take it and
21 yet they still owe you rent now?

22 MS. RECINE: Correct.

23 CHIEF JUDGE LIPPMAN: You - - -

24 MS. RECINE: Unrelated. Unrelated. We
25 have damages, much, much, much, much above ten

1 million dollars.

2 CHIEF JUDGE LIPPMAN: But you're saying the
3 lease continues after you take the - - -

4 MS. RECINE: But even if the lease - - -

5 CHIEF JUDGE LIPPMAN: - - - ten million?

6 MS. RECINE: - - - even if the lease didn't
7 continue - - -

8 CHIEF JUDGE LIPPMAN: But did it continue
9 or didn't it continue or is it still in existence?

10 MS. RECINE: I mean, we - - - we - - -
11 we're suing on it. It's still a valid contract
12 between us and the Salvation Army.

13 JUDGE SMITH: No, no, but you can sue on a
14 contract after it's - - -

15 MS. RECINE: Correct.

16 JUDGE SMITH: - - - terminated for breach.
17 Isn't that what - - - it looks to me that - - -
18 that's what your complaint looks like to me. It
19 doesn't look like a complaint saying I have a tenant
20 still in possession who's not paying the rent.

21 MS. RECINE: I think, perhaps it's a fair
22 reading. But I think - - -

23 JUDGE PIGOTT: I'm surprised that - - -
24 their argument seems to be that no matter what they
25 did to your building, ten million dollars is the - -

1 - is the max and that you accepted that. The check
2 was in September of '08 - - -

3 MS. RECINE: We did not accept it in
4 September of '08, and that has certainly never been
5 our position.

6 JUDGE PIGOTT: September of '05.

7 MS. RECINE: We've - - - that's never been
8 our position.

9 JUDGE PIGOTT: Well, it - - - it says - - -
10 all right. It says the City pays ten million dollars
11 termination fee due pursuant to the services
12 agreement. So you never got the ten million dollars?

13 MS. RECINE: We're not saying we didn't get
14 the ten million dollars.

15 JUDGE PIGOTT: Okay.

16 MS. RECINE: There are two different issues
17 here.

18 JUDGE PIGOTT: They paid - - - I've got to
19 issues I want to bring to you.

20 MS. RECINE: Sorry.

21 JUDGE PIGOTT: So that happened. All
22 right? Now, you go in and for the first time - - -
23 and I'm not criticizing this - - - I'm saying all of
24 a sudden, you say holy cow, look at - - - look at the
25 damage that was done to our building.

1 You seem to be arguing that you - - - the
2 City is responsible for that as opposed to saying the
3 Salvation Army's responsible for that, separate and
4 apart from the service agreement, which seems to be
5 solely monetary with respect to how the rent's going
6 to get paid and things of that nature.

7 MS. RECINE: We agree that we - - - when we
8 - - - we agree with the Salvation Army that when we
9 drafted this contract we said the following: the
10 Salvation Army, your liability will be limited to
11 monies paid to you by the City. But you don't get to
12 just sit on your hands. The City is going to owe you
13 money under the services agreement or otherwise, and
14 you are obligated, in order to enforce that
15 limitation of liability, you are first obligated to
16 take commercially reasonable steps. And we didn't
17 even say really what those commercially reasonable
18 steps are.

19 JUDGE PIGOTT: So - - - so without saying
20 this is what happened, what you're saying is the
21 Salvation Army only owes what's due under the
22 contract. If they trash the place, torch the place,
23 or whatever, if you can't get that from the City, if
24 the City said hey, that wasn't anywhere in the
25 agreement that we had with the Salvation Army that

1 they were going to trash the place, so we're not
2 paying it, where are you?

3 MS. RECINE: Well, that would be di - - -
4 it would be different if we knew. You have to
5 transport yourself back into time during the six-
6 month period while the services agreement was still
7 in effect. What they needed to do was make an effort
8 to try to recover.

9 JUDGE PIGOTT: Right. That's kind of my
10 point. I'm saying, whatever happens here, you're - -
11 - you're arguing a commercial reasonableness vis-a-
12 vis the service agreement. You're not saying the
13 City did its job, the Salvation Army accepted their
14 money, but separate and apart from that, not related
15 to or maybe even in breach of that service agreement,
16 they ruined our building - - -

17 MS. RECINE: Well - - -

18 JUDGE PIGOTT: - - - and they ought to be
19 responsible for that, not just from whatever the City
20 promised to pay them, but because they, separate and
21 apart, as if they were a trespasser, ruined our
22 building.

23 MS. RECINE: Well, actually today, they are
24 liable in exactly that way. And I'll explain why.

25 JUDGE SMITH: Do you have - - - do you have

1 any tort claims in your complaint, or are they all
2 breach of contract claims?

3 MS. RECINE: They're all breach of contract
4 claims. They are responsible today, and the reason
5 they're responsible today is the limitation of
6 liability doesn't apply. That is our position. It
7 doesn't apply. It was eviscerated by their failure
8 to take commercially reasonable action.

9 JUDGE PIGOTT: I thought - - -

10 JUDGE ABDUS-SALAAM: Counsel, you mentioned
11 - - -

12 JUDGE PIGOTT: - - - you said the opposite
13 thing.

14 MS. RECINE: No, I apologize. That - - -
15 no, what I'm saying is that our position was, had
16 they taken commercially reasonable actions, it would
17 have been in effect. Their failure - - -

18 JUDGE ABDUS-SALAAM: What are those
19 commercially reasonable actions? You mentioned
20 before that they weren't spelled out in the
21 agreement. And you only have mentioned suing. Are
22 you saying that they could have asked the City to pay
23 the money - - - and by the way is it really 200
24 million dollars? Is that the amount you're asking
25 for? Or is that just what the Appellate Division - -

1 -

2 MS. RECINE: To rebuild the hotel, that's
3 what it would cost.

4 JUDGE ABDUS-SALAAM: To rebuild - - -
5 wouldn't it be simpler to just tear it down and build
6 a new building?

7 MS. RECINE: Well, that's - - - that's the
8 argument is that 200 million - - -

9 JUDGE ABDUS-SALAAM: Is that the tearing
10 down?

11 MS. RECINE: - - - to tear it down and
12 rebuild the building.

13 JUDGE ABDUS-SALAAM: So could the City - -
14 - my point is, though, could the City have merely
15 asked - - - I mean, could Salvation Army have merely
16 asked the City to pay the money, and would that have
17 been commercially reasonable; and if the City said
18 no, that would be the end of their responsibility?

19 MS. RECINE: Our allegation is they did
20 absolutely nothing. So maybe that would be enough,
21 that's a question of fact for the trial court.

22 JUDGE ABDUS-SALAAM: But on a motion to
23 dismiss, you say that will wait for another day?

24 MS. RECINE: We've alleged on our mo - - -
25 in our - - -

1 JUDGE ABDUS-SALAAM: Or summary judgment.

2 MS. RECINE: - - - in our complaint, we've
3 alleged they did absolutely nothing, and there's no
4 question that cannot be commercially reasonable.

5 JUDGE GRAFFEO: What prevented you from
6 going after the City at an earlier point in time when
7 you began to realize that the building was becoming
8 dilapidated? Were you not able - - -

9 MS. RECINE: Well, certainly - - -

10 JUDGE GRAFFEO: - - - to bring an action
11 against the City directly?

12 MS. RECINE: We brought an action against
13 the City.

14 JUDGE GRAFFEO: Well, I know. They were
15 initially a party here. I'm saying earlier, before
16 the alleged termination of the lease?

17 MS. RECINE: We were negotiating - - - we
18 were negotiating daily with the City. This is not
19 about our obligations. This is about the Salvation
20 Army's obligation under the lease.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.
22 Thank you.

23 Counselor, rebuttal?

24 MS. CHIN: In response to a question from
25 Judge Lippman, my opponent indicated that it was

1 neither here nor there that the lease was negotiated
2 between JFK and the City. It is not neither here nor
3 there. That is critical to an understanding of how
4 this whole arrangement came to be.

5 Salvation Army was solely the intermediary
6 here. The negotiations were done between JFK and the
7 City of New York. Among other things, they were the
8 ones who negotiated the rates of payment for services
9 to be provided at the homeless shelter, which now
10 apparently JFK believes were abysmally low. Well,
11 that's - - -

12 JUDGE ABDUS-SALAAM: Counsel, did the City
13 - - - did the Salvation Army ask the City to pay for
14 any restoration? Did they do anything or did they
15 just decide, well, our limit was the ten million
16 dollars, and that's it?

17 MS. CHIN: I have to assume for purposes of
18 a motion to dismiss that everything that they are
19 saying is true. But clearly somehow the ten million
20 dollars appeared. It's not as if we did nothing.

21 And the other thing to keep in mind is that
22 for this, you know, magical period around the time
23 that the termination took place, Salvation Army was
24 essentially told to back off. The City was going to
25 negotiate with JFK. They were going to resolve this

1 problem between them. We were to have no place at
2 the table, which had been the case from the very
3 beginning. Those documents were not negotiated - - -
4 the services agreement, the rates that were included
5 in the services agreement, the lease, the lease rate,
6 those were negotiated without the Salvation Army.

7 If there was too little money to be had
8 there to maintain this building, it's not our fault.
9 We were there solely to provide services. Actually,
10 the limitation of liability clause in the lease
11 mentions specifically that the Salvation Army was
12 entering this lease solely in order to comply with
13 its obligations to the City under the services
14 agreement.

15 JUDGE PIGOTT: Right, it reads - - - it
16 reads like that. It reads like it's a service
17 agreement where you've got a - - - the City is going
18 to provide for these people. They've decided on this
19 building, and they've decided that you're the ones
20 that are going to oversee the services, so to speak.

21 MS. CHIN: Right.

22 JUDGE PIGOTT: And as you argue, the - - -
23 the money from the City to JFK was between the two of
24 them.

25 MS. CHIN: Right.

1 JUDGE PIGOTT: The - - - the question I
2 guess I have is, if you, separate and apart from this
3 agreement, which to me is just cash - - - I mean,
4 we're going to - - - we're going to pay for the use
5 of your building and the Salvation Army's going to do
6 the - - - do the work on it. But if you
7 independently do something to damage the building,
8 isn't that separate? Because the service agreement
9 reads like it's a financial obligation type thing.
10 So that if the rent didn't get paid or something like
11 that, they can pursue the City.

12 But in terms of actually destroying the
13 building, if that's their allegation, if the City
14 didn't do it, because they're not - - - all they're
15 doing is being - - - is paying money - - - can't the
16 Salvation Army be found liable for that?

17 MS. CHIN: Well, that's not actually the
18 allegation - - -

19 JUDGE PIGOTT: That's right.

20 MS. CHIN: - - - in the amended complaint.

21 JUDGE PIGOTT: It's not. It's commercial
22 reasonableness.

23 MS. CHIN: Right. They're just saying that
24 we, the Salvation Army didn't go after the City when
25 we should have.

1 JUDGE PIGOTT: Right.

2 MS. CHIN: And as the dissent points out,
3 there was nothing to go after the City for. You
4 cannot be expected to bring a suit against a party
5 where you have no rights against the party. And the
6 City had, pursuant to the services agreement, paid
7 the ten million dollars. There was nothing that we
8 could do at that point in time. And we, in any
9 event, had been told - - -

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MS. CHIN: - - - not to even engage.

12 CHIEF JUDGE LIPPMAN: Thank you - - -

13 MS. CHIN: Thank you.

14 CHIEF JUDGE LIPPMAN: - - - counsel. Thank
15 you both. Appreciate it.

16 MS. CHIN: Okay. Thank you.

17 (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 JFK Holding Company LLC v. City of New York, et al., No. 196 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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