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COURT OF APPEALS

STATE OF NEW YORK

KIMSO APARTMENTS, LLC, ET AL.,

Respondent,

-against-

No. 197

MAHESH GANDHI,

Appellant.

20 Eagle Street
Albany, New York 12207
October 21, 2014

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 ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Kimso Apartments,
2 number 197.

3 Counselor, you want any rebuttal time?

4 MR. FEIT: Yes, Your Honor, one minute,
5 please.

6 CHIEF JUDGE LIPPMAN: One minute, sure, go
7 ahead.

8 MR. FEIT: May it please the court, my name
9 is Eli Feit of Heller, Horowitz & Feit, attorneys for
10 the Appellant, Mahesh Gandhi. On this appeal, we
11 seek modification of the March 2013 order of the
12 Appellate Division, which found that the - - -

13 CHIEF JUDGE LIPPMAN: Why didn't you do
14 what you did earlier? Why?

15 MR. FEIT: Well, there are - - - there are
16 three - - - there are a number of reasons, Your
17 Honor. First of all, there was an admission from the
18 get-go by the - - - in the initial complaint by the
19 plaintiffs that they owed the money. They - - - they
20 brought a declaratory judgment for a setoff. And
21 inherent in a setoff were - - -

22 JUDGE SMITH: Yeah, but then they - - -
23 they - - - but then they did stop paying you at a
24 certain point, after the litigation was brought.

25 MR. FEIT: But that - - - no, they - - -

1 they continued making the payments during the course
2 of the litigation.

3 JUDGE SMITH: Well, but the - - - but not
4 the - - -

5 MR. FEIT: In fact, they made nine payments
6 during.

7 JUDGE SMITH: And then they stopped.

8 MR. FEIT: And then they stopped.

9 JUDGE SMITH: I mean, with hindsight, would
10 it not have been more prudent to sue them the day
11 they stopped?

12 MR. FEIT: Yeah, well, Your Honor, the - -
13 - the problem was that the agreement did not have an
14 acceleration clause in it. And it's similar to rent.
15 You know, the mon - - - rent that's due under a
16 lease. So I'd have to go back to court,
17 theoretically or practically, every month or every
18 couple of month - - -

19 JUDGE SMITH: You - - - but you - - - you
20 could have - - - you could have done what they did.
21 You could have counterclaimed for a declaratory
22 judgment that they owe you the money.

23 MR. FEIT: Yeah, but they already said they
24 owed the money. So, in other words, I'd have to go
25 to the trial court every couple of months. This

1 litigation will not - - -

2 CHIEF JUDGE LIPPMAN: Your argument is that
3 everyone knew what was going on here?

4 MR. FEIT: It was - - -

5 CHIEF JUDGE LIPPMAN: Everyone knew what
6 the claim was, what your claim was?

7 MR. FEIT: Not only the - - -

8 CHIEF JUDGE LIPPMAN: What their claim was,
9 no surprise. That's your argument?

10 MR. FEIT: There was absolutely no
11 surprise, no prejudice, no laches.

12 JUDGE RIVERA: You - - -

13 MR. FEIT: In fact, in their own brief in
14 '09 when we made a motion for summary judgment, we
15 moved for summary judgment. We asked for affirmative
16 relief. We said judge, we're entitled to summary
17 judgment. We headed our section. The money's owed
18 under the settlement agreement.

19 JUDGE SMITH: And they said - - - and they
20 said they haven't pleaded it. Let me ask you another
21 hindsight question. With hindsight, could you not
22 just have taken away that argument by saying - - -

23 MR. FEIT: No, 30 - - -

24 JUDGE SMITH: - - - okay, you want a
25 pleading, here it is.

1 MR. FEIT: Right, but 3025, you know, says
2 that you can - - - you can amend at trial, you know,
3 I've done it many time - - -

4 CHIEF JUDGE LIPPMAN: But the answer is you
5 would have - - - in answer to the judge's question -
6 - -

7 MR. FEIT: Yeah.

8 CHIEF JUDGE LIPPMAN: - - - you would have
9 been better off just pleading it, right?

10 MR. FEIT: Yeah, I would have been better
11 off but then I wouldn't be here.

12 JUDGE GRAFFEO: The - - - the - - -

13 JUDGE RIVERA: All right, but I guess - - -
14 I - - - I guess - - - here's - - -

15 CHIEF JUDGE LIPPMAN: That would - - - that
16 would certainly be better off.

17 JUDGE RIVERA: Here's - - - okay, so here's
18 a question. What - - - what was the disadvantage to
19 doing it?

20 MR. FEIT: Well, as I explained, I'd have
21 to do it every couple of months - - -

22 JUDGE RIVERA: But for - - -

23 MR. FEIT: - - - or every month because - -
24 -

25 JUDGE RIVERA: Okay.

1 MR. FEIT: - - - as each payment became
2 due, that's when the - - - the - - - the - - - there
3 was an accrual for purposes - - -

4 JUDGE RIVERA: What's the disadvantage - -
5 -

6 JUDGE GRAFFEO: Well, that - - - that's
7 true of a lot of counterclaims, though, isn't it that
8 - - - that you plead that it's a continuing
9 situation?

10 MR. FEIT: Well, yeah, but then - - - but
11 then you amend, so I'd have to continue to amend.

12 JUDGE GRAFFEO: The - - - the - - - the
13 Appellate Division found you didn't have a reasonable
14 excuse. What would you pose to us is the reasonable
15 excuse?

16 MR. FEIT: Well, I - - - I think - - -

17 JUDGE GRAFFEO: Other than everybody knew
18 this? I mean a lot of people could say that in lit -
19 - - a lot of - - - especially in contract disputes, a
20 lot of parties could say everybody knew this. I mean
21 there has to be a rule that's a little bit tighter
22 than that.

23 MR. FEIT: Yeah, but when there's a
24 judicial admission, which is conclusive and binding
25 for purposes of the case, which says I owe you the

1 money, and in fact, if we look at the record and we
2 look at the amended complaint - - - and I did the
3 math the other night, they specifically pled that
4 they're owed X amount of dollars. We - - - that they
5 owe us Y amount of dollars. And they figured out and
6 they put it in the complaint to the penny. And it's,
7 I believe, 830 - - -

8 CHIEF JUDGE LIPPMAN: But they say that if
9 you had had your pleadings right, they would have put
10 certain defenses in or whatever, and they didn't get
11 a chance to do that because you never pleaded it.

12 MR. FEIT: First of all, there's nothing in
13 the record to indicate what kind of defenses they
14 would have put in. There is no defense. They
15 already said a judicial admission under the law is
16 very clear. It's - - - it - - - it says I owe you
17 the money. It's conclusive and binding.

18 JUDGE SMITH: By now - - - by now they
19 think they have a statute of limitations defense to
20 at least some of the installments, right?

21 MR. FEIT: Yeah, well, I don't believe
22 that's correct, because under 203, if the - - - the -
23 - - the amendment was correct, and we think the trial
24 court - - -

25 JUDGE SMITH: Okay, but if you - - - but,

1 well - - - but if you're denied the amendment, they
2 would have a statute of limitations?

3 MR. FEIT: They would - - - if - - - if the
4 amendment is denied they would have a statute of
5 limit - - - but - - - but that's not prejudice.
6 Prejudice that was - - -

7 JUDGE RIVERA: But you're saying at the
8 time.

9 MR. FEIT: At the time, right.

10 JUDGE RIVERA: There - - - there was no
11 statute of limitation defense available?

12 MR. FEIT: That's not prejudice. Under the
13 - - - under these - - - under the court's decision on
14 Loomis - - -

15 JUDGE RIVERA: So what - - - what - - -

16 MR. FEIT: I'm sorry.

17 JUDGE RIVERA: No, no, no. What - - - what
18 - - - what, if any, significance is there? I - - - I
19 thought you - - - you tried to rescind or requested
20 to rescind the settlement agreement.

21 MR. FEIT: Yes.

22 JUDGE RIVERA: What, if any, significance
23 does that have in the case?

24 MR. FEIT: I don't think it has any
25 significance.

1 JUDGE RIVERA: Okay, why not?

2 MR. FEIT: Because that - - - they moved
3 for summary judgment in 2007 to knock out our
4 rescission claim, and it was granted. So that's out
5 of the case. And, in any event, you can plead, you
6 know, inconsistent pleadings. We've cited cases,
7 many cases to that effect. You can even go - - -
8 there was one case that was reversed where the - - -
9 where there was a fail - - - they - - - the Appellate
10 Division said that a failure to charge a jury on
11 inconsistent claims requires a reversal. In other
12 words, you can take it all away. We - - - we know
13 you have to elect, but there could be different
14 theories upon which we're entitled to recovery.

15 JUDGE RIVERA: Could they think you're
16 abandoning tho - - - could they think you're
17 abandoning those claims because you're seeking - - -

18 MR. FEIT: I'm sorry?

19 JUDGE RIVERA: Could they think you're
20 abandoning the claims for the money owed, because
21 you're seeking to rescind the settlement agreement?

22 MR. FEIT: Judge, in - - - in '09 we made a
23 motion for summary judgment even though we didn't
24 technically use the words "counterclaim". We said
25 you owe us 1,343,000 dollars. They said in their

1 brief, they referred to it - - - they referred to it,
2 and I have it right here. It's in the 6/30/09 brief.
3 It's 950 of the record. And they say, "Defendant's
4 instant counterclaim is for less than that amount,
5 approximately 1.3 million dollars, thus plaintiff's
6 claims exceed defendant's counterclaims." They knew
7 it was a counterclaim. There was never an issue.
8 The judge knew it was a counterclaim. This case went
9 on for years. The discovery went on as if this was a
10 - - - a counterclaim because, in effect, they said we
11 owe you the money.

12 JUDGE SMITH: Let - - - let me - - - let me
13 ask you this. Suppose - - - suppose you lose. You -
14 - - you - - - your motion to amend is denied. On an
15 ordinary declaratory judgment action, the court
16 declares the rights of the parties, either way,
17 whether plaintiff wins or defendant wins. Suppose
18 you got a declaratory judgment that says they owe you
19 the money. Are you happy?

20 MR. FEIT: No, I need an affirmative
21 judgment in order to collect my counterclaim.

22 JUDGE SMITH: You - - - you - - - you want
23 something you can actually levy on?

24 MR. FEIT: Right, in - - - in effect,
25 that's what the trial court said, because the trial

1 court - - -

2 JUDGE SMITH: If you want something to levy
3 on, shouldn't you put in a pleading?

4 MR. FEIT: Well, Your Honor, it's - - - it
5 - - - it - - - it was in the pleading, in effect,
6 because I would consider my motion for summary
7 judgment in effect saying to the court in - - - you
8 know, amend my pleading. I've asked for summary
9 judgment.

10 JUDGE SMITH: You did - - - you did at
11 trial say - - -

12 MR. FEIT: I didn't use - - -

13 JUDGE SMITH: At trial you said please
14 amend the pleading to conform to the claim.

15 MR. FEIT: Specifically, but I put in
16 papers, in motion papers before, and the judge didn't
17 reject it. He simply said there were issues of fact.
18 And I would say that that's an indication that the
19 case is going to go on. Everybody knew. We - - - we
20 introduced an exhibit. Why did they make the motion
21 in limine to preclude us if they didn't think that -
22 - - that this was coming in and that this was an
23 issue? So I - - - I - - - I think the - - - the - -
24 - the - - - the record is crystal clear that there's
25 absolutely no prejudice. There could not be any

1 prejudice, because they admitted that they owe the
2 money and they should pay it. I don't - - - I think
3 under our system where we - - - we deal with notice
4 of pleading, they had plenty of notice. They could
5 have put on any defenses that they wanted.

6 JUDGE ABDUS-SALAAM: Counsel, even - - -
7 even though we do have notice of pleading and 3025 is
8 a pretty liberal pleading statute, isn't it usually
9 the case for things that come up at trial that you
10 don't anticipate before the trial or before you bring
11 your - - - your lawsuit or before you put in your
12 answer? Isn't that usually what 3025 is about?

13 MR. FEIT: Yeah, but throughout this whole
14 case, this was - - - this was in the case. This was
15 litigated. They said - - -

16 JUDGE ABDUS-SALAAM: Well, that's what I'm
17 saying. It's usually for something that comes up
18 during trial that's not in the case, really, isn't
19 it?

20 MR. FEIT: Well, you know, it could be yes
21 and it could be no. It could be both. I think 3025
22 is liberal. I mean, I - - - the way - - - just the
23 way we say in our brief, I don't think that this case
24 should be decided on a technicality that we gotcha
25 you, you know, because you didn't put the word in

1 counterclaim in - - -

2 JUDGE GRAFFEO: But - - - but what's our -
3 - - what's our standard of review of the Appellate
4 Division decision?

5 MR. FEIT: Well, I think the - - - the - -
6 -

7 JUDGE GRAFFEO: It's an abuse of
8 discretion?

9 MR. FEIT: Well, it can be a number. It's
10 a-abuse of discretion as a matter of law, because in
11 - - - in our judgment they changed the rule under
12 Murray.

13 JUDGE GRAFFEO: Is - - - is - - -

14 MR. FEIT: Because they said theoretical
15 prejudice is good enough to - - - you know, to
16 prevent an - - - an at-trial amendment or any kind of
17 amendment under CPLR 3025. And that's not what this
18 court's decision in - - - in Murray says so I - - - I
19 - - - I - - - I think that that's one basis. The
20 other basis is that they didn't - - - they didn't
21 look at the facts in terms of the - - - the
22 admissions made, the informal judicial admissions,
23 the judicial admissions, the party's admitted it
24 during the course of trial.

25 JUDGE SMITH: Are you - - - are you asking

1 us for - - - are you asking us for a rule, or are you
2 saying it already is the rule?

3 MR. FEIT: I - - - I think it's cle - - -

4 JUDGE SMITH: And that - - - that - - -
5 that you can never deny a motion to amend unless the
6 opposing party shows prejudice?

7 MR. FEIT: I think that is the rule,
8 prejudice or surprise it would have to be. Under
9 Loomis you have to be hindered in the presentation of
10 a defense in order for there to be prejudice.

11 CHIEF JUDGE LIPPMAN: Okay, coun - - -

12 MR. FEIT: And that's not what occurred
13 here.

14 CHIEF JUDGE LIPPMAN: Okay, thanks,
15 counselor.

16 MR. FEIT: Thank you.

17 CHIEF JUDGE LIPPMAN: You'll have your
18 rebuttal.

19 JUDGE READ: Mr. Spolzino, what is the
20 prejudice here?

21 MR. SPOLZINO: The prejudice here is that
22 the plaintiffs were never able to fully articulate
23 and try the issue of liability. They didn't admit in
24 the pleadings that there was liability.

25 CHIEF JUDGE LIPPMAN: Counselor, wasn't it

1 fundamental to this case that this is what was going
2 on? You - - - you have a claim against them. They
3 have a claim against you. Wasn't that so evident
4 during the course of this?

5 MR. SPOLZINO: I don't believe so, Judge
6 Lippman. You know what - - -

7 CHIEF JUDGE LIPPMAN: You didn't know that
8 they were seeking that money against you?

9 MR. SPOLZINO: No, here's - - - here's what
10 happened. If you go back - - - this is - - - what -
11 - - what this really is, as I see it, is an exercise
12 in hindsight. But if you start where the litigation
13 started, it's not all that clear.

14 CHIEF JUDGE LIPPMAN: This was a surprise
15 to you that they wanted that money?

16 MR. SPOLZINO: Well, they didn't plead it,
17 Judge Lippman, when they had the opportunity to.

18 CHIEF JUDGE LIPPMAN: I - - - that I
19 understand, counselor.

20 JUDGE RIVERA: Yeah, but the - - - the
21 litigation starts with you saying I owe them money.

22 MR. SPOLZINO: No, Judge - - - Judge
23 Rivera, it doesn't. It says look, we owe - - - they
24 owe us - - - they owe us money. They owe us seven,
25 eight million dollars or something like that.

1 JUDGE RIVERA: Okay.

2 MR. SPOLZINO: There's an agreement by
3 which we're supposed to pay them whatever, one point
4 something.

5 JUDGE RIVERA: You mean I owe them money?

6 MR. SPOLZINO: No, no.

7 JUDGE RIVERA: Okay.

8 MR. SPOLZINO: Because it doesn't exclude
9 the possibility of defenses. The pleading here does
10 not exclude the possibility that there were defenses
11 to the obligation under the settlement agreements.
12 What - - -

13 JUDGE PIGOTT: Were you surprised?

14 MR. SPOLZINO: I'm - - - I'm sorry, Judge?

15 JUDGE PIGOTT: Were you surprised?

16 MR. SPOLZINO: I think, yes. And - - -

17 JUDGE PIGOTT: I - - - I - - - I - - - I -
18 - - I find it hard to understand why we're talking
19 about this - - - this one agreement involving in
20 these apartments, never wandered farther than that,
21 and somehow whether or not he was paying on his loans
22 or whether you were paying on the settlement
23 agreement is a surprise to somebody.

24 MR. SPOLZINO: Because if you go back to
25 where the litigation started - - -

1 JUDGE PIGOTT: You either knew or didn't
2 know he was paying on the loans.

3 MR. SPOLZINO: Well - - -

4 JUDGE PIGOTT: And you either knew or
5 didn't know that you were paying on your - - - on
6 your settlement agreement, and I don't know where the
7 - - -

8 MR. SPOLZINO: Except that it proceeded in
9 a different way, Judge Piggott.

10 JUDGE PIGOTT: So what? You still knew.

11 MR. SPOLZINO: No, because if you take that
12 position, respectfully - - -

13 JUDGE PIGOTT: Yeah.

14 MR. SPOLZINO: - - - then whenever anybody
15 tries a case, what they have to do is prepare not
16 just for what's - - - what was pleaded and - - - and
17 what claims have been made. They've got to prepare
18 and try whatever case anybody could possibly make out
19 of whatever facts there might have been.

20 JUDGE RIVERA: Well, what was the point of
21 the motion in limine then?

22 MR. SPOLZINO: The - - - the point of the
23 motion in limine was to be - - - be a hundred percent
24 clear that this issue wasn't in the case.

25 JUDGE RIVERA: Then you had suspicions

1 beforehand.

2 MR. SPOLZINO: Because - - - because - - -

3 JUDGE RIVERA: Enough to draft this motion.

4 MR. SPOLZINO: Because what happened here,
5 Judge, was that they made the motion for summary
6 judgment. The plaintiff said you didn't plead this.
7 The judge didn't - - - the trial judge didn't address
8 that issue. So - - - and - - - and basically their
9 response was we don't have to.

10 JUDGE SMITH: Okay, by saying that we don't
11 have to, they surely eliminate any doubt in your mind
12 that they wanted the mon - - - money. Let me - - -
13 let me - - - well, okay. I want you to respond to
14 that one, but I do have another question. Didn't
15 that eliminate any doubt in your mind that they
16 wanted the money when they said we don't have to
17 plead it?

18 MR. SPOLZINO: No, because the answer - - -

19 JUDGE SMITH: You had no doubt anyway. You
20 knew they wanted the money.

21 MR. SPOLZINO: Because what they could - -
22 - the simple thing they could have done was seek - -
23 - cross-move for leave to amend and for some reason -
24 - -

25 JUDGE SMITH: Okay, I mean you - - - your -

1 - - your point is that it wouldn't have been very
2 hard for them to plead it.

3 MR. SPOLZINO: Right, for some reason they
4 wouldn't.

5 JUDGE SMITH: But we're - - - we're trying
6 to press you on your weak point which is you
7 shouldn't - - - shouldn't have exactly been shocked
8 when they said pay us.

9 MR. SPOLZINO: Well, except that if - - -
10 if I can - - - if I can go back, Judge Smith, to
11 where this all started and how this litigation
12 started.

13 JUDGE SMITH: Okay, well, actually, I was
14 going to do that. That was my other question. I - -
15 - I opened up your original complaint before you
16 amended it: "Pursuant to the agreement annexed
17 hereto as Exhibit A," this is November - - - you in
18 November 2003, your client, "if plaintiffs fail to
19 make the full payments as specified under the
20 agreement, plaintiffs would be in default of the
21 agreement and Gandhi would be entitled to all its
22 remedies." How clear does it get?

23 MR. SPOLZINO: Well, because I think in - -
24 - in the context of this litigation, remember what
25 you have here. You have a claim that says he owes us

1 eight million dollars, some - - - a large amount well
2 in excess of whatever was due under the agreement.
3 So from the plaintiff's perspective, this was about -
4 - - doesn't matter whether we owe him the money or
5 not, because our claim is so large - - -

6 JUDGE SMITH: Well, if it didn't matt - - -
7 if it didn't matter why did you plead so explicitly
8 that you did owe it?

9 MR. SPOLZINO: Because they were looking
10 for a setoff. They had to have - - - they had to say
11 - - -

12 JUDGE PIGOTT: But you knew it was in
13 there.

14 MR. SPOLZINO: So - - -

15 JUDGE PIGOTT: At some point I was
16 wondering if - - - if everybody out to put their
17 carriers on notice. I mean either - - - either the
18 settlement is clear or it's not. And - - -

19 MR. SPOLZINO: But then - - - but then what
20 happens, Judge Pigott, is not - - - the normal thing
21 that someone would do in a situation like this is say
22 yeah, but you owe me the money. You owe me the 1.4
23 million. I counterclaimed for it. That's not what
24 the defendant did here. He - - -

25 JUDGE PIGOTT: Did you think he - - - you

1 think he conceded that he - - - that - - - that - - -
2 that he didn't owe it? That he owed it?

3 MR. SPOLZINO: He says the agreements - - -
4 he - - - he - - - his counterclaim is to repudiate
5 the agreements. Then - - -

6 JUDGE SMITH: Suppose - - - let try to - -
7 - let me try the possibility I suggested to him.
8 Suppose there's no - - - you don't get - - - he
9 doesn't get judgment on his counterclaims. But he -
10 - - under this pleading, wouldn't he be entitled to a
11 declaratory judgment that you must pay the money
12 without offset?

13 MR. SPOLZINO: No, I - - -

14 JUDGE SMITH: You - - - you got - - - you
15 asked for a declaration. You're entitled to an
16 offset, didn't you?

17 MR. SPOLZINO: But I - - - but I think
18 there - - - I - - - I don't - - - well, Judge - - -
19 Judge Smith, he didn't put in issue whether he's
20 entitled to the money or not. But I think there are
21 issues here that still have to be addressed.

22 JUDGE SMITH: But let me ask you this.

23 MR. SPOLZINO: That - - -

24 JUDGE SMITH: Suppose you got - - - suppose
25 such a declaration were issued, no judgment against

1 you, just a declaration that you are required to pay
2 the amount in full due under the agreement with no
3 offset. Would you pay it?

4 MR. SPOLZINO: Well, that effectively bec -
5 - - that's effectively the same thing. I understand
6 that it's a technical distinction, but - - -

7 JUDGE SMITH: Well, in - - - in a - - - in
8 - - - yeah - - - that - - - that's what I'm
9 suggesting.

10 MR. SPOLZINO: It - - - it just means there
11 one more procedure. You have to convert it to a
12 judgment.

13 JUDGE SMITH: Okay, but now - - - but - - -
14 but - - - yeah, but under a declaratory judgment
15 action he doesn't need a counterclaim. You can - - -
16 the - - - the court in a declaratory judgment action
17 declares the rights of the parties at the end.

18 MR. SPOLZINO: But he never put that in - -
19 - that in issue. I mean here - - -

20 JUDGE PIGOTT: You did.

21 MR. SPOLZINO: - - - here's the problem.
22 Here's the fundamental problem.

23 JUDGE PIGOTT: You did. You - - - you - -
24 - you wanted the offset.

25 MR. SPOLZINO: No, I - - - the offset's

1 gone.

2 JUDGE PIGOTT: The judge says you don't get
3 it, then you lose.

4 MR. SPOLZINO: But if - - - if - - - if the
5 - - - if the amount - - -

6 JUDGE SMITH: But if the offset's gone, why
7 - - - if the offset's gone, don't you have pay it?

8 MR. SPOLZINO: If the amount - - - I'm
9 sorry, Your - - - Judge, if the amount, if the
10 underlying debt is in issue and we had a fair
11 opportunity to litigate whether that was owed.

12 CHIEF JUDGE LIPPMAN: Counselor, but - - -
13 but I guess our questioning is a little along the
14 lines of how could you possibly not know that it's in
15 issue? It's the whole premise of this case. You
16 were the offsets.

17 MR. SPOLZINO: Because - - -

18 CHIEF JUDGE LIPPMAN: I mean why is this
19 not so fundamental that sometimes the piece of
20 actually pleading it is just a technicality?

21 MR. SPOLZINO: Because - - -

22 CHIEF JUDGE LIPPMAN: Because you know
23 that's what's being litigated here.

24 MR. SPOLZINO: Because here's the - - -

25 CHIEF JUDGE LIPPMAN: Why shouldn't we take

1 that view?

2 MR. SPOLZINO: Because here, for some
3 reason, Judge Lippman, the - - - the defendant
4 decided he wasn't going to litigate that issue. He
5 said the agreement's no good.

6 CHIEF JUDGE LIPPMAN: He didn't - - -

7 MR. SPOLZINO: That was his original
8 pleading. That was how he litigated the case.

9 JUDGE SMITH: Well, he did - - - he did - -
10 -

11 MR. SPOLZINO: For four or five years.

12 JUDGE SMITH: He did try to - - - well,
13 first of all, there - - - there was - - - until 2004,
14 I guess you were paying. So he - - - he wouldn't
15 have had a counterclaim.

16 MR. SPOLZINO: But that's when he
17 repudiated the - - - that's when he put in - - - we
18 stopped paying when he put in the pleading saying the
19 settlement agreement's no good, void the settlement
20 agreement.

21 JUDGE SMITH: Well, he - - - he sued for
22 rescission.

23 MR. SPOLZINO: Right, sued for recessions

24 JUDGE SMITH: Okay, but - - - but certainly
25 by 2009 he was saying, in so many words, I want my

1 money?

2 MR. SPOLZINO: He - - - he may have been.
3 But I think what - - - what you're doing by looking
4 at it that way, Judge Smith, is shifting the burden,
5 putting the burden back on the - - - on the other
6 party to justify why they didn't defend something
7 that hadn't been raised. Isn't the initial burden -
8 - -

9 JUDGE SMITH: Well, the - - - the - - - the
10 - - - you didn't just not defend it, you preemptively
11 conceded it. You said without the offset I've got to
12 pay him.

13 MR. SPOLZINO: I - - - I don't think we
14 said that anywhere in any of the pleadings, Judge
15 Smith. I - - - the - - -

16 JUDGE SMITH: What did I just read?

17 MR. SPOLZINO: The - - - the - - - the
18 first pleading - - - first of all, the first pleading
19 is not a formal judicial admission because it was
20 superseded. But beyond that, I - - - I think in the
21 context of this complaint, what that sets up is
22 simply our counterclaim is so big - - - our - - - our
23 - - - our claim is so big we don't have to address
24 that issue.

25 JUDGE SMITH: If plaintiffs fail - - - "if

1 plaintiff's fail to make the full payments to
2 defendant, plaintiffs would be in default and Gandhi
3 would be entitled to its remedies." You said that.

4 MR. SPOLZINO: Well, I think in the context
5 - - - you have to understand that in context. And
6 the context is our counterclaims are so big, who
7 cares. That's the - - - that's really what this case
8 was about, and that's how it proceeded for years. It
9 - - - there was never a formal change in - - - in the
10 - - -

11 JUDGE RIVERA: Well, I guess you care
12 because you want to know - - - let - - - let's assume
13 you're right. You want to know how much you're - - -
14 you're - - - the amount that you claim he owes you is
15 going to be cut down by what you owe him.

16 MR. SPOLZINO: Well, but - - - but it - - -
17 here the numbers were such, Judge Rivera, that it
18 didn't matter. That our - - - our number was 6, 7, 8
19 million dollars that he owed us, and his number he
20 was owed was 1.4, 1.5, or something like that. So
21 the magnitude of the numbers was such that there
22 wasn't - - - there was no anticipation at the
23 beginning of this case that there was going to be
24 litigation over what that amount might be. So that's
25 why - - -

1 JUDGE SMITH: Now if - - - if - - - if you
2 win and he's - - - he - - - he has to pursue his
3 separate lawsuit, which he filed last year, I guess -
4 - -

5 MR. SPOLZINO: Right.

6 JUDGE SMITH: - - - you would plead the
7 statute of limitations?

8 MR. SPOLZINO: Correct.

9 JUDGE SMITH: Is there any other possible
10 def - - - I mean were - - - were you actually - - - I
11 mean can - - - can a lawyer - - - in light of this
12 history, can a lawyer sign an answer denying
13 liability as to nontime-barred claims?

14 MR. SPOLZINO: Well, there's certainly a
15 statute of limitations defense. There's defense of -
16 - - that we talked about in terms of failure to give
17 notice of default. There are other defenses that
18 were mentioned in the - - - in the briefs in the
19 Appellate Division, potential defenses, regarding
20 breach of the settlement agreement that were never -
21 - - never raised here, never pleaded here, because
22 the issue never came up. I mean the confusion here
23 was even the trial judge didn't know this issue was
24 in the case during the trial. He sus - - - he
25 sustained objections when they tried to put in

1 testimony about what monies were paid or not paid.
2 He said I'm not going into that. He - - - he
3 sustained that objection. So how could the
4 plaintiffs have known? How could they have tried
5 this case and prepared this case, given this crazy
6 situation and then be stuck at the end with - - -

7 JUDGE SMITH: What - - - what - - - what
8 did the judge think he was doing? I mean, I - - - if
9 I were the judge I - - - I would have - - - yeah, I
10 would have thought this case was about whether you
11 had to pay him or not.

12 MR. SPOLZINO: Well, but - - - he - - - he
13 sustained an objection to that. The - - - I - - - I
14 would just leave you - - - I know my time's up.

15 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

16 MR. SPOLZINO: The - - - the issue here is
17 abuse of discretion, whether there's abuse of
18 discretion by the Appellate Division. That's the
19 question. And I - - - and in light of the
20 plaintiff's delay and the fact that defenses - - -
21 because of that delay and the confusion here, the
22 defenses were not fully raised. I can't see how this
23 court can say there was an abuse of discretion,
24 respectfully.

25 CHIEF JUDGE LIPPMAN: Okay, thanks,

1 counselor.

2 MR. SPOLZINO: Thank you.

3 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

4 MR. FEIT: Yes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Counsel, where's the
6 abuse of discretion by the AD?

7 MR. FEIT: Well, Your Honor, because the -
8 - -

9 CHIEF JUDGE LIPPMAN: And is that - - - is
10 that the test?

11 MR. FEIT: There can't be - - - there - - -
12 there was an abuse of discretion by the Appellate
13 Division because it utilized the wrong test.
14 Because, as I said earlier, they said that there was
15 theoretical prejudice enough. You need actual
16 prejudice. There was no prejudice here. Where you
17 have a judicial admission, which is conclusive and
18 binding, you can't do anything else during the course
19 of the case.

20 And for my adversary to say that we didn't
21 litigate the issue, in the face of our motion for
22 summary judgment, A937 of the record, the heading of
23 our - - - of - - - of what follows is, "The Monies
24 Owed Under the Settlement Agreement." And then we go
25 on to explain in support of our motion for summary

1 judgment. I mean I would say that that's enough of a
2 pleading. While technically I didn't say the words
3 in the - - - in the answer "counterclaim," I think
4 this is better than a counterclaim to - - - than to
5 use the word counterclaim. Because I said the monies
6 owed and accordingly, "I'm entitled to summary
7 judgment against plaintiffs for the amounts due to me
8 under the settlement agreement through March 2008 in
9 the sum of 1,305,124.80."

10 What were they thinking that I didn't want
11 the money? That we weren't trying that issue? That
12 the judge wasn't going to try the issue? I mean the
13 judge knew that that was an issue in the case. We
14 put in an exhibit, Exhibit M, in the trial record
15 which gives every monthly payment what - - - that was
16 due and owing. We asked for judgment for that
17 amount. They didn't put on the defense.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. FEIT: They couldn't put on a defense.

20 CHIEF JUDGE LIPPMAN: Okay, thank you.

21 MR. FEIT: I just - - -

22 CHIEF JUDGE LIPPMAN: Thank you both,
23 appreciate it.

24 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Kimso Apartments, LLC, et al. v. Mahesh Gandhi, No. 197 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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