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COURT OF APPEALS

STATE OF NEW YORK

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CRP/EXTELL,

Respondent,

-against-

No. 75

CUOMO,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 04, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Final matter on this  
2 afternoon's calendar is number 75, CRP/Extell v.  
3 Cuomo.

4 MR. COLEMAN: Good afternoon, Your Honors.  
5 John Coleman, Cohen & Coleman LLP, for  
6 respondents/appellants.

7 I would like to request three minutes rebuttal  
8 time.

9 CHIEF JUDGE DIFIORE: You have three  
10 minutes, sir.

11 MR. COLEMAN: Purchasers requested and were  
12 conditionally awarded statutory interest at the  
13 outset of the case, the first court appearance,  
14 November 10th 2010. Judge Singh ordered Extell to  
15 set aside one million dollars paid into court, which  
16 Extell paid into court, towards this interest.

17 JUDGE PIGOTT: Is that right, or was it  
18 just posting a bond?

19 MR. COLEMAN: He specifically said in the  
20 record, and I believe it's on the record 211 and 212,  
21 that it was for - - - because of the possibility that  
22 purchasers might be entitled to nine percent  
23 statutory interest.

24 JUDGE PIGOTT: Right. Okay.

25 JUDGE ABDUS-SALAAM: But there was a

1 judgment already entered here when you came back for  
2 the prejudgment interest, correct, counsel?

3 MR. COLEMAN: Well, there was a - - - there  
4 was a decision in January of 2012 dismissing the  
5 action. There is - - -

6 JUDGE FAHEY: And that's the date the  
7 Appellate Division relied on, right?

8 MR. COLEMAN: Correct.

9 JUDGE FAHEY: That was the January 25th?

10 MR. COLEMAN: Correct. That's when the  
11 order was entered.

12 JUDGE FAHEY: Now, you didn't move for  
13 statutory interest though till February of that year?

14 MR. COLEMAN: That's correct.

15 JUDGE FAHEY: Go ahead, I just wanted to  
16 have the dates right.

17 MR. COLEMAN: It is - - - it is purchasers'  
18 position that - - - that that order did not fully  
19 dispose of the case and was not a judgment, it was -  
20 - - it was merely - - -

21 JUDGE ABDUS-SALAAM: When was the judgment  
22 entered?

23 MR. COLEMAN: At that point, there was no  
24 judgment entered, the judgment that was entered in  
25 this case was the judgment awarding purchasers' int -



1 don't think any of us grappled with these procedural  
2 issues at the time, and I think we were all eager to  
3 have the Appellate Division decide the issue, and  
4 particularly purchasers were eager to have the  
5 Appellate Division decide the issues so they get  
6 their money back.

7 The matter of interest, which purchasers  
8 believed had been dealt with at the first court  
9 appearance by this - - - by the requirement of  
10 posting this bond, was not dealt with in this order  
11 that was issued in the January, and purchasers  
12 believed that it was appropriate for them to seek the  
13 interest after the order.

14 And indeed, the way Judge Singh had  
15 discussed the interest at the initial court  
16 appearance, he made it clear it would be only upon  
17 purchasers prevailing, would the interest happen.

18 JUDGE STEIN: If - - -

19 MR. COLEMAN: So it's - - - it's hard to  
20 see how they could have sought the interest before  
21 the case was dismissed.

22 JUDGE PIGOTT: File a judgment. I thought  
23 you would have filed a judgment when the Attorney  
24 General said you win, back in April of 2010. You  
25 know, you've now got - - -

1 MR. COLEMAN: I don't think we're entitled  
2 to enter judgment on the Attorney General - - -

3 JUDGE PIGOTT: I'm sorry.

4 MR. COLEMAN: I do not believe we are  
5 entitled to enter judgment on an Attorney General's  
6 decision.

7 JUDGE PIGOTT: Why not? You are owed money  
8 by CRP, you file a judgment saying CRP owes me  
9 330,000 dollars, and I want - - - plus the accrued  
10 interest, and I now want to charge, you know,  
11 interest from the date of this judgment forward until  
12 they pay it.

13 MR. COLEMAN: It's not clear to me I can  
14 walk into the county's clerk's office with a  
15 determination of the Attorney General and enter it as  
16 a judgment.

17 JUDGE PIGOTT: Sure you can. You got - - -  
18 I mean, you've got costs of the judgment ruling - - -

19 MR. COLEMAN: I would think I would have to  
20 go to court to have it entered as a judgment.

21 JUDGE PIGOTT: Even then, let's assume you  
22 had to do that, but you somehow have to have a  
23 judgment in order to get interest, don't you?

24 MR. COLEMAN: No. This is a - - -

25 JUDGE PIGOTT: Interest on the judgment?

1 MR. COLEMAN: No, this is pre - - - we're  
2 talking about prejudgment at trust.

3 JUDGE PIGOTT: Right.

4 MR. COLEMAN: And we're talking about - - -

5 JUDGE PIGOTT: Pre judgment.

6 MR. COLEMAN: So - - - so no, we don't need  
7 to get it - - -

8 JUDGE PIGOTT: You need a judgment.

9 MR. COLEMAN: - - - need to have a judgment  
10 entered to get prejudgment in trust.

11 JUDGE PIGOTT: It's - - - all right.

12 MR. COLEMAN: I mean, maybe I'm  
13 misunderstanding.

14 JUDGE PIGOTT: No, I'm saying prejudgment,  
15 you've got to have a judgment somewhere. Because you  
16 don't have a pre until you get a judgment.

17 MR. COLEMAN: I - - - I - - - I - - -

18 JUDGE ABDUS-SALAAM: Aside from that,  
19 counsel, while you ponder that, how about this. So  
20 Judge Singh dismissed the petition, right, and so  
21 after he dismisses the petition, that - - - the case  
22 is resolved, that's when you come back and ask for  
23 the prejudgment interest, right? So the case is  
24 over. What jurisdiction did Judge Singh have to give  
25 you interest then?

1 MR. COLEMAN: We would maintain that the  
2 case was not over because there was still the issue  
3 of this bond outstanding, and the January order did  
4 not deal with what would happen with that bond. And  
5 - - -

6 JUDGE PIGOTT: Well, if the case is over,  
7 he just goes and says, bond is over; I'm not paying  
8 you anymore premiums.

9 MR. COLEMAN: And you - - - you could also  
10 say that the - - - the requests for interest could be  
11 analogous to a motion for - - - for rehearing or  
12 reargument, where we are coming to say, Judge, you  
13 forgot to award the interest, and it was done, if  
14 that were the case, in a timely manner within the  
15 time period required for that.

16 JUDGE STEIN: Or would it have been - - -  
17 let's say we - - - we disagree with you and we think  
18 that that order was a judgment. Then, wouldn't your  
19 relief have been, or at least one way you might have  
20 sought relief would have been to amend the judgment  
21 under CPLR 5019(a)?

22 MR. COLEMAN: Conceivably, and a - - - in  
23 our brief we cite, there are cases where judgment  
24 interest or interest under CPLR 5001 is awarded after  
25 a judgment is entered, and that - - - that has been

1 permitted in certain cases.

2 JUDGE STEIN: I guess my - - - my question,  
3 what I was leading up to is if you had proceeded  
4 under 5019(a), would you have been entitled under the  
5 terms of the statute to relief here, and to our case  
6 law?

7 MR. COLEMAN: I would think that we would  
8 be. But I would also say that - - - that Judge  
9 Singh, having set this interest as a condition of the  
10 stay - - -

11 JUDGE STEIN: Well, at that point, had the  
12 issue of the - - - had the issue of the interest rate  
13 been litigated; had it been disputed?

14 MR. COLEMAN: Up until - - - it had not  
15 been litigated up until the motion made in February  
16 2012, but - - - but following that motion - - -

17 JUDGE STEIN: But CRP said - - - when you  
18 first raised it, CRP said you were entitled to it.

19 MR. COLEMAN: I'm not sure that it was  
20 addressed at that - - - at that particular time, but  
21 CRP did have multiple opportunities which it took  
22 advantage of to litigate the issue of the interest  
23 rate, so I don't think there's any question that they  
24 - - - that they - - - that they have the opportunity.

25 I also don't think that they can say that

1           it wasn't fairly raised in the case, because it was  
2           raised at the outset of the case. And furthermore,  
3           in their answer, purchasers requested that the money  
4           be returned together with prejudgment interest.

5                        There is an issue with the judicial process  
6           here. I mean, Judge Singh imposed a condition, it's a  
7           conditional condition as it were, at the beginning of the  
8           case. It would seem to me that he is - - - he is entitled  
9           to enforce that condition.

10                      JUDGE PIGOTT: You're talking about the  
11           posting of the bond?

12                      MR. COLEMAN: Correct. That he says, I'm  
13           making you post a bond on the - - - on the chance  
14           that you may lose, and that the purchasers may be  
15           entitled to the interest. It would seem to me that  
16           he is entitled to, at the end of the case, rule and  
17           say, yes, purchasers are entitled to interest, pay  
18           it.

19                      JUDGE STEIN: Well, how is that - - - how  
20           is that a determination that they would be entitled  
21           to interest? It sounds to me like - - - like the  
22           judge was saying, if you win, and if you're entitled  
23           to this interest, then we'll just make sure there's  
24           money aside, but then there was never any  
25           determination as to that interest before the case was

1 over.

2 I guess then the case couldn't be completed  
3 without that. And because it was not a - - - because it  
4 was a hybrid proceeding, and not a - - - not an Article  
5 78, and as Extell argued in its original memorandum of law  
6 in support of its petition, I believe it's record 547,  
7 that those actions proceed on separate tracks. And that  
8 if Extell wanted to terminate the plenary action, they  
9 would have had to enter judgment upon the January order,  
10 which they never did.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 Mr. Cyrulnik.

13 MR. CYRULNIK: Good afternoon, Your Honors.  
14 May it please the court. Jason Cyrulnik on behalf of  
15 CRP.

16 As the court I think touched on in my  
17 adversary's opening argument, there are procedural,  
18 jurisdictional, and there are also substantive problems  
19 with the underlying order here. But the court was focused  
20 on the first instance on the procedural and  
21 jurisdictional, so I'll start there with the court's  
22 permission.

23 I'll start with Judge Stein's point. The answer  
24 to the question that she posed to my adversary, how could  
25 this judgment from January 2012 have been appealed to the

1 Appellate Division and affirmed, if it was simply an  
2 interlocutory order in an Article 78. The answer is, it  
3 could not have been. And the Appellate Division, First  
4 Department termed it a judgment. In that very decision,  
5 judgment affirmed.

6 And it was treated as a judgment by both parties  
7 because that's the way it works. In an Article 78, and  
8 the De Paula v. Ga - - - De Paula Garden - - - the Memory  
9 Gardens case specifically touches on this issue citing  
10 CPLR 7806, unlike a plan of reaction.

11 An Article 78 proceeding necessarily terminates  
12 in a judgment when the court decides whether or not the  
13 administrative decision was proper or improper. And the  
14 denomination of that judgment, on the front cover as a  
15 decision in order, is simply error. It is to be ignored,  
16 I'm quoting from that case, because the CPLR specifically  
17 deems it a judgment as a function of what it does, which  
18 is to finally resolve the issue that was brought to the  
19 court.

20 So it was a judgment, and as - - - as we  
21 outlined in our papers, and the court was asking some  
22 questions about it, you cannot go to a court post-judgment  
23 for any type of substantive relief. The only thing you  
24 can go - - - go to the court for is clerical errors - - -  
25 to amend clerical errors, et cetera.

1                   JUDGE STEIN: What about the plenary aspect  
2 of the proceeding?

3                   MR. CYRULNIK: The plenary aspect of the  
4 proceeding was the flip side of the Article 78. The  
5 Article 78 sought to amend the - - - to challenge the  
6 Attorney General's determinations that the contracts  
7 would permit the purchasers to get their deposits.  
8 And the flipside was, the entire case revolved around  
9 the single digit typographical error in a - - - in a  
10 800-page offering plan.

11                   And so coupled with the Article 78 was, we  
12 should be permitted - - - the Attorney General's  
13 determination should be overturned, and we should be  
14 permitted to get - - - present the evidence to reform  
15 the typographical error in the agreement. Because  
16 the Attorney General did not permit any discovery or  
17 any testimony or anything, it used the authority  
18 granted to it under the - - - under the regulation to  
19 resolve this case without any of the benefit it may  
20 get out of the procedure.

21                   JUDGE PIGOTT: So could - - - could they  
22 have, in the January - - - was it January 12, 2012,  
23 when you brought your Article 78, they could have  
24 cross-moved for interest at that time, saying there  
25 is a foot dragging going on here, and I know you're

1 going to dispute that, but - - - and therefore we  
2 would like interest taxed at nine percent from the  
3 date of this judgment.

4 MR. CYRULNIK: Yeah, they had many  
5 opportunities. I think frankly, the first  
6 opportunity they had and when they should have raised  
7 it, Judge Pigott, is at the Attorney General level.  
8 They elected to forgo bringing a cause of action in  
9 court. They had a choice; it was their choice, not  
10 ours. Do you want to go to court, or do you want to  
11 go through the administrative procedure, they elected  
12 they'll - - -

13 JUDGE RIVERA: They'll be penalized for  
14 that?

15 MR. CYRULNIK: It's not a penalty. They  
16 elected a procedure which they - - - which they then  
17 took advantage of, that procedure carried within its  
18 own - - -

19 JUDGE RIVERA: It was successful.

20 MR. CYRULNIK: They were successful, as a  
21 result, in large part - - -

22 JUDGE RIVERA: The client owed and didn't  
23 pay, correct?

24 MR. CYRULNIK: No, that's not - - - that's  
25 not correct. The money was in es - - - was held in

1 escrow until the conclusion of the administrative  
2 proceeding and the challenge to that, and it was  
3 distributed promptly thereafter.

4 JUDGE RIVERA: How many years after the  
5 administrative proceeding?

6 MR. CYRULNIK: Two.

7 CHIEF JUDGE DIFIORE: Had the cross moved  
8 appropriately?

9 MR. CYRULNIK: They did not cross move - -  
10 -

11 CHIEF JUDGE DIFIORE: Had they done that,  
12 would 5001 be applicable?

13 MR. CYRULNIK: No, Your Honor, I don't  
14 think it would have been. Had they cross moved - - -

15 JUDGE FAHEY: You mean because the AG's  
16 determination is administrative?

17 MR. CYRULNIK: I think for two reasons.

18 JUDGE FAHEY: Yeah.

19 MR. CYRULNIK: Number one, exactly what you  
20 said, Judge Fahey. Number two, it's what Judge  
21 Abdus-Salaam actually said in the 706 Realty case.  
22 Judge Abdus-Salaam, ironically, I'd never thought  
23 you'd have a case that's so on point, but there is a  
24 case there where another - - -

25 JUDGE ABDUS-SALAAM: Neither did I.

1 MR. CYRULNIK: Where another party was a  
2 respondent to an Article 78. The Defendant in 706  
3 Realty - - - 706 Realty was the petitioner, they were  
4 a landlord, and they were challenging the  
5 administrative decision that ordered them to pay - -  
6 - to pay back-pay on a rent - - - on a rent decision  
7 to the tenant. The 706 Realty challenged that  
8 decision and brought an Article 78. Of course the  
9 Article 78 was defended by the Department of Housing,  
10 and by the tenant, who was awarded a sum of money by  
11 the administrative agency.

12 In the context of that opposition, the  
13 respondent in the Article 78, the tenant, said, I'm also  
14 challenging the fact that there was no interest included  
15 in the Department of Housing's award to me. And as a  
16 threshold of matter, Judge Abdus-Salaam wrote, you don't  
17 get to do that. If you had a problem with that, you could  
18 have brought an Article 78; you didn't do it. If you had  
19 a problem with that, you could have challenged it before  
20 the AG - - - the administrative agency in the first  
21 instance; you didn't do it.

22 You don't get to respond to an Article 78  
23 petition, where the court is simply being asked to review  
24 the propriety of the administrative decision, is it good  
25 or not, and here the court affirmed, by our client, you

1 don't get to come in there and say, by the way, I won  
2 below, but I have a problem with what they did, I didn't  
3 file - - - I didn't file an Article 78 in a timely  
4 fashion, I didn't even ask for this relief from the  
5 administrative agency, but I am asking - - - I'm asking  
6 this court.

7 So in short, I know it's a long winded version  
8 of the answer, but even if they had filed a motion for  
9 interest at the outset of this case, which they did not  
10 do, even if they had filed it within a year and a half of  
11 this case before it had been resolved, they still would  
12 not be entitled to interest because they didn't file an  
13 Article 78 petition to challenge the administrative  
14 decision, whether they agreed with it or not.

15 But here, it's worse because they didn't file a  
16 motion, they didn't even say - - - they didn't make a peep  
17 about statutory interest, and any motion, any proceeding,  
18 prior to after they won the judgment in January 2012.  
19 After it was appealed to the First Department, they said,  
20 well, we won that, let's see if we can get some more money  
21 out of this, and they filed a motion with the court that  
22 was deprived of jurisdiction under binding precedent.

23 JUDGE FAHEY: Let me ask this - - -

24 JUDGE RIVERA: What - - - what if they  
25 don't think they have a - - - what if they're not

1 complaining about the administrative decision. All  
2 right. No, their com - - - excuse me, their  
3 complaint is that they are waiting and waiting to be  
4 paid, and your client is not paying. And at that  
5 point, that's when they believe they are entitled to  
6 this interest. It's the delay that - - - that they  
7 are tying this to; would they have had to bring that  
8 as a separate Article 78? How would they have  
9 presented that?

10 MR. CYRULNIK: I would say three things.  
11 Number one, the delay, so to speak, was simply the  
12 waiting for the various administrative agencies and  
13 courts to confirm the determination, and decide  
14 what's right. The money wasn't being held by my  
15 client, it was being held in escrow, and the bind - -  
16 - the escrow agreement between both parties says,  
17 this gets released at the conclusion.

18 They went into that with their eyes wide  
19 open. They decided to put their money in escrow,  
20 their down payments in escrow, and they benefited  
21 from that money being in escrow because while that  
22 money was sitting in escrow, they were retaining for  
23 themselves the right to force CRP to sell them their  
24 luxury condominium units at the price set forth in  
25 the option purchase agreements.

1           So the money was doing something for them,  
2           and they opted to go, put the money in escrow, and  
3           then wait for the - - - for the process set forth in  
4           the purchase agreements and the regulations to  
5           unfold. So that was their decision, one.

6           Two, they could have brought a breach of  
7           contract action. Instead of going the administrative  
8           route, if they thought that somehow what happened over  
9           here was breach of contract, and if they could pursue a  
10          legal cause of action in the court below, they could have  
11          done that, and they could have, in that case, pursued  
12          whatever relief they thought they were entitled to under  
13          5001. 5001, by its very terms, applies only to a party  
14          that pursued in action, and that received a judgment in  
15          court on a claim.

16           JUDGE FAHEY: So the AG's determination,  
17          giving them interest is escrow interest only, is - -  
18          -

19           MR. CYRULNIK: That's correct. The AG's  
20          determination clearly - - - and the AG does this  
21          hundreds of times, or at least until about two years  
22          ago, I think the AG stopped doing this, but the AG  
23          was deciding this, and he awarded the interest earned  
24          thereon as accrued in the escrow accounts, and they  
25          got that; they got every dime of that money that was

1 sitting in an escrow account.

2 And if they had a problem with putting it  
3 in that escrow account because it was only bearing X  
4 percent interest instead of more, they could have not  
5 - - - they could have elected not to go that route  
6 and not to tie up the units. But they - - - they  
7 went that route.

8 And just further to your question, Judge  
9 Fahey, the lower court actually made an egregious  
10 mistake with respect to that very issue. The  
11 language used in the purchase agreements and in the  
12 AG's decision is the return of the down payments and  
13 the interest earned thereon, of course referring to  
14 the fact that the - - - there was more than the down  
15 payment sitting in the interest bearing escrow  
16 accounts.

17 The lower court, Judge Singh, mistook that  
18 language for the language that's used in a different case,  
19 the Ansonia case, where it refers to interest, just  
20 interest thereon in a general case, as referring to  
21 statutory interest. Interest earned thereon is very  
22 different from interest thereon. Interest earned is  
23 earned because it's sitting in an escrow account earning  
24 interest.

25 Statutory interest is not earned. That language

1 was significant, and the lower court mistook that language  
2 and conflated that with the language in the Ansonia case.

3 I would just add that with respect to the  
4 procedural issues, there are many other things that the  
5 petitioners here could have done - - - that the appellants  
6 here could've done if they thought that they were entitled  
7 to something. They didn't even - - - they're talking  
8 about this, I think my adversary's opening line was, the  
9 court conditionally awarded interest at the very outset of  
10 this case. That is a - - - that is a very far cry from  
11 what actually happened. And Judge Pigott hit the nail on  
12 the head when he asked the question that he did. The  
13 court didn't conditionally award interest; the court knew  
14 almost nothing about this case. It was the first day that  
15 we brought this case to the court, and we were appearing  
16 before the court, and the court has the discretion under  
17 Article 78, to stay or not stay the administrative action  
18 pending its determination, it elected to stay, and  
19 similarly under 7805, it has the discretion to include a  
20 bond.

21 That bond is at the discretion of the court, and  
22 it's not remotely construed as a conditional award of  
23 statutory interest; that's just - - - that's just a real -  
24 - - a real stretch, because there was no award at all.  
25 The court mused at oral argument, in a fifteen minute oral

1 argument, the court mused, well, maybe at the end you'll  
2 be - - - you'll move for a statutory interest, maybe  
3 you'll be entitled to it, so in order to ensure that  
4 there's not going to be an issue with payment, I'm  
5 entitled to order a bond, and I will.

6 That's the court musing, the court thinking out  
7 loud about whether or not that's possible; that's not a  
8 conditional award, that's not an award at all. The court  
9 could have considered a motion, the petition - - - the  
10 appellants here never made a motion.

11 For a year and a half they sat there waiting for  
12 the Article 78 to be resolved, they never filed a motion  
13 for statutory interest, whatever they think they could  
14 have filed, I think all those motions, further to Judge  
15 DiFiore's question, would have been improper on the  
16 merits, but they would have been procedurally appropriate,  
17 and we could have litigated the issue then. They didn't,  
18 they waited until after this case was decided as a  
19 judgment; they treated it as a judgment throughout the  
20 entire appeal process, and Mr. Coleman told you why. His  
21 - - - his clients wanted to get their money back, and they  
22 were anxious to have the First Department resolve the  
23 appeal.

24 That's fine, but if you thought that this was  
25 not a judgment, which it is under the law, you would have

1 needed to have taken the position and not proceeded to  
2 treat it as a judgment, which but for the fact - - - it's  
3 status of the judgment, could not have been reviewed at  
4 that time.

5 So for all of these reasons, Your Honors, we  
6 think that the First Department correctly and unanimously  
7 reversed the lower court.

8 And I thank you very much for your time.

9 CHIEF JUDGE DIFIORE: Thank you.

10 Mr. Coleman.

11 MR. COLEMAN: At the record at 211, Judge  
12 Singh from in his - - - on November 12th, 2012, said,  
13 "However, I'm going to maintain the status quo on the  
14 condition that petitioner post a bond of one million  
15 dollars within two weeks of today because point made  
16 by counsel is correct, they may be in an interest  
17 bearing account, but ultimately, if respondent  
18 prevails, they may be entitled to interest at  
19 statutory rate." That seems - - -

20 JUDGE STEIN: They didn't - - - the court  
21 didn't say if they prevailed, they will be entitled  
22 to interest of the statutory rate; the court said  
23 they may be entitled to interest and a statutory - -  
24 -

25 MR. COLEMAN: Correct. But once we



1 the merits of the - - - of the Article 78, shouldn't  
2 you have said, and if we prevail, we're requesting  
3 interest at the rate of nine percent? Did you ever  
4 say that to the court?

5 MR. COLEMAN: In our answer, we requested  
6 prejudgment interest. And prejudgment interest means  
7 interest at the statutory rate.

8 And to touch on counsel's distinction of  
9 the interest earned thereon and the language, the  
10 language in the J. D'Addario case was in fact  
11 interest earned thereon. And the distinction made in  
12 that case was not the earned thereon, and as a matter  
13 of fact it seemed clear that but for the agreement  
14 that this was the liquidated damages, or - - - and  
15 the sole remedy, that there would have - - - the  
16 interest rate would have been nine percent. There  
17 was nothing - - - there was nothing - - - nothing in  
18 the language that specified the interest rate.

19 JUDGE ABDUS-SALAAM: Counsel, what's your  
20 response to your adversary's point about 706 Realty?

21 MR. COLEMAN: Well, 706 Realty is a very  
22 different case because the - - - what the respondent  
23 in that case was seeking was a different award. She  
24 in fact wanted to challenge what the administrative  
25 agency had done here - - - had done in that case. In

1           this case, purchasers had no desire or reason to  
2           challenge the AG's determination, because the AG's  
3           determinations were in their favor. And to be clear,  
4           had Extell paid this money within the time set forth  
5           of the AG's determination - - -

6                     JUDGE PIGOTT: Well, go back. Suppose - -  
7           - suppose at the time that the AG made his  
8           determination he says, you're entitled to your down  
9           payment back, period. What would you do then?

10                    MR. COLEMAN: And then we probably would  
11           have gone to court and said, we're entitled to  
12           interest.

13                    JUDGE PIGOTT: You probably would have  
14           written or moved to vacate the Attorney General's  
15           decision and say, we're certainly entitled to the  
16           interest on the escrow accounts.

17                    MR. COLEMAN: I think at that point, if we  
18           brought - - - we brought an Article 78, we would seek  
19           escrow interest or - - -

20                    JUDGE PIGOTT: Right. And - - -

21                    MR. COLEMAN: - - - quite possibly nine  
22           percent - - - but at that point, once we are in  
23           court, we would seek nine percent interest.

24                    JUDGE PIGOTT: And so when - - - and so  
25           when the decision came in, you would say, we disagree

1 with this, we get the - - - our money and the escrow  
2 interest, but we want nine percent more.

3 MR. COLEMAN: But the AG had no power to  
4 award nine percent interest - - -

5 JUDGE PIGOTT: That's why you go to court.

6 MR. COLEMAN: - - - so - - - so we  
7 couldn't have challenged it in that - - - in that  
8 sense.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. COLEMAN: Thank you

11 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of CRP/Extell v. Cuomo, No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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