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COURT OF APPEALS

STATE OF NEW YORK

MARIN,

Appellant,

-against-

No. 2

CONSTITUTION REALTY/MENKES V GOLOMB,

Respondent.

20 Eagle Street
Albany, New York 12207
January 03, 2017

Before:

CHIEF JUDGE JANET DIFIORE
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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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on
2 today's calendar is appeal number 2, Marin v.
3 Constitution Realty/Menkes, Golomb.

4 Counsel.

5 MR. HORN: Good afternoon, Your Honors.

6 May it please the court. My name is Scott Horn,
7 counsel representing the appellant, Sheryl Menkes, in this
8 matter.

9 If I may, I'd like to reserve three minutes
10 rebuttal time.

11 CHIEF JUDGE DIFIORE: Yes, you may, sir.
12 Three minutes, you said?

13 MR. HORN: Three minutes, Your Honor.

14 CHIEF JUDGE DIFIORE: Yes, sir.

15 MR. HORN: Thank you.

16 CHIEF JUDGE DIFIORE: You're welcome.

17 MR. HORN: Appellant contends, Your Honors,
18 that the lower courts erred in awarding Respondent
19 Golomb forty percent of the net attorneys' fees in
20 this case, and likewise erred in awarding twenty
21 percent to the Respondent Manheimer.

22 With regard to Golomb, in particular, the
23 agreement in question unambiguously entitles him to
24 receive a twelve percent fee for having handled the
25 mediation of the matter.

1 We submit, Your Honors, that that the tipping
2 point between the twelve percent fee for handling the
3 mediation and the forty percent fee for assuming the far
4 greater responsibility of trial counsel, was whether the
5 "mediation" resolved the case.

6 Here, it's uncontroverted that after having
7 brought the parties from eighteen million dollars apart to
8 one million dollars apart - - -

9 JUDGE ABDUS-SALAAM: Counsel, what if - - -

10 JUDGE STEIN: What - - -

11 JUDGE ABDUS-SALAAM: What if at the - - -
12 what if the mediation were over, not just two weeks,
13 but there was a trial date set, and just before the
14 jury is selected after talking to the judge again, or
15 someone else, the case settles. Was - - - would that
16 be the result of mediation, or would that be
17 something else?

18 MR. HORN: I think that I missed the
19 beginning of your hypothetical. When you said the
20 judge, do you mean the mediating judge or the trial
21 judge was negotiating between the parties at that
22 juncture?

23 JUDGE ABDUS-SALAAM: It's - - -

24 MR. HORN: So if it's the mediating judge,
25 I think that's a dispositive distinction. If it's

1 the - - -

2 JUDGE ABDUS-SALAAM: Even - - - even if
3 they are already in court?

4 MR. HORN: That's correct, Your Honor. I
5 think that when we talk about the mediation, we're
6 talking about the mediator negotiating, bringing the
7 parties together, bridging the gap, at the end of the
8 session, the gap was narrowed from eighteen million
9 down to one million, or perhaps 1.5 million,
10 depending upon whose story you believe, and then he
11 specifically contemplated continuing the
12 negotiations.

13 One of the more salient pieces of - - -

14 JUDGE RIVERA: So if what matters is the
15 judicial mediators involved, or that it's part of
16 this process that's a mediation, why - - - why is the
17 date included in the agreement? Why does that
18 matter?

19 MR. HORN: Well, I - - - I would submit it
20 doesn't matter, Your Honor, quite frankly. I think
21 that under the case law that we submitted, the
22 Gravatt case from the Southern District, the NCS
23 (sic) case from the D.C. Circuit, and the
24 Massachusetts Mutual case from the District Court in
25 Massachusetts, it clearly establishes that the manner

1 in which this language was inserted by Golomb into
2 the agreement, merely makes it a clause of
3 description rather than the clause of limitation.

4 JUDGE FAHEY: But - - - but even if we
5 assumed that, let's assume that's correct, and that
6 was the dissent's point too, you have the phrases of
7 the contract itself referring to "the mediation",
8 rather than "mediation", which is a process. That's
9 an arguable point. It's a difficult distinction,
10 maybe, but it's certainly - - - I would consider from
11 your point of view, a drafting error.

12 But further on, the language says then,
13 "Whenever the case is resolved - - - entitled to
14 forty percent whenever the case is resolved, whether
15 by settlement, verdict, or trial." Settlement seems
16 to be a difficult distinction for you to be able to
17 draw here, on your side of the case.

18 MR. HORN: In other words - - -

19 JUDGE FAHEY: Why wouldn't it say settle
20 the case?

21 MR. HORN: They settled the case via - - -

22 JUDGE FAHEY: Right.

23 MR. HORN: - - - the mediator; that is
24 correct.

25 JUDGE FAHEY: Right. Right.

1 MR. HORN: And as a - - -

2 JUDGE FAHEY: Whenever the case - - -

3 "Entitled the forty percent, whenever the case is
4 resolved, whether by settlement, verdict, or trial."

5 MR. HORN: Well, that - - -

6 JUDGE FAHEY: Am I misreading that?

7 MR. HORN: - - - starts out by saying, "In
8 the event the matter has to be tried"; is that the
9 sentence that we're reading from? At the bottom - -
10 - the last full sentence of the second - - -

11 JUDGE RIVERA: It's the sentence before
12 that.

13 MR. HORN: - - - pertinent paragraph?

14 JUDGE RIVERA: No. It's the sentence
15 before that.

16 MR. HORN: Okay. This percentage - - - oh,
17 the sentence before it. Okay.

18 JUDGE FAHEY: Here, let me go to my notes
19 here. Yeah.

20 JUDGE RIVERA: It's the second sentence of
21 that paragraph.

22 JUDGE FAHEY: It's - - -

23 JUDGE RIVERA: You're reading the third.

24 JUDGE FAHEY: Yeah.

25 JUDGE RIVERA: Judge Fahey is referring to

1 - - -

2 JUDGE FAHEY: "After such mediation, I will
3 be entitled to forty percent of all attorneys' fees,
4 whenever the case is resolved, whether by settlement,
5 verdict, or trial, or appeal calculated afterwards.

6 MR. HORN: Okay.

7 JUDGE FAHEY: Right.

8 MR. HORN: Yes. So after such mediation.
9 Meaning that the mediation has ended.

10 JUDGE STEIN: How do you know when the
11 mediation ends? Here, there was a five-hour
12 mediation, they received the bill for the five hours,
13 the mediation - - - the mediator said, you know, I'll
14 keep in touch with you, but the attorney had to
15 pursue the mediator several times - - - haven't gone
16 to it - - - whatever. And there was a lot of
17 negotiation about the details of the settlement,
18 after the mediator was completely out of it. So - -
19 -

20 MR. HORN: Well - - -

21 JUDGE STEIN: - - - so - - - and just in
22 answering that, I just want to throw one other thing
23 in there. There's the first sentence of the second
24 paragraph referring to the twelve percent fee says,
25 "For those services", that is, mediation, "twelve

1 percent whenever the case is resolved, whether by
2 settlement, verdict, after trial, or appeal."

3 So how does - - - how does verdict after trial
4 come into that? That's saying twelve percent, even if
5 there's a verdict after trial. So obviously, if there's a
6 verdict after trial, the mediation didn't resolve it,
7 there was a trial, and the second paragraph says you get
8 forty percent. So how do you - - - how do you - - -

9 MR. HORN: Well, I - - - again, the drafter
10 of that language was Golomb; my client didn't draft
11 that language. And you can look at the various
12 iterations and drafts at pages 969, of the record, to
13 972, which is very important in dealing with some of
14 the arguments that the respondent is making.

15 JUDGE STEIN: But your client was very
16 careful. I mean, she made sure to add that last
17 sentence so that no matter what, he wouldn't get
18 twelve plus forty.

19 MR. HORN: Plus forty.

20 JUDGE STEIN: Right?

21 MR. HORN: That's correct.

22 JUDGE STEIN: So - - -

23 MR. HORN: That's the only sentence that
24 was added as a consequence of something that she
25 voiced in the context of those emails.

1 JUDGE STEIN: I guess what I'm getting at
2 is, is I read this agreement as a whole. There's a
3 lot of confusing language. And to me, there's a lot
4 of ambiguity.

5 MR. HORN: Okay. Fair enough.

6 JUDGE STEIN: So why - - - how - - - why -
7 - - you know, how can we say that there's no
8 ambiguity here, if we - - - if none of us and none of
9 you can agree on - - - on what it means?

10 MR. HORN: Well, fair point.

11 JUDGE STEIN: And we have reasonable points
12 of view.

13 MR. HORN: The - - - the - - - both the
14 majority and the dissenting opinion in the Appellate
15 Division found it was unambiguous. We maintain it
16 was unambiguous, and is unambiguous. In the
17 alternative, if it is ambiguous, this language should
18 be construed against the drafter. And that's why
19 these drafts, these various iterations come into
20 importance.

21 Pages 969 through 972 of the record. Page
22 969 is the original draft, which Golomb admits at
23 page 48 of the record that he drafted. And what's
24 important about that is that the language that Your
25 Honor is struggling with, and the language that you

1 find - - - that may be ambiguous must be construed
2 against the drafter.

3 So that's an alternative argument. And if
4 that's the direction the court is going, we would
5 respectfully submit that in construing this language,
6 it should be construed in accordance with the
7 interpretation that's being offered by Ms. Menkes,
8 which is - - -

9 JUDGE STEIN: Or should the trial - - -

10 MR. HORN: - - - twelve percent - - -

11 JUDGE STEIN: - - - trial court go back and
12 look at this extrinsic evidence, and discern the
13 intent of the parties?

14 MR. HORN: Well, that, of course, is - - -
15 becomes part in part of it. Right. When - - - when
16 there is a - - - when there is a ambiguity, then we
17 can start looking at extrinsic evidence, which is,
18 again, why I refer the court back to these drafts.
19 Right.

20 We couldn't consider these drafts really
21 unless there is some sort of ambiguity within the
22 four corners of the document that was executed by the
23 parties. So that would be part and parcel of the
24 analysis. As well as things like the expert
25 affirmation that was submitted by Ms. Menkes

1 name is Brian Shoot; I represent Mr. Golomb here.

2 Our position is very simple, ultimately. And
3 that is, construction of a contract begins and ends,
4 unless there's an ambiguity, with the plain language of
5 the contract.

6 JUDGE STEIN: What if - - - what if this
7 case settled an hour after midnight on the day that
8 they actually met face-to-face? Same result?

9 MR. SHOOT: Judge, actually, I address that
10 very hypothetical in my brief, if it settled at 12:01
11 or 4:01 in the morning, if they continued. And I
12 said, if that was the same arbitration that began on
13 the day forward, then it's part of the arbitration.
14 But our point, part of the arbitration - - -

15 JUDGE STEIN: What if they - - - what if
16 they broke at - - - at 7 o'clock, and they had - - -
17 they had - - - they all went home, and the mediator
18 wakes up in the middle of the night, and he has this
19 brilliant suggestion for how to settle the case, or,
20 you know, and at 12:01, he starts making some phone
21 calls, and they all agree. What then?

22 MR. SHOOT: Your Honor, as I also indicate
23 in the brief, there will come a point that you give
24 me a hypothetical, and I'll say, Your Honor, that's
25 very close.

1 If the facts were more like Ms. Menkes
2 actually alleged them to be, that the arbitrator had
3 a cold, and it was truncated because the arbitrator
4 had a cold, and everyone agreed that it was going to
5 settle, we all knew it was going to settle when we
6 walked out of the arbitration, and it was adjourned
7 to the next day, well, those would be, obviously, a
8 completely different set of facts. They are not the
9 facts, however, of this instance.

10 CHIEF JUDGE DIFIORE: So counsel, what
11 settled this case?

12 MR. SHOOT: It may well have settled as a
13 result of the mediation. Although, we'll never know
14 whether it wouldn't have also settled at the same
15 exact - - - some had the case going to trial; we'll
16 never know that.

17 But the point is, Your Honor, that the contract
18 did not say that Menkes would receive the higher fee, if
19 the "mediation process" resulted in the settlement, or if,
20 quoting from page 5 of their brief to this court. "Golomb
21 assumed the significantly greater obligations of trial
22 counsel." Nor did it say that there was a trial counsel
23 fee, and a mediation counsel fee.

24 All those terms were invented for the purposes
25 of this court. What it said was there was a single

1 bright-line distinction, whether the case did or did not
2 "resolve at the mediation, presently scheduled for May
3 20", 2000 - - -

4 CHIEF JUDGE DIFIORE: Presently scheduled.

5 MR. SHOOT: Presently scheduled.

6 CHIEF JUDGE DIFIORE: What's the import of
7 that word?

8 MR. SHOOT: The mediation date could have
9 changed, Your Honor. It was presently scheduled for
10 that date, it could have changed to May 30th. It
11 didn't - - -

12 JUDGE FAHEY: Right. Aren't you asking us,
13 though - - -

14 MR. SHOOT: - - - but it could have.

15 JUDGE FAHEY: If we promulgate your rule,
16 Mr. Shoot, then we would be saying the word "the"
17 would be enough to - - - we would be promulgated, in
18 essence, in otherworldly rule, in my experience in
19 mediations and arbitrations, both as a judge and
20 attorney, because they always go over the set amount
21 of time.

22 People have to contact other people.

23 Sometimes there isn't a formal adjournment, but you
24 say, well, we'll talk later, I'll get a phone call
25 later, somebody call me back, an adjustor called

1 back, and they got some more money, and two days
2 later - - - in this case, I guess, thirteen days
3 later - - - the case was finally settled.

4 The rule that you're promulgating basically
5 says that based on the distinction between "the
6 mediation" and "mediation" is sufficient to enable
7 that process to be limited to the specific scheduled
8 period, when in point of fact, experience usually is
9 that it isn't quite so contained.

10 MR. SHOOT: I beg to differ with Your
11 Honor, both as that being my client - - -

12 JUDGE FAHEY: I figured you would. Okay.

13 MR. SHOOT: - - - and that that distinction
14 - - -

15 JUDGE FAHEY: Yeah.

16 MR. SHOOT: - - - exists.

17 JUDGE FAHEY: Yeah.

18 MR. SHOOT: It's not the distinction, so
19 called, between "the mediation" and "mediation".

20 JUDGE FAHEY: Um-hum.

21 MR. SHOOT: "At the mediation, presently
22 scheduled for May 20th, 2013". At the mediation.

23 Now, if we had the alternative, Your Honor, if
24 it scheduled as a result of mediation - - - if it
25 settled, rather, as a result of mediation, the argument

1 then could be made at trial, unappealed, any time in the
2 case, that the groundwork was laid during the mediation,
3 and that it settled as a result of the mediation, no
4 matter what happened at trial. And indeed, that argument
5 would certainly be made in this case, where even with
6 respect to hard facts, what was the last offer, what was
7 the last demand. We have - - -

8 JUDGE STEIN: But what about the structured
9 aspect of this? Because, you know, I wonder whether
10 if at - - - at the mediation, on May 20th, they
11 agreed on the number, and everybody agrees that there
12 - - - there needed to be some further discussions
13 about how it was going to be structured, and - - -
14 and what the insurance company was going to be, and
15 all of that, would that, then, in your view, also
16 take it beyond, "at the mediation"?

17 MR. SHOOT: Again, Your Honor, I can't
18 answer that; it would be much closer, and it would
19 depend upon whether you construe it as the number
20 being sufficient.

21 In this case, there was no agreement as to
22 number. There's an affirmed finding of fact that the
23 parties left without any agreement at all on anything.
24 With resp - - - the - - - the Appellate Division ruled,
25 "We are not here concerned with mediation. The abstract

1 of what Menkes claims it meant that when they left, there
2 was nothing." Nothing was settled, even in principle.
3 Justice Edmead said that, and the Appellate Division - - -

4 JUDGE RIVERA: But - - - but the mediators
5 - - -

6 MR. SHOOT: - - - majority said that.

7 JUDGE RIVERA: - - - continues to - - - to
8 act - - - to reach an agreement.

9 MR. SHOOT: The - - -

10 JUDGE RIVERA: I mean, what's the point of
11 that?

12 MR. SHOOT: I'm sorry, what's the point of
13 what?

14 JUDGE RIVERA: But what's the point of the
15 mediators' continued involvement?

16 MR. SHOOT: The - - -

17 JUDGE RIVERA: Was it out of gratuity - - -

18 MR. SHOOT: - - - something might happen -
19 - -

20 JUDGE RIVERA: - - - out of niceness?

21 MR. SHOOT: No, no, no. Something might
22 happen or not happen, but the point is, the
23 arbitration - - - it - - - whatever happened at that
24 point, after that point was not going to happen at
25 the arbitration presently scheduled. And the parties

1 could have had a subjective qualifier in which - - -
2 which would have been a very difficult to enforce - -
3 -

4 JUDGE RIVERA: Let me ask you about - - -

5 MR. SHOOT: - - - and to interpret.

6 JUDGE RIVERA: - - - the para - - - if the
7 case does not resolve at the medi - - - at the
8 mediation presently scheduled, that paragraph, why -
9 - - why isn't that paragra - - - or that sentence.
10 Let me put it this way. That sentence, less about
11 the date of the mediation, and more about what the
12 attorneys' responsibilities are, post the failed
13 mediation.

14 MR. SHOOT: Well, I agree.

15 JUDGE RIVERA: Why isn't that sentence
16 about, okay, this is what I'm doing afterwards. I'm
17 prepping for trial, and the rest of the paragraph is
18 clarifying the fee associated with that trial prep,
19 and potentially going to trial.

20 MR. SHOOT: Your Honor, I agree that the
21 date is identified in the arbitration. If you took
22 out the date, and you said at the arbi - - - at the -
23 - - at the mediation, I keep on saying arbitration,
24 I'm sorry - - - at the mediation, it wouldn't be
25 materially changed, but they mean at the mediation,

1 it means at the mediation. I - - -

2 JUDGE RIVERA: No, no. You're
3 misunderstanding my question. Perhaps I didn't make
4 it clear. It is - - - what I'm saying is, you're
5 focused on the first part of the sentence,
6 understandably so, because it's the first part of the
7 sentence. But after the comma, after the date is
8 really what the sentence is about; is it not? What
9 this lawyer's responsibilities are post mediation.
10 Because the paragraph before this is about
11 responsibilities related to the mediation - - -

12 MR. SHOOT: Well - - -

13 JUDGE RIVERA: - - - and the fee. But this
14 paragraph is about, okay. We don't solve this at
15 mediation; does this attorney's responsibilities to
16 this case end are not? And that's what this
17 paragraph is focused on.

18 MR. SHOOT: And I think, Your Honor, you
19 have to look at the sentence afterwards that Judge
20 Fahey was reading before. And that, contrary to what
21 Mr. Horn said, was in fact, drafted by Ms. Menkes.

22 JUDGE RIVERA: I know. It says, you get
23 forty percent, or your client gets forty percent.

24 MR. SHOOT: The - - - the sentence before,
25 the version at 969 - - -

1 JUDGE RIVERA: Um-hum.

2 MR. SHOOT: - - - which was the initial
3 version of it - - -

4 JUDGE RIVERA: Um-hum.

5 MR. SHOOT: - - - it provided - - - bear
6 with me for one moment. "Once such preparations
7 commence," it immediately follows the sentence that
8 you asked about, Judge. This is the sentence Judge
9 Fahey mentioned. "Once such preparations commence,
10 I", meaning Golomb, "will be entitled to forty
11 percent of the gross attorneys' fees whenever the
12 case is resolved, whether by settlement, verdict,
13 after trial, or appeal."

14 That was changed, Your Honor. It was changed at
15 Menkes' behest, and it was changed because he was going to
16 begin trial preparation, had to begin trial preparation,
17 before the projected date of the mediation. The trial was
18 going to follow - - -

19 JUDGE RIVERA: But that - - -

20 MR. SHOOT: - - - immediately after the
21 mediation.

22 JUDGE RIVERA: But what you're referring to
23 as trial prep is in furtherance of mediation. It can
24 also be used for trial prep, agreed.

25 MR. SHOOT: Yes. But at this point, as Mr.

1 Golomb noted at page - - -

2 JUDGE RIVERA: You make it seem like your
3 client was doing two things separately and
4 independently, preparing for mediation, and preparing
5 for trial, when it's - - -

6 MR. SHOOT: As Mr. Golomb noted at page 933
7 of the record, the kind of preparation that one would
8 do for mediation is not the kind of preparation that
9 one would do for a trial. Because the trial was
10 expected - - -

11 JUDGE RIVERA: You're saying there's no
12 overlap, there's nothing of benefits - - -

13 MR. SHOOT: Oh, sure, there's overlap.

14 JUDGE RIVERA: - - - the effort at
15 mediation?

16 MR. SHOOT: But - - - sure there's overlap,
17 but in terms of the quantum of work, it's not the
18 same degree of difficulty. And they knew,
19 anticipated that indeed, he would be doing trial
20 prep, and this is why that sentence was changed at
21 Ms. Menkes' behest, to where it currently is in the
22 agreement, at page 970, the sentence that Judge Fahey
23 read, after such mediation, referring to the prior
24 sentence that mediation was presently scheduled for
25 May 20th.

1 Your Honor, I've - - - I - - - I know I'm over
2 time, but - - -

3 JUDGE RIVERA: But isn't the point of that
4 - - - the sentence - - - well, a couple of sentences
5 down, "In the event this matter has to be tried",
6 right, there you're clarifying it's the forty
7 percent. If it has to be tried, it's the forty
8 percent. Are you saying - - -

9 MR. SHOOT: No, that's - - -

10 JUDGE RIVERA: - - - there's some limbo
11 between it has to be tried and it doesn't have to be
12 tried?

13 MR. SHOOT: "In the event it has to be
14 tried", that sentence goes on to say that both Golomb
15 is responsible for trying it and Menkes is
16 responsible for helping him try it. Both things are
17 mentioned in that sentence, Your Honor.

18 JUDGE RIVERA: But, yes. So the focus is
19 on - - -

20 MR. SHOOT: But it doesn't relate to the -
21 - -

22 JUDGE RIVERA: - - - the forty percent.

23 MR. SHOOT: - - - triggering of the fade.

24 JUDGE RIVERA: Right. But the sentence is
25 focused on clarifying it's the forty percent. Right?

1 MR. SHOOT: It - - -

2 JUDGE RIVERA: That is, forty percent for
3 that and mediation.

4 MR. SHOOT: The triggering - - -

5 JUDGE RIVERA: It has to be tried, your
6 client gets forty percent for that - - - any work
7 related to that, and the mediation. Isn't that the
8 point of that sentence?

9 MR. SHOOT: The triggering sentence is the
10 one that you - - - you asked me about before. The
11 triggering sentence is the one at 969, it's the one
12 that you read before, that ends "presently scheduled
13 for".

14 If I may, Your Honor, this is - - -

15 CHIEF JUDGE DIFIORE: Last point.

16 MR. SHOOT: A point that was made in their
17 reply brief, and therefore, I've had no opportunity
18 to address. The claim made in reply, and why this -
19 - - the argument that we're now talking about is
20 preserved for appeal, supposedly, is that it was made
21 in a brief dated October 1, 2013, that it's not in
22 the record, but the appellant asks you to - - -
23 escorts you to consult as where they actually made
24 this argument, supposedly.

25 However, when you look at that memorandum, which

1 is not in the record, what you'll find is the argument
2 there made - - - the two sentences that were quoted, it's
3 page 8 of the memorandum, are the two sentences we've been
4 talking about. The argument made in the memorandum is not
5 that those words literally mean what appellant now says
6 they mean.

7 The argument there made was that courts have the
8 authority to reject "a literal reading of the contract
9 where it defeats the purpose of the agreements that little
10 interpretation would effect an absurd result, and such"
11 would provide - - - would also provide Golomb with a
12 "unconscionable incentive to delay."

13 And my point, which is point one in the brief to
14 your - - - this court, is that everything that you've just
15 heard today in oral argument, and most of what you've read
16 in their brief was not in the lower court, or even in
17 their main Appellate Division brief, that surfaced in
18 their reply brief, the Appellate Division.

19 Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, sir.

21 Counsel.

22 MR. HORN: Yes, Your Honor.

23 CHIEF JUDGE DIFIORE: Counsel, hold on one
24 second.

25 Counsel.

1 MR. HORN: Oh, I'm sorry.

2 CHIEF JUDGE DIFIORE: Anxious.

3 MR. BREAKSTONE: May it please the court.

4 My name is Jay Breakstone. I represent the Estate of
5 Jeffrey Manheimer.

6 I feel like the odd child out. Everybody wants
7 to get at everybody else, and - - - and without saying it,
8 and sort of sub silentio, I can't figure out what I'm
9 doing here. So with the court's permission, I'd like to
10 address the point I made with reference to 5601, because
11 that's the mechanism by which I came here.

12 The - - - we've always understood, and I'm just
13 as guilty, understanding that a - - - a dissent brings up
14 a two - - - a two-person dissent brings up all issues.
15 And that is a great rule for most cases. It's not for
16 this case; it's wrong in this case. Because not a single
17 judge, be it in the Supreme Court or in the Appellate
18 Division, has ever agreed with appellant, has ever
19 disagreed with respondents.

20 JUDGE STEIN: So there should be a diff - -
21 - you're saying there should be a - - - we've never
22 said that there is a different rule under the
23 circumstances you're describing. You're saying that
24 we should make that a new rule?

25 MR. BREAKSTONE: I'm saying this is - - -

1 this would be a good opportunity to write on this
2 subject, let's put it that way. Because here, it's
3 unfair. It's unfair to - - - to this widow who had
4 to pay to prosecute this appeal, which was completely
5 unnecessary.

6 And the court does have a mechanism
7 available to it, and it used it in a bunch of cases
8 involving condemnation proceedings in the '40s and
9 '50s, having to do with the Harlem River Drive, and I
10 think the Bronx Whitestone Bridge.

11 Because there, there were multiple claims
12 made against the same owner, and the court said that
13 the 5601 rule that we all think we know what it
14 means, the essence of that rule is practicality. And
15 sometimes, not - - - rarely, not in every case,
16 sometimes, that practicality standard gets offended
17 by cases just like this one, in which the only
18 commonality between Jeffrey Manheimer and this fee
19 dispute between Menkes and - - - and Golomb, is that
20 at some point in time, the fee will come out of the
21 same pocket, which is to say, Menkes.

22 Other than that, the cases are completely
23 unrelated. They don't - - -

24 JUDGE STEIN: Can I ask you - - -

25 MR. BREAKSTONE: Sure.

1 JUDGE STEIN: - - - just a little bit on
2 the merits. Because it's - - - it's not clear to me
3 that we have ever spoken definitively about this
4 situation, in terms of when there is a violation of
5 the fee-splitting rules, whether there may be, in any
6 event, an enforcement of the contract, and if so,
7 when.

8 MR. BREAKSTONE: Oh.

9 JUDGE STEIN: Would you speak to that - - -

10 MR. BREAKSTONE: Abs - - -

11 JUDGE STEIN: - - - for a moment?

12 MR. BREAKSTONE: Absolutely.

13 It would be easy to call it the sword and
14 the shield. Except here, the shield is shielding the
15 client, and the sword is being welded - - - wielded
16 by an attorney who had an equal obligation.

17 JUDGE STEIN: Is the client affected by
18 this at all?

19 MR. BREAKSTONE: Not at all. Not at all.
20 The money is coming - - - money comes solely from the
21 attorney. From the attorney who brought in Mr.
22 Manheimer because of his experience.

23 They are agreeing with us. Clearly,
24 there's no problem with that. But I think the
25 Appellate Division spoke to that, and spoke to the

1 fact that - - - that Ms. Menkes cannot use the
2 disciplinary rule to remove Mr. Manheimer's estate
3 from the fee she agreed to pay it.

4 JUDGE STEIN: And does it make a difference
5 that she herself was also in violation of the rule?

6 MR. BREAKSTONE: Well, I think it does. I
7 think it does very much. And I'm sorry; I thought I
8 made that clear. That's, again, that's the sword
9 and, you know, once-removed shield - - - shield
10 argument.

11 I mean, there are - - - there are things in Ms.
12 Menkes' brief which is - - - which are quite strange. And
13 one of which is that she didn't have any idea that it was
14 her obligation to do that.

15 JUDGE RIVERA: Why should it fall harder on
16 her than on your client?

17 MR. BREAKSTONE: Well, it doesn't.

18 JUDGE RIVERA: It's - - - it's a viol - - -
19 isn't it a violation of public policy? Why should
20 your client get the benefit?

21 MR. BREAKSTONE: Well, it doesn't. And
22 first - - - and the reason is, is because Ms. Menkes
23 prohibited my client from speaking - - - my client
24 from speaking to her client for various obvious
25 reasons. Jeffrey Manheimer was a very well-known

1 attorney, very highly thought of in the Bar, and she
2 was worried that - - - that - - - that she - - - that
3 Mr. Manheimer was going to steal her client. So she
4 excised him from that relationship, so he can have
5 the ability - - -

6 JUDGE RIVERA: Was that an excuse not to
7 comply with the rules?

8 MR. BREAKSTONE: Well, the agreement says
9 that he's not allowed to contact the client. These
10 clients had been Ms. Menkes' clients for over three
11 years. So I don't think that it weighs evenly on
12 both sides. And surely for the purposes of what's
13 before this court, which is the fee dispute - - -

14 JUDGE RIVERA: You're saying, between the
15 two, she acted more egregiously.

16 MR. BREAKSTONE: Yes. But I don't really
17 think that that is necessary here, because the - - -
18 the - - - I agree with you. But - - - or what you're
19 suggesting, anyway.

20 CHIEF JUDGE DIFIORE: Thank you, Mr.
21 Breakstone.

22 MR. BREAKSTONE: Thank you.

23 CHIEF JUDGE DIFIORE: Mr. Horn?

24 MR. HORN: Thank you, Your Honor.

25 I think, briefly, I'd like to touch upon the

1 preservation issue that was raised by Mr. Shoot. And I
2 would respectfully refer the court to page 18 of that very
3 memo of law, which I referred to in my brief, and you'll
4 see that argument there broadly stated - - - agreed is
5 that there was no definitive deadline May 20th, it had to
6 be settled that day, that's the end of it. If it doesn't
7 settle that day, binding, then he's entitled to the forty
8 percent.

9 JUDGE ABDUS-SALAAM: Well, couldn't - - -

10 MR. HORN: At the oral argument - - -

11 JUDGE ABDUS-SALAAM: Counsel, couldn't Ms.
12 Menkes have inserted some kind of language in the
13 contract? She was not without the ability to insert
14 language to say the mediation process, or the
15 mediation whenever it ended, or some other language
16 that would suggest it was beyond May 20th.

17 MR. HORN: There's no question that this
18 agreement could have been better drafted.

19 JUDGE ABDUS-SALAAM: Um-hum.

20 MR. HORN: For sure. The way that the
21 language is, however, under the case law which I've
22 cited, that temporal reference merely describes the
23 mediation. Mr. Shoot admitted, during his
24 presentation, that if you remove that language, it
25 doesn't change the meaning of the - - - of the

1 sentence.

2 And that's the very definition, by the way,
3 of the distinction between a clause of description
4 and a clause of limitation, under Gravatt, NACS - - -

5 JUDGE ABDUS-SALAAM: Well - - -

6 MR. HORN: - - - and Massachusetts Mutual.

7 So - - -

8 JUDGE ABDUS-SALAAM: Going back to
9 something that Judge Stein asked earlier. How do you
10 know when the mediation ends?

11 MR. HORN: Well, I think that - - -

12 JUDGE ABDUS-SALAAM: Judge Hurkin-Torres
13 only billed for five hours. Does that mean the
14 mediation ended at the end of that billing period?

15 MR. HORN: Certainly not, Your Honor.

16 JUDGE ABDUS-SALAAM: Why not?

17 MR. HORN: I mean, we have all this
18 information in front of us as to what exactly
19 transpired thereafter. I read for you the Boule
20 affirmation, which is that the parties broke - - -
21 and by the way, the parties - - - the representation
22 in the appellant's brief was not that the parties
23 broke because of a cold, it was because, and I refer
24 you to page 17 of the appellant's briefs, because
25 they had reached the limit of their authority to

1 settle. The excess carrier. That at page 17,
2 referring to page 912 in the record.

3 That's why they broke. That's why Mr.
4 Boule affirms, the only objective independent person
5 that was there, that's not here today - - - and he
6 says it was fully contemplated that the mediator was
7 going to reach out to the excess carriers to get more
8 money, hopefully.

9 That's precisely what he did. And I refer you
10 to page 18 in my appellant's brief, which talks exactly
11 about what - - -

12 JUDGE ABDUS-SALAAM: So only - - - only - -
13 -

14 MR. HORN: - - - Judge Hurkin-Torres did.

15 JUDGE ABDUS-SALAAM: Only if the mediator
16 could not have gotten more money from the excess
17 carrier would the mediation have ended?

18 MR. HORN: Well, I don't think it needs to
19 be that definitive. I think, you know, we're talking
20 in hypotheticals, and the thing that I keep coming
21 back to is that the mediator settled the case. The
22 mediator is the one who got the number from the
23 excess carrier, related it to the plaintiff's
24 counsel, received the acceptance from the plaintiff's
25 counsel, and brought the parties together.

1 JUDGE STEIN: What if they - - -

2 MR. HORN: He bridged the gap.

3 JUDGE STEIN: - - - agreed on the number,
4 but they weren't able to agree on the structure?

5 MR. HORN: If a - - - if it falls apart,
6 then it falls apart. But the fact of the matter is -
7 - -

8 JUDGE STEIN: But the mediator had no
9 involvement in negotiating the structure.

10 MR. HORN: That shows you just how
11 ancillary these things that are now elevated to up -
12 - -

13 JUDGE STEIN: Well, that's because it
14 turned out - - - it resolved. If it hadn't resolved,
15 we might be in a different - - -

16 MR. HORN: We might very well be in a
17 different - - -

18 JUDGE STEIN: But then would you be - - -

19 MR. HORN: - - - position.

20 JUDGE STEIN: - - - saying, the mediator
21 produced a settlement?

22 MR. HORN: The mediator would have brought
23 the parties together, in furtherance of a settlement,
24 whether it was ultimately signed, sealed, and
25 delivered. Obviously, under that hypothetical, it is

1 not the case.

2 One last point that I would like to leave Your
3 Honor with, again, on the preservation point, page 52 in
4 the record, the exact argument that's based upon Gravvat,
5 and NACS, and Massachusetts Mutual about the dispositive
6 import of comments appears during the argument presented
7 to the trial court, and was addressed by the trial court
8 in her decision. It was presented to the Appellate
9 Division in the briefing, it was addressed in the majority
10 opinion, it was addressed in the dissenting opinion.

11 The issue is clearly preserved.

12 Thank you, Your Honors.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 (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 Marin v. Constitution Realty/Menkes v. Golomb, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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