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COURT OF APPEALS

STATE OF NEW YORK

ROBERT J. CONGEL, ET AL.,

Respondents,

-against-

NO. 30

MARC A. MALFITANO,

Appellant.

20 Eagle Street
Albany, New York
February 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is number 30, Congel v. Malfitano.

3 Good afternoon, counsel.

4 MS. GRAFFEO: Good afternoon. I am Victoria
5 Graffeo, and I'm representing the appellant, Marc
6 Malfitano, in this matter. I would request two minutes for
7 rebuttal, please?

8 CHIEF JUDGE DIFIORE: You may.

9 MS. GRAFFEO: The fundamental error by the
10 Appellate Division in this case was its failure to
11 recognize that this was an "at will" partnership, and it
12 was an "at will" partnership under Section 62(1)(b) of the
13 Partnership Law, because it lacked a definite term or a
14 particular undertaking. Section 12.1 - - -

15 JUDGE GARCIA: Counsel, I - - - I think their - -
16 - their argument is that's kind of a default section,
17 right? So these are contracting parties. Essentially,
18 they enter into this partnership. They make specific rules
19 about when it can be dissolved, so why do we need to look
20 at that? Why would you superimpose those terms on this
21 contract for one?

22 MS. GRAFFEO: Well, I disagree that in this case
23 that it's a default rule. It's not a default rule because
24 it's only a default rule if the parties have addressed the
25 subject matter.



1 JUDGE WILSON: Well, Section - - - Section 12. -
2 - -

3 MS. GRAFFEO: Here, there is no indica - - -

4 JUDGE WILSON: Section 12.1 has a provision for
5 dissolution and it - - - it - - - either a vote or
6 illegality, but could you address that?

7 MS. GRAFFEO: 12.1 just says that it shall - - -
8 that it shall continue until the election by the partners
9 to dissolve the partnership. That's an open-ended
10 perpetual provision.

11 JUDGE FAHEY: But it - - - but it sets out a pro
12 - - -

13 MS. GRAFFEO: It does not rep - - -

14 JUDGE FAHEY: It sets out a procedure to make a
15 decision in - - - in the agreement, and - - - and specifies
16 that a decision has to be made by a majority of the
17 partners. So are you saying that there has to be an
18 expressed prov - - - provision in the partnership to
19 default?

20 MS. GRAFFEO: There has to be an expressed - - -

21 JUDGE FAHEY: Or to not default?

22 MS. GRAFFEO: Excuse me.

23 JUDGE FAHEY: Go ahead; go ahead.

24 MS. GRAFFEO: There has to be an expressed
25 provision that provides as the Gelman case indicated - - -



1 JUDGE FAHEY: Now, I thought the Gelman case - -
2 -

3 MS. GRAFFEO: - - - a definite term - - -

4 JUDGE FAHEY: Excuse me; I'm sorry. I thought
5 the Gelman case was an oral contract with - - - with none
6 of these specific provisions.

7 MS. GRAFFEO: Well, certainly the facts of Gelman
8 are very distinguishable, but the court was providing
9 further clarification of a statutory phrase "definite
10 term." That's been upheld since 1916 in the Hardin case,
11 so what you need to look for is, and what I can't find that
12 my adversary and the briefs on behalf of the Executive
13 Committee provide here, is what was the precise date of the
14 termination of this partnership. That's what's required.
15 Now, if they had put exclusive language in here, that they
16 were - - -

17 JUDGE FAHEY: Well, is it required - - - let me
18 ask this. I understand your - - - your particular
19 undertaking and - - - and your definitional and your
20 durational argument. Is it required where there - - -
21 where there is an actual agreement setting out a procedure
22 for dissolution? I see how it's required in a default
23 proceeding under Gelman. I agree with you on Gelman. But
24 I'm not sure that's what we have here.

25 MS. GRAFFEO: Well, 12.1 does not address at what



1 point a partner can - - -

2 JUDGE FAHEY: So you're saying that - - - you're
3 saying - - -

4 MS. GRAFFEO: - - - can bring - - -

5 JUDGE FAHEY: - - - even if - - -

6 MS. GRAFFEO: - - - at - - - at what point the
7 partnership terminates. It doesn't give us any indication.
8 It's a - - - it's - - -

9 JUDGE FAHEY: So let me get this question out,
10 then. So you're saying that it's - - - it - - - the
11 durational requirement is there, even in an agreement, even
12 if someone is contracted to conduct their partnership in a
13 particular way, they're required to have a set term of
14 partnership in every partnership agreement?

15 MS. GRAFFEO: No, if you have what you said, that
16 would be a particular purpose, so that would be the
17 particular undertaking.

18 JUDGE FAHEY: I see.

19 MS. GRAFFEO: That would take it out of the "at
20 will" provision. But - - -

21 JUDGE STEIN: The problem - - -

22 CHIEF JUDGE DIFIORE: But Counsel, you started to
23 speak about exclusive language?

24 MS. GRAFFEO: Yes, I - - -

25 CHIEF JUDGE DIFIORE: What specifically?



1 MS. GRAFFEO: I think it's - - - I think it's
2 clear in the In re Century case and the Prudential
3 Insurance case, that there's a number of ways that
4 partnerships can avoid being deemed "at will." One is to
5 have exclusivity to indicate the exclusive means of
6 dissolving this partnership shall be, and then list those.
7 I know that my adversary - - -

8 CHIEF JUDGE DIFIORE: Magic words.

9 MS. GRAFFEO: - - - calls that "magic words." I
10 don't think it's magic words; I think it's what we require
11 under basic contract principals. There's no - - -

12 JUDGE WILSON: It would still be a definite term,
13 then, right?

14 MS. GRAFFEO: - - - that - - - that specificity
15 supplanting the Partnership Law is not in this agreement.

16 JUDGE WILSON: Yeah, but even with those words,
17 there would be no definite term.

18 MS. GRAFFEO: But they would be indicating that
19 they were eliminating a partner's ability to use the
20 Partnership Law, and they were substituting the provisions
21 of the contract.

22 JUDGE STEIN: How - - - how - - -

23 MS. GRAFFEO: That's - - - that's permissible and
24 - - -

25 JUDGE RIVERA: Okay, but - - -



1 MS. GRAFFEO: - - - that's what many partnerships
2 do.

3 JUDGE RIVERA: But I'm not clear how - - - how
4 12.1 doesn't do that?

5 MS. GRAFFEO: Because it just has the election by
6 partners to dissolve the partnership. It doesn't even say
7 - - -

8 JUDGE RIVERA: Yes, but it's not - - -

9 MS. GRAFFEO: - - - the majority of partners,
10 quite honestly.

11 JUDGE RIVERA: Yes, but since that's not what
12 happened, isn't he in violation of the agreement? So it
13 doesn't really matter if it's "at will"?

14 MS. GRAFFEO: No, if it's - - -

15 JUDGE RIVERA: Does it really matter?

16 MS. GRAFFEO: If it's "at will," a partner has
17 the ability to rely on Section 62(1)(b) and can notice a
18 dissolution.

19 JUDGE STEIN: Wouldn't that render other
20 provisions of this agreement completely superfluous,
21 though? About - - - about different means of transfer, and
22 - - - and - - - and that the - - - the obligation to
23 fulfill certain capital commitments, if - - -

24 MS. GRAFFEO: Well - - - well, no, because they
25 knew how to escape the requirements of the Partnership Law



1 for disability and death and bankruptcy. There, they
2 clearly indicated that those were the specific - - -
3 specific means - - -

4 JUDGE STEIN: But these other provisions, they
5 wouldn't have any meaning, if anybody - - - if - - - if
6 then a person could just "at will" declare the partnership
7 dissolved?

8 MS. GRAFFEO: Well, that's - - -

9 JUDGE WILSON: Particularly - - - particularly
10 the sales provisions, right?

11 MS. GRAFFEO: That's - - - that - - -

12 JUDGE WILSON: The - - - the requirements - - - I
13 think what Judge Stein is talking about is the provisions
14 that say, for example, if you want to sell to a - - - a
15 permitted person, then you don't need approval; but if you
16 want to send - - - sell to somebody, an outsider like me,
17 you've got to get a bonafide offer in writing submitted to
18 the committee. They have the right of first refusal.
19 Those provisions would all be irrelevant; you could simply
20 just dissolve, no?

21 MS. GRAFFEO: Well, not if you met the
22 requirements of - - - those provisions are established for
23 certain fact patterns. But here, in terms of section - - -
24 the section entitled "Dissolution" does not provide
25 specifically that only these provisions allow a partner to



1 dissolve. It doesn't affect the other provisions of the
2 agreement, that allow transfer to a third party or that
3 allow some - - - some other remedies that are available to
4 the partners.

5 They - - - you know, they - - - the Partnership
6 Law has been in existence for almost a hundred years. The
7 sky is not going to fall in by upholding the "at will"
8 rule. I mean, most partnerships, there's a number of ways
9 that they're able to contract around it. I mean, first of
10 all, what they could have done here, when he noticed for
11 dissolution, since there was - - - well, since there's
12 clearly no specific time limit here, they could have done
13 the accounting, paid him his interest, and continued the
14 business. They never dissolved in this case. There was
15 never a termination. The mall - - -

16 JUDGE WILSON: So - - - so if there is - - -

17 MS. GRAFFEO: The mall was never out of business
18 for even a single day.

19 JUDGE WILSON: So if the partnership is - - -
20 I've been struggling with this - - - if the partnership was
21 never dissolved, how can there be a wrongful dissolution?

22 MS. GRAFFEO: Because upon notice of a
23 dissolution under the Partnership Law by operation of law,
24 there's a dissolution. Dissolution - - -

25 JUDGE WILSON: I think you just said it had not -



1 - -

2 MS. GRAFFEO: - - - is distinct from termination

3 - - -

4 JUDGE WILSON: Right.

5 MS. GRAFFEO: - - - so - - -

6 JUDGE WILSON: I thought you had said it had not
7 dissolved.

8 MS. GRAFFEO: I'm sorry. I should have said had
9 - - - was not terminated.

10 JUDGE WILSON: Okay.

11 MS. GRAFFEO: They - - - they did not even wind
12 down the business, because they considered it a wrongful
13 dissolution notice, they just continued the business. They
14 eventually did reconstitute the - - - the partnership.

15 JUDGE FAHEY: Do you want to address the
16 attorneys' fees question for a second?

17 MS. GRAFFEO: Yes.

18 JUDGE FAHEY: Thank you.

19 MS. GRAFFEO: The - - - I - - - I think the
20 attorney fee award is en - - - entirely unjustified in this
21 case. It really violates the American rule. There's no
22 provision for it, either in statute or in the actual
23 partnership agreement itself; that is, I think, a very
24 established rule in New York.

25 As a matter of fact, the transcript here on page



1 B-767, the attorney for the Executive Committee testified
2 that less than 15,000 dollars pertained to the actual
3 reconstitution of the partnership. So all of the other
4 damages here, the one-point-million in attorneys' fees that
5 were assessed against Mr. Malfitano, those were all for
6 litigation expenses. And in New York, in breach of
7 agreement cases, each party bears their own fees. There
8 was no provision in this agreement or by statutory
9 authorization to be able to assess those counsel fees.

10 JUDGE RIVERA: So then they're entitled to the
11 14,000-plus but not anything else? Is that your position?

12 MS. GRAFFEO: Yes, well, that would be if you
13 find that he did not wrongfully dissolve the partnership.

14 CHIEF JUDGE DIFIORE: Thank - - -

15 MS. GRAFFEO: Or if he - - - or if he did, the
16 counsel fees in excess of the - - - of the 14,7-.

17 JUDGE FAHEY: But the attorneys' fees, the
18 question isn't predicated on the wrongful dissolution?

19 MS. GRAFFEO: Correct.

20 JUDGE FAHEY: Right, thank you.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.
22 Counsel?

23 MS. HALLIGAN: Chief Judge DiFiore, and may it
24 please the court, Caitlin Halligan on behalf of the
25 respondent partnerships.



1 Let me start with the first question before the
2 court, which is whether or not Section 62 along with the
3 other provisions of the Uniform Partnership, provide
4 default terms. They do; this court has said so. I think
5 that's a straightforward question. I think the real issue
6 for this court is what do partners have to do to contract
7 around the terms set forth in the UPA?

8 As we say in our brief, there are no magic words
9 that are required for a couple of reasons. First of all,
10 the Uniform Partnership Act, as this court has stressed,
11 places primacy on the ability of partners to pick the terms
12 that they want. There is no formula that is required. If
13 the legislature - - -

14 JUDGE RIVERA: But there must be some threshold?
15 What's the threshold?

16 MS. HALLIGAN: Absolutely, Your Honor. The
17 partners have to make clear that they do not intend the
18 partnership to be "at will." They have absolutely done so
19 here. The provisions that a few of - - - of the members of
20 the court identified with respect to transfer rights, as
21 well as capital calls, as well the - - - the clear language
22 in 2.3 and 12.1 that the partnership "shall continue" until
23 one of several enumerated events happens, makes absolutely
24 clear that the partnership is not intended to be "at will."
25 Those are completely mutually inconsistent.



1 And indeed, if you were to deem a partnership
2 like this "at will," then any time a partner didn't want to
3 abide by a number of the other provisions in the agreement,
4 such as the transfer restrictions or the capital call, she
5 could simply decide to dissolve at will and walk away.
6 Those provisions would be rendered completely nugatory.

7 That is also why the wide array of amici that
8 have filed before this court have said that reading this
9 partnership agreement to be "at will," notwithstanding the
10 clear choice that the partners made to the contrary, would
11 be very destabilizing.

12 JUDGE WILSON: So - - - so, Counsel, my - - - my
13 earlier question I'm still wrestling with - - -

14 MS. HALLIGAN: Yes.

15 JUDGE WILSON: - - - which is, you essentially
16 are saying, and suppose I agree with you, that there's a
17 contract that says a single partner cannot dissolve the
18 partnership.

19 MS. HALLIGAN: Yes.

20 JUDGE WILSON: Right. Then a single partner
21 saying I'm dissolving the partnership has no legal effect.
22 So why is there a wrongful termination here? And let me -
23 - - let me posit this to you.

24 MS. HALLIGAN: Yes, Your Honor.

25 JUDGE WILSON: That the wrongful termination



1 provision in - - - in the statute is meant to deal with
2 circumstances where the partner - - - the terminating
3 partner in question - - - actually has managerial authority
4 over the partnership. That would be the wrongful
5 termination be - - - or dissolution because the whole thing
6 is gone. But we're - - - if - - - I mean, if I announce
7 I'm king of England, I'm not king.

8 MS. HALLIGAN: Well, Your Honor. A - - - a
9 couple of points. The - - - the - - - first of all, if you
10 look at Section 62, right, Section 62, which is what my
11 adversary relies upon to suggest that this is an "at will"
12 partnership, says that the partnership can be dissolved "in
13 contravention of the agreement between the partners where
14 the circumstances don't permit a dissolution under any
15 other provision." That's Section 62(2). That I would
16 argue is exactly what happened here.

17 The dissolution, because it was not in
18 conformance with 2.3 and 12.1, was in contravention of the
19 agreement. We do not dispute that a partner has the power
20 to walk away from a partnership. What Section 69 then does
21 is to explain what the consequences of a wrongful
22 dissolution are. Section 69 explains that in the event of
23 a dissolution, if the dissolution is permissible, the
24 partnership property after liquidation is allocated among
25 the partners on a pro rata basis.



1 JUDGE RIVERA: Is that because under the law, you
2 can't force people to stay in a partnership?

3 MS. HALLIGAN: Absolutely. And we don't - - - we
4 don't contest that, Your Honor. There's, I think, no
5 question about that. I've seen no decision from any court
6 suggesting that you can bind a partner, just like with
7 breach of contract. You may breach.

8 JUDGE RIVERA: So the business continues and they
9 form some other partnership?

10 MS. HALLIGAN: Yeah - - - yes, absolutely, Your
11 Honor. And that is pursuant to - - - and this is the power
12 that was authorized here, and I think page B-50 of the
13 court's opinion confirms this. This is Section 69(2)(b).
14 That is what makes clear that in an event of a wrongful
15 dissolution, then the remaining partners, they have two
16 options. They can liquidate, and the court sets forth the
17 damages that - - - the court - - - the statute first sets
18 forth that, in the event of a wrongful dissolution, the
19 wrongful dissolver has to pay damages to the remaining
20 partners.

21 JUDGE STEIN: So - - - so if they continue - - -
22 if they continue or reformulate the partnership - - -

23 MS. HALLIGAN: Yes.

24 JUDGE STEIN: - - - or whatever they do, and - -
25 - and then there - - - there has to be some determination



1 of who owes who what, right?

2 MS. HALLIGAN: Exactly.

3 JUDGE STEIN: Okay. So why in the sit - - -
4 situation we have here - - -

5 MS. HALLIGAN: Yes.

6 JUDGE STEIN: - - - should we not apply the
7 reasoning in Friedman as it relates to the minority
8 discounts?

9 MS. HALLIGAN: I think that's the only question
10 of law with respect to the valuation that's before this
11 court, Your Honor. I would direct the court to a couple of
12 decisions, which explain, I think, very clearly why a
13 minority discount properly applies under Section 69, even
14 though it clearly does not under Friedman, for purposes of
15 BCL Section 623. Anastos from the Massachusetts Supreme
16 Court, these are cited in the briefs. And Vick, which is
17 from the Appellate Division First Department.

18 Here's why Friedman doesn't apply. The two
19 statutory regimes, the BCL and the appraisal rights that it
20 offers to minority shareholders, and the allocation of
21 partnership property under Section 69, are completely
22 different in two critical respects. The text of the
23 statutes, first of all, is different. BCL 623 allows for a
24 minority shareholder to get fair value. The statute makes
25 clear that this is a remedial provision that is designed to



1 protect the rights of minority shareholders.

2 There is also an independ - - -

3 JUDGE STEIN: Well, I - - - so my question is
4 this. Why - - - why is a - - - is a partner - - -

5 MS. HALLIGAN: Yes.

6 JUDGE STEIN: - - - who has a tiny percentage - -
7 -

8 MS. HALLIGAN: Yes.

9 JUDGE STEIN: - - - of ownership, why is that
10 partner in any different position than a minority
11 shareholder?

12 MS. HALLIGAN: Well, because - - - because what
13 Section 69 is intended to do is not to protect the rights
14 of minority shareholders. Those are protected otherwise in
15 the Partnership Law in several ways - - - several important
16 ways. First of all, if a minority partner believes that
17 her fiduciary duty has been breached by the other partner,
18 she can bring a suit. She can seek an accounting. She can
19 also seek judicial dissolution.

20 In this case, Your Honor, the appellant sought
21 each and every one of those remedies which are available to
22 him and any other minority partner under the law, and the
23 Supreme Court determined that those claims were patently
24 devoid of merit. So there are protections available under
25 the Partnership Law. They are different protections than



1 the protection available under the BCL. Under the BCL,
2 there is also an additional independent statutory
3 prohibition, under 501(c), that says, you may not treat
4 minority and majority shareholders, when they own the same
5 class of stock, differently.

6 Partnership Law is set up completely differently.
7 And that's what Anastos and Vick explain. What Section 69
8 is intended to do is to require a wrongful dissolver, like
9 someone who breaches a contract to absorb the consequences
10 of that action. So the partner is free - - -

11 JUDGE RIVERA: So that - - - that could mean like
12 in this case that they owe the - - - the breaching partner
13 - - - that minority holder - - -

14 MS. HALLIGAN: Yes.

15 JUDGE RIVERA: - - - whatever it is, 2.68 percent
16 - - - whatever it is - - - 3.08; I'm sorry; I can't
17 remember.

18 MS. HALLIGAN: 3.08, Your Honor.

19 JUDGE RIVERA: Right, over a million dollars?

20 MS. HALLIGAN: And let me explain why. And Your
21 Honor - - -

22 JUDGE RIVERA: Yeah.

23 MS. HALLIGAN: - - - let me acknowledge that this
24 is an unusual - - -

25 JUDGE RIVERA: There's a sixty-six percent share



1 on that minority, right? That - - - that was the
2 deduction?

3 MS. HALLIGAN: The minority discount was sixty-
4 six percent - - -

5 JUDGE RIVERA: Sixty-six percent.

6 MS. HALLIGAN: But that's something that there's
7 perfectly strong factual support for. It's a question of -
8 - - that particular issue is - - -

9 JUDGE FAHEY: Well, it - - - it wasn't - - -

10 MS. HALLIGAN: - - - a question of fact.

11 JUDGE FAHEY: - - - it wasn't contested by their
12 expert. Isn't that the core of your argument?

13 MS. HALLIGAN: Absolutely correct.

14 JUDGE FAHEY: You know, while - - - while we're
15 on the topic, and you - - - I want you to answer Judge - -
16 -

17 MS. HALLIGAN: Yes.

18 JUDGE FAHEY: - - - Judge Rivera's question, but
19 can you also address, I - - - I struggle with what the
20 difference is between a marketability discount - - -

21 MS. HALLIGAN: Yes, Your Honor.

22 JUDGE FAHEY: - - - and a minority discount. I -
23 - -

24 MS. HALLIGAN: Let me - - -

25 JUDGE FAHEY: Go ahead.



1 MS. HALLIGAN: Let me try to address that and
2 also address Your Honor's question about how could it be
3 that someone owes money when they're trying to walk away
4 from a partnership.

5 A marketability discount, Your Honor, is intended
6 to account for the relative illiquidity of an asset. So if
7 you have something that - - -

8 JUDGE FAHEY: Right, right. But they both
9 involve lack - - - I - - - no, I read it.

10 MS. HALLIGAN: Okay.

11 JUDGE FAHEY: I understand that. My - - - my
12 point is that - - - is that they both - - - both are - - -
13 both address the question of a lack of a control.

14 MS. HALLIGAN: No, I - - - I believe not, Your
15 Honor.

16 JUDGE FAHEY: You think it's different?

17 MS. HALLIGAN: I do think it's different. A
18 minority - - - a minority discount clearly does address a
19 lack of control and Mr. Pangia which - - - which was the
20 Partnership's expert, explains the way in which they are
21 distinct. The reports are included in the record. So - -
22 - so the minority discount accounts for the lack of
23 control. And in this partnership, because there are
24 significant powers accorded to the executive committee and
25 to the majority, that discount was substantial.



1 By distinction, a marketability discount - - -

2 JUDGE FAHEY: But what - - - wasn't there a
3 clause in the partnership agreement that that set up a
4 penalty for a - - - a five-year penalty?

5 MS. HALLIGAN: Yes, and - - -

6 JUDGE FAHEY: Can you explain that?

7 MS. HALLIGAN: And - - - and there are - - - were
8 other con - - - restrictions as well. And in general in a
9 partnership, as Mr. Pangia testified to, a holder of
10 minority interests may face some discount of varying
11 degrees. And that discount reflects what the market would
12 pay if a third party were to attempt to purchase the asset
13 taking into account that there is limited control.

14 If I may just finish, Your Honor?

15 CHIEF JUDGE DIFIORE: You may.

16 MS. HALLIGAN: A marketability discount simply
17 reflects relative illiquidity, and those are distinct, and
18 the expert reports lay that out.

19 If I may just answer your question, Judge Rivera.
20 With respect to the bottom-line dollar amount here. Once
21 the goodwill was discounted and the dam - - - as required
22 by statute, and the marketability and minority discounts
23 were applied, the share that Mr. Malfitano had, the value
24 was approximately 911,000 dollars, which he would have
25 received.



1 The statute instructs that a wrongful dissolver
2 pay damages to the partnership. That is set forth in
3 Section 69(2) (a). The Supreme Court found - - -

4 JUDGE STEIN: Since when have counsel fees - - -
5 been considered damages, though?

6 MS. HALLIGAN: At - - - well, at - - - first of
7 all, Your Honor, I think there's no question but that a
8 statute can authorize the payment of attorneys' fees.

9 JUDGE STEIN: Yes, sure. And - - -

10 MS. HALLIGAN: And - - - and - - -

11 JUDGE STEIN: - - - so can a contract.

12 MS. HALLIGAN: A - - - absolutely. And so the
13 factual finding that Supreme Court made that the
14 partnership had no choice but to pursue a declaration of
15 wrongful dissolution in order to exercise its rights under
16 Section 69, to reconstitute the partnership. I would - - -
17 I would urge Your Honor to look at Section 69(2) (b). That
18 is what allows the partnership to reconstitute under the
19 same name and to continue. That is available in the event
20 of a wrongful dissolution. So as Supreme Court found, it
21 was necessary to secure a declaration of wrongful
22 dissolution in order to exercise that right.

23 And I urge the Court to look at pages B-40 to 43.
24 Supreme Court lays out the devastating consequences that it
25 would have resulted, and to not proceed with this



1 litigation, explained that it was Mr. Malfitano's actions -
2 - -

3 JUDGE STEIN: But that - - - that can be said of
4 - - - of almost any situation, can't it? If - - - if I
5 didn't go to court to preserve my rights, I would have been
6 further damaged.

7 MS. HALLIGAN: No, Your Honor, I think that what
8 - - - what Supreme Court says is that it was an absolutely
9 direct connection. I think that's a finding of fact that
10 is, with respect, not before this court. And I think if
11 you look at Section 69(2) - - -

12 JUDGE RIVERA: Wasn't it about the loan? Isn't
13 that what was going on? If they didn't get this loan?

14 MS. HALLIGAN: The - - - well, it was a
15 refinancing and - - -

16 JUDGE RIVERA: Refinancing, I'm sorry.

17 MS. HALLIGAN: - - - and Mr. Malfitano, who was
18 counsel to the companion management company, was uniquely
19 aware of the consequences of his actions. So I think
20 Supreme Court explains why it is that incurring these fees
21 to prosecute this action, including nine appeals. Ten
22 years of litigation that Mr. Malfitano chose to proceed
23 with was directly occasioned by and made necessary by his
24 actions.

25 If there are no other questions - - -



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 MS. HALLIGAN: Thank you, Your Honor.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MS. GRAFFEO: If you disagree with us that this
5 was an "at will" partnership, and I think if you look at
6 Section 62(2), you're going to see the structure of the
7 Partnership Law is that it is only in contravention of a
8 part of the Partnership Law if it meets one of the
9 provisions of the - - - of the section. And here, of
10 course, we don't have either the particular undertaking or
11 the - - - or the specific term of duration.

12 But in any event, if you disagree with us,
13 Section 69, regardless of whether it's legitimate or a
14 wrongful dissolution, the partner is entitled to the
15 interest. What I think went astray in this case is that
16 Supreme Court ignored the testimony of my client's expert
17 and went entirely with the testimony of the Executive
18 Committee's expert. And it's contrary to law.

19 JUDGE FAHEY: Is - - - is that - - - is that - -
20 -

21 MS. GRAFFEO: Goodwill - - - excuse me.

22 JUDGE FAHEY: Is that true, Counselor, on the
23 minority discount question?

24 MS. GRAFFEO: Well, minority - - - minority
25 discount - - -



1 JUDGE FAHEY: I - - - I thought - - -

2 MS. GRAFFEO: - - - I think under the Vick case
3 and under the Friedman - - -

4 JUDGE FAHEY: No, I mean the testimony of the
5 expert. I thought your expert didn't testify.

6 MS. GRAFFEO: The only - - - the only area my - -
7 - our expert did not testify to was goodwill, because he
8 felt there was no goodwill under New York law according to
9 the rule that real estate holdings - - -

10 JUDGE FAHEY: You -- - you can - - - you can
11 correct me if I'm wrong, but I had thought your expert
12 testified on - - - he didn't testify as to a number, simply
13 said, that there was not a legal basis for a minority
14 discount. Is that correct?

15 MS. GRAFFEO: Yes, that's - - - that's correct.
16 It's not - - -

17 JUDGE FAHEY: That's right. So - - - so they
18 didn't offer an alternative number - - -

19 MS. GRAFFEO: - - - that he didn't address it at
20 all.

21 JUDGE FAHEY: They didn't offer an alternative
22 number. Am I right about that?

23 MS. GRAFFEO: No, because they relied upon the
24 fact that he had not wrongfully or maliciously brought this
25 notice of dissolution. He had very legitimate reasons for



1 feeling that it was an inappropriate refinancing. There
2 was no serious ramification. They consummated the
3 refinancing within thirty days of when he filed his notice
4 of dissolution, so that was not a problem. But goodwill
5 has to be a recognized asset of the corporation.

6 The record here shows that they never carried it
7 on their financial statements. It wasn't in the
8 partnership agreement. It wasn't on any tax returns. It
9 was never viewed as an asset of the partnership. And under
10 the Cohen and Cinque cases, I think it's pretty clear that
11 you don't have goodwill for real estate holding companies.
12 They were not involved in the management of the mall at
13 all. It was the Pyramid Group that negotiated the leases,
14 that was in charge of the employees that handled all the
15 day-to-day operations of the mall.

16 And then marketability, unless you have goodwill,
17 you don't have marketability. That's under the Vick and
18 Cohen cases. So without goodwill, they don't - - - also
19 the thirty-five percent discount for marketability was not
20 appropriately assessed.

21 And then we get the sixty-six percent for the
22 minority, I would ask this court to look at the, I think,
23 very apt rationale of the Louisiana court in the Cannon
24 case, which clearly indicates the policy underpinnings for
25 not harnessing a minority partner, with only a three



1 percent interest, and that it ends up with a windfall, and
2 it encourages the majority members to act even against the
3 interest of minority members, because it enhances their
4 value.

5 I want to remind the court that Mr. Malfitano did
6 not initiate this litigation. He was stuck for over ten
7 years in this costly contentious litigation. All he wanted
8 was to have his interest valued properly. They refused to
9 re - - - produce any books and records. They would not
10 submit to an accounting. He asked the court for judicial -
11 - - he asked the court for judicial dissolution. He asked
12 for accounting. Every one of his requests were denied.

13 What was he to do? He had to defend himself.
14 This is a very considerable asset that he lost and ended up
15 with a judgment of over a million dollars against him for a
16 three percent interest in this partnership.

17 Thank you.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Congel, et al. v. Malfitano, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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