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COURT OF APPEALS

STATE OF NEW YORK

ANGELO A. FERRARA,

Respondent,

-against-

No. 124

PEACHES CAFE LLC and
COR RIDGE ROAD COMPANY LLC,

Appellants.

20 Eagle Street
Albany, New York
October 17, 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

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 124, Ferrara
2 v. Peaches Cafe.

3 Counsel?

4 MS. HOPE: Thank you, Your Honor. May I reserve
5 one minute?

6 CHIEF JUDGE DIFIORE: One minute?

7 MS. HOPE: Yes.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. HOPE: Okay. Thank you. Your Honors,
10 Justices, may it please the court. I'm Gabrielle Hope and
11 I represent the appellant, COR Ridge Road Company LLC. I
12 want to thank you for agreeing to hear this on our
13 petition.

14 These issues have been, I believe, fully briefed,
15 and I think the - - - the thing that I would like to talk
16 about is that there are what seems to be two lines of cases
17 causing a split among the departments. In the First,
18 Second, and Third Department, it appears, at least from all
19 the case law that I've discussed and read, that in order to
20 foreclose a lien against a noncontracting owner, there has
21 to be more of a direct consent.

22 JUDGE STEIN: Where does that line of cases
23 originate from?

24 MS. HOPE: I believe it - - - around 1901. I
25 think the first was DeKlyn, where it started to discuss



1 that, then followed up with Rice v. Culver. I think that
2 it was more expanded in Delany.

3 JUDGE STEIN: Okay. So in - - - in Delany, was
4 there a lease that authorized any improvements?

5 MS. HOPE: I think that was a - - - factually,
6 that was a different situation.

7 JUDGE STEIN: Okay. And so in that case the
8 court looked at other indicia - - -

9 MS. HOPE: Yes.

10 JUDGE STEIN: - - - of consent, correct?

11 MS. HOPE: Yes.

12 JUDGE STEIN: Okay.

13 MS. HOPE: But the - - - I think Rice is where
14 the court comes out and says that, you know, this is - - -
15 in fact, Rice is the case that came out with the - - - the
16 rule of law saying that in order to hold consent, the owner
17 had to either be an affirmative factor in procuring the
18 work or, having possession and control, have required the
19 work to be done. It's an "or" test. And - - -

20 CHIEF JUDGE DIFIORE: Let's go right to the lease
21 and the provisions in a lease.

22 MS. HOPE: Yes.

23 CHIEF JUDGE DIFIORE: What about the provisions?
24 What about them?

25 MS. HOPE: Oh, okay. In this lease, which is



1 very common in commercial leasing these days, you know,
2 does the owner keep some authority in the lease in the
3 event of a contingent problem where they have to execute on
4 that authority? Yes, they do. That's very common. You -
5 - - you have to have some type of contingent authority,
6 again, in case something goes wrong.

7 But in this particular lease, I think if you read
8 the whole lease, what you'll see is the purpose of COR's
9 review of the plans and specification is to, one, assist
10 the tenant, to the extent they need assistance with what
11 they're doing, and to make sure that what they're putting
12 out is in conformity with the rest of the shopping center.
13 And - - -

14 JUDGE STEIN: Well, what's the - - - what's the
15 relevance of the purpose of it? And clearly in the lease,
16 the landlord - - - it's their property, it's COR's
17 property, right?

18 MS. HOPE: Um-hum.

19 JUDGE STEIN: And for whatever reasons they have,
20 they want to be sure that things are done in a certain way.
21 Part of it has to do with consistency. Part of it has to
22 do with the fact that it's their building; they don't want
23 anything to harm the building, right?

24 MS. HOPE: Correct.

25 JUDGE STEIN: Okay, so all of that. So what more



1 - - - if a - - - if a lease were ever to indicate consent
2 on the part of a landlord, what more would it have to say
3 here?

4 MS. HOPE: Well, I - - - I think that it would
5 have to - - - I think there would have to be some evidence
6 that - - - that the owner would be willing to pay for these
7 improvements or step into the shoes of the tenant. Because
8 in this particular lease there's an RCE, or a retail
9 construction exhibit, which really - - -

10 JUDGE STEIN: Why would a landlord ever say that?

11 MS. HOPE: Well, why would they - - - they - - -
12 well, some of the cases that ultimately were found where
13 there was possible renegotiation where the landlord says,
14 okay, yes, we will pitch in on this. Certainly some of the
15 cases that I cite, where it's almost like an equitable
16 thing, the tenant is doing a buildout of a shopping - - -
17 or a department store, and he goes to the landlord and says
18 will you pitch in 60,000 dollars, and the landlord says,
19 well, let's see how it goes; maybe I'll give you fifteen if
20 you do all these other things. You know? So that is a
21 different situation.

22 JUDGE STEIN: But is that consistent with the
23 cases like Jones and - - - and - - -

24 MS. HOPE: No.

25 JUDGE STEIN: - - - McNulty and - - -



1 MS. HOPE: No, but I - - -

2 JUDGE STEIN: Okay.

3 MS. HOPE: I think that's where - - - but on a -
4 - - in that particular case the court came down and said
5 yes, you know, there's an issue here that they likely
6 consented. And I also think that it was an equitable
7 situation, in that particular case, because of what the
8 landlord was doing. The landlord was trying to exact
9 additional things out of the tenant.

10 JUDGE RIVERA: So let me ask you this. If you've
11 got a lease and an indemnification clause, does that
12 suggest that the landlord anticipates that they're going to
13 be liable and so they've just made that arrangement with
14 the tenant that the tenant is going to pay?

15 MS. HOPE: Yeah. I think that - - - I think what
16 it does, I think it - - - I think when - - - and this one
17 does have one, and it also has the lien - - -

18 JUDGE RIVERA: Yes.

19 MS. HOPE: - - - the normal lien thing.

20 JUDGE RIVERA: Right.

21 MS. HOPE: I think what that does is show the
22 owner's lack of consent to paying the tenant's bills
23 because I think what - - - where I - - - maybe I didn't - -
24 - I don't know. But - - -

25 JUDGE RIVERA: Why couldn't that also show we



1 have a particular arrangement, the landlord is now
2 responsible under that arrangement, recognizes it's so, but
3 is shifting the costs to the tenant, that that's part of
4 their negotiated arrangement; why couldn't it show that?

5 MS. HOPE: Well, I think that if you put - - - if
6 you put it in with the lien language that it abrogates
7 that, I think, between the two, what it's saying is, no, we
8 are not paying for this, and particularly in this case,
9 where there's a real delineation of we're going to do this
10 work and we pay for this work, and you're going to do that
11 work and you're going to pay for that work. And when you
12 have something really set out that clearly, and to keep in
13 mind, you know, the freedom of contract between a landlord
14 and tenant, we - - - they can really - - - as long as it's
15 a legal contract, they can do whatever they'd like,
16 whatever works for them.

17 JUDGE STEIN: Including the landlord could have
18 insisted upon a provision requiring the tenant to have a
19 letter of credit or post some security or something just in
20 case the landlord may not be responsible.

21 MS. HOPE: They could have done that.

22 JUDGE STEIN: So - - -

23 MS. HOPE: They could have done that.

24 JUDGE STEIN: So the landlord - - - there are
25 ways that the landlord can protect themselves.



1 MS. HOPE: They can. But now, you know, where
2 this is going to hurt people - - - okay, so you know, as I
3 was going to say, you know, the agreed-upon - - - when a
4 landlord and tenant get together on a buildout, they have
5 to decide, okay, how much are you going to pay on a monthly
6 basis, and all of these calculations are put into this. So
7 in this case they say it's 8,000 dollars a month. Now, if
8 COR had paid for all of the - - - the work, then they could
9 do that - - - they could have agreed to that as well, but
10 the lease price would go way up.

11 JUDGE WILSON: I'm not sure whether you're
12 arguing that, on the face of the contract, as a matter of
13 law, you have not consented, or you're saying there's a
14 fact issue here about whether this constitutes consent, and
15 there's extrinsic evidence necessary for that.

16 MS. HOPE: I am saying that, as a matter of law,
17 we did not consent. I am saying that when you look at
18 these general approval type provisions that the Fourth
19 Department looked at, which I believe has been somewhat
20 rejected by Rice, the general approvals that you just see
21 in - - - in leases all over the place - - -

22 JUDGE WILSON: And so regardless of, for example,
23 your - - - you know, the daily visits, your direct
24 communications with the architect, things that are
25 ex-contract, you're saying none of that is relevant; that's



1 all - - - because the contract is clear on its face, that's
2 it?

3 MS. HOPE: Well, Your Honor, the - - - the
4 communication between the tenant's architect and COR - - -

5 JUDGE WILSON: Yep.

6 MS. HOPE: - - - okay, that had nothing to do
7 with the plaintiff Ferrara. That occurred in the
8 beginning. COR had to look at the plans to make sure that
9 things like the HVAC system complied with the rest of the
10 building, the rooftop penetrations, things that they were
11 paying for under the lease. And it's a roof over several
12 parcels, okay? So you know, there are certain things that
13 they have to look at from a structural perspective.

14 JUDGE GARCIA: But why isn't this a question of
15 fact then? I mean, if you're saying there's language in
16 the contract, there are certain actions which are parsed
17 through in great detail in these briefs, why isn't this
18 just for a fact finder? Why, as a matter of law, are we -
19 - - should we find you didn't consent?

20 MS. HOPE: Well, because I think that the only
21 thing that we have here in favor of finding for Mr. Ferrara
22 is - - - are the general consents in - - - in the lease,
23 which by most - - - in most cases were not executed upon.
24 You know, while, like, for example, COR had the ability to
25 approve the - - - you know, the contract - - -



1 JUDGE FAHEY: But it seemed like they - - -

2 MS. HOPE: - - - but they didn't.

3 JUDGE FAHEY: It seemed like the consents were
4 very detailed. They had to be - - - they were approved by
5 an agent of the - - - of the owner. They outlined
6 extensive work that - - - and both to the - - - that had to
7 be approved for both the plans and the specs throughout.

8 MS. HOPE: And it never happened, Your Honor.
9 The - - -

10 JUDGE FAHEY: I'm talking about the lease,
11 though.

12 MS. HOPE: Yes.

13 JUDGE FAHEY: The lease didn't seem to outline
14 them. You know, there's an underlying policy consideration
15 that, before your time's up, if you could just address
16 briefly. One of the things I wonder about is whether or
17 not, in this situation, the landlord gets the benefit of
18 the work done on their property. In essence, then, if
19 somebody has a business like Peaches, Peaches goes belly
20 up, the landlord gets the benefit of the work without
21 paying for it, and there's no recovery available for the
22 person that actually did the work, under your theory. And
23 in essence, once - - - once they leave, the landlord gets
24 all the work that the electrical contractor did and doesn't
25 have to pay for any of it.



1 MS. HOPE: Not necessarily. I mean, I think that
2 if - - -

3 JUDGE FAHEY: How not? Tell me - - -

4 MS. HOPE: Okay.

5 JUDGE FAHEY: - - - what I'm missing.

6 MS. HOPE: Let's say, for example, that the prem
7 - - - okay, because Peaches - - - okay, the thing was - - -
8 it opened in January 2009.

9 JUDGE FAHEY: Um-hum.

10 MS. HOPE: Peaches was evicted in 2013 for
11 failure to pay rent. They owed COR 147,000 dollars.

12 JUDGE FAHEY: But there are only 50,000 that was
13 still left in dispute, right?

14 MS. HOPE: The - - - yes, there's 50,000 left in
15 dispute with Mr. Ferrara.

16 JUDGE FAHEY: So assuming that's true, how is it
17 that the landlord gets the electrical work, and in theory
18 that could be used for another restaurant because most
19 developers in this situation are looking for a restaurant.
20 And it has all that electrical work done but doesn't have
21 to pay for it because he's sheltered by Peaches acting as a
22 pass-through. Yet, he approved it, made sure that it fit
23 the needs that he thought fit in with the work that had to
24 be done for that place, and it fit in with the other
25 developments.



1 MS. HOPE: Peaches, you mean, approved the work,
2 because Peaches - - -

3 JUDGE FAHEY: Well - - -

4 MS. HOPE: - - - set up his kitchen.

5 JUDGE FAHEY: The landlord's agents approved the
6 - - - had to approve the work, per the lease. So how is it
7 that this theory - - - you know, the policy implications of
8 your theory are that the landlord gets, basically, work
9 that he didn't pay for, he gets the benefit of it.

10 MS. HOPE: I would - - - okay, let me try to
11 answer this, and I know I'm out of time here.

12 JUDGE FAHEY: Um-hum.

13 MS. HOPE: I think, in this particular case, the
14 only things the court actually approved, while there was
15 broad approval rights under the agreement, they were not
16 done. So they approved the transformer, which COR paid
17 for, and they approved the HVAC work which - - - and that
18 is all they actually approved of. The kitchen work - - -
19 you know, the guts - - -

20 JUDGE STEIN: Are you talking about the finished
21 work, because I thought they approved the plans all along
22 the way.

23 MS. HOPE: No. No, they approved the preliminary
24 plans. Okay? So in the beginning, before this all starts,
25 Passero, the architect, sends the preliminary drawings, and



1 they say, okay, except we need a - - -

2 JUDGE FAHEY: But you understand my underlying -
3 - -

4 MS. HOPE: I do. I do.

5 JUDGE FAHEY: - - - my underlying policy - - -

6 MS. HOPE: I haven't answered it.

7 JUDGE FAHEY: Yeah, I'm a little unclear on the
8 answer, so it's all right. So the underlying policy
9 concern is we're making a rule for the state now, and - - -
10 and that rule would be that the landlord could approve - -
11 - receive - - - approve plans, require the plans for his
12 lessee, and then the lessee goes belly up and the landlord
13 keeps all the improvements and doesn't have to pay for the
14 improvements that were done on the property.

15 MS. HOPE: Okay. Now, the - - - but that isn't
16 what happened here. And I agree with you.

17 JUDGE FAHEY: That would be the rule that we
18 would be promulgating should - - - should you be
19 successful.

20 MS. HOPE: Okay. The - - - the focus - - - the -
21 - - blah. The - - - the amount that's subject to the lien,
22 okay, is not part of what COR approved because - - - and
23 this is where this case is a little bit different. Mr.
24 Ferrara entered into a contract with Mr. Scanio of Peaches.

25 JUDGE FAHEY: Um-hum.



1 MS. HOPE: And it was on a time and materials
2 basis where Mr. Scanio was in charge of approving the work.
3 He wanted to tweak things as he wanted to. And - - - and
4 Mr. Ferrara testified the only way we would do this - - -
5 because they could - - - the bid, he wouldn't - - - he
6 wouldn't - - - he bid it out at 131,000 dollars during - -
7 -

8 JUDGE FAHEY: I see what you're saying in that
9 part of your argument.

10 MS. HOPE: But so they - - - you know, so those
11 two made an arrangement outside of COR's knowledge. COR
12 was unaware of that arrangement.

13 JUDGE FAHEY: I see. But all right - - -

14 MS. HOPE: And COR never - - -

15 JUDGE FAHEY: Let me ask this then.

16 MS. HOPE: Yep.

17 JUDGE FAHEY: Would the lease here create a
18 shield that would protect an owner from responsibility for
19 work that the owner approved, under your theory?

20 MS. HOPE: I think that - - - with the lease?

21 JUDGE FAHEY: Just generally, without - - - let
22 me say it again. Does the - - - does the lease, where the
23 owner has to approve all the work, create a shield
24 protecting the owner then from responsibility for work that
25 was done on the property, that the owner actually required



1 or approved, because a lien - - - lienholder can't go after
2 the owner if the - - - if the leaseholder - - - or if the
3 lessee goes belly up?

4 MS. HOPE: Well - - - well, I think to the
5 contrary. If the owner actually did approve all of this
6 work, like, actually, you know, approved it and did all of
7 that, then that would open the door to saying, you know,
8 they approved of this, this, and this, and this is the
9 focus of my lien.

10 JUDGE FAHEY: So we're back to the nature - - -

11 MS. HOPE: But they didn't, you know, so - - -

12 JUDGE FAHEY: So we're back to the nature of the
13 approval then.

14 MS. HOPE: Yes. I think that when it's general -
15 - -

16 JUDGE FAHEY: I see.

17 MS. HOPE: And I know - - - and you know, perhaps
18 I think the lesson to be learned is don't have this broad
19 approval language and these contracts when you don't plan
20 on using it.

21 CHIEF JUDGE DIFIIORE: Thank you, counsel.

22 MS. HOPE: Okay. Thank you.

23 CHIEF JUDGE DIFIIORE: Counsel?

24 MR. FINK: May it please the court. Thomas Fink,
25 representing Angelo Ferrara and Quinlan Ferrara Electric.



1 CHIEF JUDGE DIFIORE: Mr. Fink, are the lease
2 terms controlling?

3 MR. FINK: Prior Court of Appeals case said yes.
4 Several Court of Appeals cases - - - and they're old, but
5 frankly, they're still the law of this case until the court
6 makes a different ruling - - - say absolutely, that the
7 provisions in the lease which require certain work to be
8 done, where the owner agrees that they want certain work
9 done - - -

10 JUDGE WILSON: What if the lease terms say we
11 require you to comply with the local building codes?

12 MR. FINK: I'm sorry, Your Honor?

13 JUDGE WILSON: What if the lease terms say we
14 require you to comply with the local building codes, and
15 that's in the lease, is that then consent?

16 MR. FINK: Just that provision may not be - - -

17 JUDGE WILSON: Why?

18 MR. FINK: - - - sufficient.

19 JUDGE WILSON: Why not?

20 MR. FINK: Well, I would argue that it would be,
21 but there are some cases that might indicate - - -

22 JUDGE WILSON: Which - - -

23 MR. FINK: - - - that's not - - -

24 JUDGE WILSON: Which is your answer?

25 MR. FINK: - - - sufficient. In this case, on



1 the facts of this case - - -

2 JUDGE WILSON: I'm sorry; I don't understand
3 whether your answer was yes or no. Is it sufficient
4 consent, under your theory, if what the contract or what
5 the lease says is: you, the tenant, must comply with the
6 local building codes?

7 MR. FINK: I think every tenant must comply with
8 the building code, whether the lease says it or not.

9 JUDGE WILSON: But that isn't the - - -

10 MR. FINK: So I don't think that's necessarily,
11 Your Honor, with respect, the necessary relevant fact in
12 determining this - - - the decision in this case. I think
13 what is required, where the landlord said - - -

14 JUDGE RIVERA: Is it because the landlord has - -
15 - your point was - - - I think you're trying to say that
16 since the tenant has to comply anyway, the landlord doesn't
17 have control over that. The landlord can't say that you
18 shouldn't and do not comply with them or try and evict you
19 if you are seeking to comply with them.

20 MR. FINK: But in this case the landlord - - -

21 JUDGE RIVERA: No, no, but if that's what you're
22 arguing, doesn't that fall on the side of the line of cases
23 that say the - - - the requirement that the landlord may be
24 held liable doesn't apply where it's not the kind of
25 consent that the landlord can withhold?



1 MR. FINK: But in this case the landlord did
2 require, specifically, the work to be done, not - - -

3 JUDGE GARCIA: What if the work to be done had -
4 - - they said you have to spend 130,000 dollars on this
5 work, tenant goes out, contracts with the independent
6 contractor, electrician, and they do 180,000 dollars' worth
7 of work. Are they liable for 130- on the lien or 180-?

8 MR. FINK: If they require the work to be done,
9 under most of the cases, they would be - - -

10 JUDGE GARCIA: But let's say they cap it at 130-.

11 MR. FINK: - - - they would be required to
12 provide a - - - to be responsible for all of the work.

13 JUDGE GARCIA: But what troubles me about this
14 argument is you can be required to perform certain work,
15 and we can interpret that as consent, but then the tenant
16 goes out and gets the gold-plated version of that work and
17 does it all in a way that the landlord doesn't have
18 approval on. And is there, at some point, a limit to how
19 much that tenant can bind the landlord, in terms of the
20 lien, for work that is - - - let's call it excessive or
21 above the amount contemplated that the tenant would have to
22 spend on that work?

23 MR. FINK: I think, Your Honor, that if the
24 tenant went beyond what the consent was of the work to be
25 performed, then the - - -



1 JUDGE GARCIA: Sure. I guess my question is: is
2 that going beyond what the consent is in my hypothetical?

3 MR. FINK: It could be beyond it, yes, Your
4 Honor.

5 JUDGE GARCIA: So if there was a limit here - - -
6 let's say they approved this RFP, which I think had a
7 certain dollar figure to it, right? It was 130-, I think,
8 and I may be wrong on that.

9 MR. FINK: Well, they actually - - - the credit
10 from the landlord to the tenant was over 200,000 dollars
11 that they agreed that they would - - -

12 JUDGE GARCIA: But let's use a hypothetical. An
13 RFP goes out, it's 130,000, but at the end of the day the
14 work performed is 180-, and they file a lien for 180-. The
15 landlord had seen the RFP go out but isn't seeing a daily
16 billing cycle. Is the landlord on the hook for
17 180,000-dollar lien or 130,000-dollar lien?

18 MR. FINK: I think you have to understand what
19 the work was. I don't think it's - - -

20 JUDGE GARCIA: And why isn't that a factual
21 question?

22 MR. FINK: It is a factual question.

23 JUDGE GARCIA: So why isn't that not for - - -
24 not as a matter of law, why is this a summary judgment
25 issue?



1 MR. FINK: The Appellate Division Fourth
2 Department found the facts in this case; the owner agreed
3 that this contractor would perform the work. The plans
4 that - - - in terms of the electrical work were in the
5 plans, and that was all that was done. So in this case,
6 the owner agreed to the work. I don't think - - -

7 JUDGE FEINMAN: And the owner had here somebody
8 present during the buildout and could have, at some point,
9 articulated some objection: you're exceeding the scope of
10 what we agreed to.

11 MR. FINK: Could have, and again, in this case -
12 - -

13 JUDGE FEINMAN: Didn't.

14 MR. FINK: - - - they had an agent on site every
15 day approving all the work that was done, and it was - - -
16 and in fact there was a letter by the general - - - by the
17 owner to the tenant saying: make sure you understand that
18 you can't change any of the work in the plans and
19 specifications without our consent.

20 JUDGE WILSON: The both of you seem to be arguing
21 a lot of facts here, no?

22 MR. FINK: I would be happy to argue the law,
23 Your Honor, because I think counsel has indicated certain
24 cases that support her, and I think that's not correct. In
25 Rice v. Culver, which she thinks is her main case, where



1 Rice, who did some plumbing work in a building that wasn't
2 required by the owner, wasn't successful. But that's not
3 the only lienor in Rice v. Culver. There was the Frederick
4 Company (ph.) that took down trees and did some landscaping
5 on this athletic field. And in Rice v. Culver, while Rice
6 lost, Frederick won because, in the lease it said that the
7 tenant had a right to take down some trees on this athletic
8 field.

9 JUDGE STEIN: Can I ask you to clarify an answer
10 to a question that Judge Wilson asked you, and I think he
11 said are the lease provisions controlling, and you said
12 yes. And - - - but my question is, do you mean to say that
13 you can't look outside the lease to other actions on behalf
14 of the owner?

15 MR. FINK: No, I didn't understand that question
16 - - -

17 JUDGE STEIN: Oh, okay.

18 MR. FINK: - - - that way. I apologize.

19 JUDGE STEIN: Maybe I misunderstood, but that's
20 how - - - that's what I heard.

21 MR. FINK: No, absolutely. In fact, all the
22 Court of Appeals cases said it's not just the lease, but
23 you can infer, from the facts surrounding what occurs,
24 whether the work and the tenant was an affirmative factor
25 in performing the work.



1 JUDGE FEINMAN: Right. But your position here -
2 - - I just want to be clear - - - is that we don't need to
3 look at the conduct because the lease is sufficiently clear
4 to give us the consent.

5 MR. FINK: No, I think all of the facts here, in
6 terms of the having a person from COR on site inspecting
7 every day the work - - -

8 JUDGE FEINMAN: So it's the lease and the conduct
9 together lead to the conclusion that, as a matter of law,
10 the plaintiff gets his lien?

11 MR. FINK: You know, the issue is: does the - -
12 -

13 JUDGE FEINMAN: That was actually a friendly
14 question.

15 MR. FINK: Does the owner have to have a direct
16 relationship with the tenant?

17 JUDGE FAHEY: Right, and - - -

18 MR. FINK: And I think there's no - - -

19 JUDGE FAHEY: Just to follow up on what Judge
20 Feinman's saying is you're saying that it doesn't have to
21 be exactly direct, that's the way the case law, going back
22 to Jones and McNulty, doesn't have to be direct, right?

23 MR. FINK: National Wall Paper, absolutely.

24 JUDGE FAHEY: So the answer - - -

25 MR. FINK: And I think - - -



1 JUDGE FAHEY: So just let me stop you. The
2 answer is yes - - -

3 MR. FINK: Yes.

4 JUDGE FAHEY: - - - you agree with us?

5 MR. FINK: Yes, I do.

6 JUDGE FAHEY: All right. Okay.

7 MR. FINK: And I think, Your Honor, I just want
8 to talk about the statute just for a second, if I could.
9 And I know my white light's on.

10 CHIEF JUDGE DIFIORE: It's okay. Go ahead.

11 MR. FINK: It says consent or request. Request
12 is direct. You asked me a question; I'm trying to answer
13 it. Maybe I don't answer it completely, but I'm trying to
14 answer it. Request is direct.

15 JUDGE GARCIA: But why can't - - - I don't
16 understand that argument, honestly. Why can't they both be
17 direct? And I'm not saying that's how you would read them,
18 but I don't think they're mutually different - - - they're
19 necessarily different things, because I can say to you I
20 want you to do this work, and that's a request, or the
21 tenant can say to you I want you to do this work and I'm
22 there, and I say, yeah, I agree to that. That's consent.
23 You can consent or request directly to a party.

24 MR. FINK: It's consent or request.

25 JUDGE GARCIA: Right. But you could do either



1 one of those things to the contractor.

2 MR. FINK: That's correct. There was no request
3 here, but there was consent. On the facts of the case,
4 there's no question that the owner consented to the work,
5 specifically, that was done by - - -

6 JUDGE FEINMAN: And in fact, the typical landlord
7 owner, when work is going on, if the tenant is doing work
8 that they don't want done, is going to serve a notice to
9 cure to somehow stop that work.

10 MR. FINK: In Cowen v. Paddock the owner
11 specifically came and objected to the work, and as a
12 result, the contractor lost.

13 JUDGE GARCIA: But the point being, I think, from
14 the "consent or request" language that I thought you were
15 making was - - - and maybe I just had the argument wrong,
16 was that a request was request to the contractor; consent
17 implied consent in some type of lease language. But to me,
18 consent or request can be direct to a contractor. It
19 doesn't have to be consent between the landlord/tenant or a
20 direct request to the contractor. And I thought that's how
21 you were setting it up.

22 MR. FINK: That's absolutely correct, Your Honor.
23 And I'm saying it doesn't have to be a direct request; it
24 can be consent, based on the facts of the case, both from
25 the lease and from what occurs during construction of - - -



1 of the work.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. FINK: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MS. HOPE: Yes. Thank you, Your Honor.

6 CHIEF JUDGE DIFIORE: You have your one minute.

7 MS. HOPE: Yes. Just on this consent thing, it
8 is vexing, I think. But in this case - - - okay, so COR
9 did look at the preliminary design drawings but then never
10 - - -

11 JUDGE STEIN: I'm sorry; go ahead.

12 MS. HOPE: - - - then never saw any more drawings
13 ever again. The contract with Ferrara and Peaches, and Mr.
14 Ferrara testified to this, that he said the only way we'd
15 enter into this agreement is on a time and materials basis
16 because Charlie wanted to tweak things, change the plans,
17 and they used it - - -

18 JUDGE RIVERA: Can I just clarify? Are you
19 saying there are facts in dispute as to the conduct of the
20 landlord? Because the lease is in writing; we can read it.

21 MS. HOPE: Right, exactly. Well, I would say
22 that, you know - - -

23 JUDGE RIVERA: That's a yes or no.

24 MS. HOPE: I don't think - - - well, I don't
25 think - - - I guess there are because he's saying - - -



1 JUDGE RIVERA: What would those be?

2 MS. HOPE: Well, he says that because somebody
3 was on the - - - at the mall - - -

4 JUDGE RIVERA: Yeah.

5 MS. HOPE: - - - who wasn't inspecting work, just
6 happened to be around to see if anybody need - - -

7 JUDGE RIVERA: But that's a disagreement about
8 the import of the - - -

9 MS. HOPE: Right, but the - - - okay, then - - -

10 JUDGE RIVERA: - - - of the person being present.
11 Where is the factual dispute?

12 MS. HOPE: Then there isn't because we didn't - -
13 - Mr. Scanio - - -

14 JUDGE RIVERA: Um-hum.

15 MS. HOPE: - - - consented to Mr. Ferrara's work.
16 We didn't know what the scope was. I mean, and - - -

17 JUDGE RIVERA: Is the rule you're seeking that
18 the landlord must expressly consent to the contractor to do
19 any specific work that the contractor bases their lien on?
20 Is that your rule?

21 MS. HOPE: I think it has to be tantamount to
22 express. Now, are we going to - - -

23 JUDGE RIVERA: Okay. What makes it just short of
24 express?

25 MS. HOPE: Pardon me?



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JUDGE RIVERA: What makes it just short of
express, when you say "tantamount", which means it's not
express - - -

MS. HOPE: Right.

JUDGE RIVERA: - - - but it's close enough?

MS. HOPE: I think there has to be some kind of
an understanding from the landlord directly to the
contractor. Some kind of - - -

JUDGE RIVERA: Okay. What case has said that,
from this court?

MS. HOPE: Not this court. Paul Mock was the
first that came up with that, out of the First Department,
and it's heavily followed.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. HOPE: Okay. Thank you. Thank you for your
time, Your Honors.

CHIEF JUDGE DIFIORE: You're very welcome.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Angelo A. Ferrara v. Peaches Cafe LLC and COR Ridge Road Company, LLC, No. 124, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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