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COURT OF APPEALS
STATE OF NEW YORK

111 West 57th,

Appellant,

-against-

NO. 41

111 W57 Mezz,

Respondent.

20 Eagle Street
Albany, New York
April 14, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE E. JEANNETTE OGDEN

Appearances:

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Bobby Hodges
Official Court Transcriber

1 CHIEF JUDGE WILSON: The last case on today's
2 calendar is 111 West 57th Street Investor v. 111 West 57th
3 Mezz Investment. And we are delighted to be joined by our
4 colleague from the Fourth Department, the Honorable E.
5 Jeannette Ogden. Counsel.

6 MS. PROCTOR: May it please the court. Haley
7 Proctor for Plaintiff - - - Plaintiff-Appellant, 111 West
8 57th Investment, LLC. I'd like to reserve four minutes for
9 rebuttal.

10 CHIEF JUDGE WILSON: Yes.

11 MS. PROCTOR: Thank you. There are two claims at
12 issue in this appeal. One for breach of contract against
13 the Apollo lenders and the other for tortious interference
14 against all of the respondents.

15 I'd like to begin with a contract claim, which is
16 for breach of the covenant of good faith and fair dealing
17 in the pledge agreement. Now, New York law imposes a duty
18 of good faith on every party to every contract. That duty
19 serves to restrict the - - - a party from doing what it
20 might otherwise be understood to have the discretion to do
21 under the contract.

22 JUDGE SINGAS: Well, how about - - - it's more
23 than discretion. How about they were authorized to do what
24 they did?

25 MS. PROCTOR: Your Honor is referring to the



1 assignment - - -

2 JUDGE SINGAS: Yes.

3 MS. PROCTOR: - - - that the - - - that they had
4 the discretion to assign. So it's a choice that the lender
5 had the ability to make.

6 JUDGE SINGAS: It's a choice that was contracted
7 for and was explicit in the contract, and they engaged.

8 MS. PROCTOR: Yes, Your Honor. And we would not
9 deny that they had a right to assign. The difficulty here,
10 the problem here is that that assignment was the final act
11 in a series of actions that were part of a deal between
12 Apollo and Spruce and the Sponsors to steal the surplus
13 value of the collateral - - -

14 JUDGE SINGAS: I mean, that's - - -

15 MS. PROCTOR: - - - securing the loan.

16 JUDGE SINGAS: - - - a loaded statement. So
17 you're suggesting that they made a deal? And what's the
18 evidence of that deal?

19 MS. PROCTOR: We allege a lot of evidence in the
20 complaint. So there are a few things. The first is that
21 the same time that the assignment is completed, Apollo
22 lenders enter into an amendment to the intercreditor
23 agreement. This loosened the ability of Spruce to transfer
24 ownership interest in the reconstituted entity to the
25 Sponsors. So in other words, it facilitated the

1 fulfillment of the promise of bringing the Sponsors - - -

2 JUDGE GARCIA: But it could do that, right?

3 There was no violation of renegotiating the creditor
4 agreement, right?

5 MS. PROCTOR: There isn't - - -

6 JUDGE GARCIA: And it was openly done here, as I
7 understand it. I mean, it's renegotiated with AIG, I
8 believe and - - -

9 MS. PROCTOR: So you're absolutely right that
10 they were open about it. In fact, further to this
11 question, when we go in for the TRO hearing, counsel for
12 Spruce comes in and says, we got everyone here together on
13 an agreement that there could be a strict foreclosure.

14 JUDGE GARCIA: Right.

15 MS. PROCTOR: The difficulty is that the strict
16 foreclosure, what this is, is it is the borrower agreeing
17 to hand over all of the collateral in satisfaction of the
18 debt. The outstanding debt here is \$25 million. The value
19 of the collateral is hundreds - - -

20 JUDGE GARCIA: Well, the default - - -

21 MS. PROCTOR: - - - of million.

22 JUDGE GARCIA: - - - is on a loan much larger
23 than that, right? I mean, you borrowed \$725 million,
24 right?

25 MS. PROCTOR: That is correct. But Apollo



1 lenders severed off the junior most tranche \$25 million.

2 JUDGE GARCIA: Right.

3 MS. PROCTOR: And the - - - Apollo's own models
4 showed cash flow to equity.

5 JUDGE GARCIA: No. I understand those
6 allegations. But what was in default? Was it only the \$25
7 million loan?

8 MS. PROCTOR: Well, it was a default under all of
9 the loan agreements.

10 JUDGE GARCIA: Right. So that's 725 million. So
11 I have a hard time with saying this is a \$25 million
12 problem. It's a quarter of a billion problem you have,
13 right?

14 MS. PROCTOR: Well, so Your Honor, it's not - - -
15 to be clear, this isn't a repayment default. It's a
16 technical default. It was a budget overrun. But even with
17 the budget overrun, Apollo's own models were showing \$600
18 million above.

19 JUDGE GARCIA: And that's - - - of course. And
20 there are reasons why they would want to do what they
21 wanted to do, business reasons. But the question is here,
22 you know, what was tortious about that, right? They had
23 the right to assign. And the person who takes the
24 assignment, as I understand it, and correct me if I'm
25 wrong, only has the same rights and obligations as the

1 lender who assigns?

2 MS. PROCTOR: So you are correct, Your Honor,
3 that they had a right to assign. All we are saying is that
4 - - -

5 JUDGE GARCIA: And do they have different rights,
6 Spruce, once they get the assignment?

7 MS. PROCTOR: No, no. They're foreclosing on a
8 smaller portion of the debt.

9 JUDGE GARCIA: So what's the - - - what - - - why
10 is that - - - why do they need to do that for your plan?

11 MS. PROCTOR: So it was irrational. So the
12 borrower - - - let me be clear. In the context of a strict
13 foreclosure, the borrower has an absolute statutory right.

14 JUDGE GARCIA: I understand the strict
15 foreclosure, but what I'm trying to understand is part of
16 this plan was to assign this to Spruce.

17 MS. PROCTOR: Correct.

18 JUDGE GARCIA: Spruce only takes the rights that
19 Apollo had under the original loan agreement.

20 MS. PROCTOR: That's absolutely correct.

21 JUDGE GARCIA: So why do they need to assign it
22 to Spruce to do what they did?

23 MS. PROCTOR: Your Honor, I don't know precisely
24 what Apollo's motivations were. Maybe they didn't want the
25 bad image of having done a foreclosure. But the point is -

1 - -

2 JUDGE GARCIA: So there's - - - nothing changes.
3 Spruce stands in for Apollo. If Spruce violates the terms
4 of your loan, then you go after Spruce. They take the same
5 rights and obligations, right? So the assignment itself
6 just shifts those rights and obligations to a different
7 party, as I understand.

8 MS. PROCTOR: The - - - it does. But Spruce - -
9 - Spruce's rights and obligations are to hold a public
10 foreclosure auction at which the surplus value of the
11 equity comes back - - -

12 JUDGE GARCIA: And you had - - -

13 MS. PROCTOR: - - - to the borrower.

14 JUDGE GARCIA: - - - a claim against Spruce,
15 which is something I understand is still going on under the
16 UCC provision. That's still a live claim. The issue for
17 me here is, okay, so you have that claim against Spruce.
18 What's the - - - they didn't harm - - - they didn't
19 interfere with your claim against Spruce. They assigned
20 this to another party.

21 MS. PROCTOR: That's right, Your Honor.

22 JUDGE GARCIA: That party now has been found to
23 potentially have violated. You have a potential claim
24 there. And there you go.

25 MS. PROCTOR: Okay. So the question then is why



1 does Spruce pay par value for this assignment? And it's
2 because Apollo has said we will do everything you need us
3 to do to carry over the Sponsor's equity, to bring the
4 Sponsors back in as construction managers for millions of
5 dollars in fees. And these are the financial - - -

6 JUDGE GARCIA: And what is it that they could
7 have done with Spruce holding it, that they promised
8 Spruce, that they couldn't have done when they were holding
9 it themselves?

10 MS. PROCTOR: So they could have and if they had
11 induced, if they had suborned, bribed the manager of the
12 borrower to hand over the hundreds of millions of dollars
13 of collateral - - -

14 JUDGE GARCIA: Let's say there's the same
15 provision and they assigned to a competitor of the debtor,
16 right? And now your argument is, but that new assignee has
17 an interest in foreclosing and doing these things to me
18 because they're my competitor. So that assignment gives
19 rise to a breach of the good-faith covenant. Is that what
20 your position would be?

21 MS. PROCTOR: Well, Your Honor, the fact remains
22 that the assignee could only foreclose subject to the
23 provisions of the UCC.

24 JUDGE GARCIA: But you're saying - - -

25 MS. PROCTOR: Which - - -



1 JUDGE GARCIA: - - - the lender did that on
2 purpose because they knew by assigning it to one of my
3 competitors, they were going to play this game hardball,
4 where, you know, if Apollo or whoever the lender was in
5 that hypothetical had kept it, they might not have done
6 that. So would that be a breach?

7 MS. PROCTOR: I see, Your Honor. Our point is
8 not just that it was foreseeable to Apollo that Spruce
9 would do this. Our point is that Apollo had to make
10 guarantees - - -

11 JUDGE GARCIA: But my point is - - -

12 MS. PROCTOR: - - - to Spruce.

13 JUDGE GARCIA: - - - if you're going underneath
14 the purpose of the assignment - - - and an assignment, as I
15 understand it, and correct me if I'm wrong, is to
16 distribute risk generally, right? So I'm going to assign a
17 portion of this loan, I'm taking away some of the risk. So
18 then as I understand it too, and again correct me, you can
19 negotiate for limits on that. So you as the borrower could
20 negotiate a provision that says you can't assign that to a
21 competitor of mine. And those happen, as I understand it.
22 Why would they ever have to negotiate that in the future if
23 you could just bring a breach of the assignment - - - the
24 covenant of good faith?

25 MS. PROCTOR: Well, this is the office of the

1 implied covenant, which is to come in and supply duties
2 that were promises that were too obvious and in fact, that
3 the Delaware Supreme Court has put it really well, would
4 have been provocative - - -

5 JUDGE GARCIA: So - - -

6 MS. PROCTOR: - - - for the borrower to
7 negotiate.

8 JUDGE GARCIA: - - - the competitor isn't too
9 obvious. That's the standard?

10 MS. PROCTOR: Well, no. No. I'm not talking
11 about the competitor. Here, the allegations are that
12 Apollo facilitated a bribe to the management.

13 JUDGE GARCIA: Right. But if we read this
14 provision into an assignment clause that is meant to give
15 flexibility to a lender to redistribute risk, then they're
16 going to be constrained going forward by that in ways that
17 previously potentially they - - - borrower had to
18 negotiate.

19 MS. PROCTOR: Well, Your Honor, it's long been
20 the law in New York that every discretionary right in a
21 contract is subject to the duty of good faith. And this is
22 the sort of thing - - -

23 JUDGE GARCIA: Well, it depends on the clause,
24 right? I mean, it can't contradict the right under the
25 clause. And then you say, well, you have a duty of good

1 faith, so you can't do that. I agree we can say discretion
2 generally doesn't end the discussion, right?

3 MS. PROCTOR: In fact, it starts - - -

4 JUDGE GARCIA: It might not - - - it might end
5 the discussion in a particular clause.

6 MS. PROCTOR: Your Honor is absolutely correct
7 that it - - - it is going to be informed by the - - - that
8 it's a fact intensive inquiry. It's informed by the
9 context. The context here is a - - - is a minutely
10 negotiated loan agreement - - -

11 JUDGE GARCIA: Right.

12 MS. PROCTOR: - - - that protects the borrower's
13 ability to get the surplus value of the collateral, no
14 matter how the collateral is disposed of. If it's strict
15 foreclosure, the borrower has an absolute statutory right
16 to object. If it's a public foreclosure auction, it's sold
17 for market value. The surplus value flows to the borrower.
18 Even in the context of a private sale, Section 9 of the
19 pledge agreement says no bad faith, commercially reasonable
20 terms.

21 JUDGE GARCIA: All of those things were alleged
22 at one time or another in this litigation, that this was a
23 major decision that had to be approved by the partnership,
24 by the joint venture partners. That was lost. So that
25 clause was not negotiated for. This was a breach of

1 fiduciary duty, which would have prevented that from
2 happening. You waive fiduciary duty negotiated in a
3 complex commercial transaction, well-represented. You lost
4 that, right? So there were all stops along the way that
5 could have been negotiated that you've now alleged and have
6 lost, except for, as you point out, the UCC claim.

7 MS. PROCTOR: Well, and Your Honor, so there are
8 two different contracts here. There's - - - one is the
9 pledge agreement - - -

10 JUDGE GARCIA: I understand.

11 MS. PROCTOR: - - - where the borrower is - - -
12 is negotiating with the lender. The major decision,
13 fiduciary duties, those are in the operating agreement.
14 And we are dealing with an implied covenant there. And
15 that's because, as the lower courts have held, they've
16 rejected our claims under the express provisions. And it
17 follows that there is a gap.

18 JUDGE GARCIA: So you have a claim against an
19 entity in the joint venture, right? That, as I understand
20 it, has survived summary judgment.

21 MS. PROCTOR: It has. And yet the First
22 Department says that we've not actually pleaded it, which -
23 - - so there's a contradiction there in the lower court's
24 decisions. One court says we have pleaded it. The other
25 court says we have not.

1 JUDGE GARCIA: So you have that claim and you
2 have a claim against the Spruce assignee for the UCC.

3 MS. PROCTOR: Correct, Your Honor.

4 JUDGE GARCIA: But now you want us to read in
5 another claim against the lender assigning?

6 MS. PROCTOR: You're right. Because the
7 transaction that we have alleged, it was a three-legged
8 stool. It couldn't have happened without Spruce's
9 involvement. It could not have happened without the - - -

10 JUDGE GARCIA: Why could it - - -

11 MS. PROCTOR: - - - Sponsor's involvement.

12 JUDGE GARCIA: - - - not have happened without
13 Spruce's involvement?

14 MS. PROCTOR: Because Spruce was the lender who
15 foreclosed. They came in, they took the \$25 million.

16 JUDGE GARCIA: But why couldn't Apollo just do
17 that?

18 MS. PROCTOR: Well, Apollo could have done it,
19 but it chose not to. As you say, maybe it wanted to spread
20 the risk, but the reality - - -

21 CHIEF JUDGE WILSON: Well, let me slow you down
22 there a little bit. Sorry.

23 MS. PROCTOR: Yes, Your Honor.

24 CHIEF JUDGE WILSON: Apollo had - - - was holding
25 \$325 million of debt, right?

1 MS. PROCTOR: Yes.

2 CHIEF JUDGE WILSON: So Apollo could have started
3 foreclosure on that 325. But the equity value was a lot
4 less than that, right?

5 MS. PROCTOR: The equity value was \$600 million
6 over that. That's - - -

7 CHIEF JUDGE WILSON: In equity?

8 MS. PROCTOR: That was the projected cash flow.

9 CHIEF JUDGE WILSON: No, no. Not the projected
10 cash flow. Just the equity that your client held that was
11 extinguished by the strict foreclosure.

12 MS. PROCTOR: Right. So we have alleged in
13 excess of \$200 million.

14 CHIEF JUDGE WILSON: Right. So but you're not
15 going to throw away \$325 million to get \$200 million
16 probably, right?

17 MS. PROCTOR: Well, Your Honor, the - - - to be
18 clear, the \$200 million is based on the value of the equity
19 above the debt service. So it's in that context - - -

20 CHIEF JUDGE WILSON: So let me ask you this just
21 plainly. What would have happened if instead of splitting
22 out the \$25 million, Apollo had just itself gone to a
23 strict foreclosure? What would have happened then?

24 MS. PROCTOR: Okay. If - - - well, so if Apollo
25 had gone to a strict foreclosure, borrower would have said

1 no, because there's surplus value in the equity. Borrower
2 would have insisted on a public foreclosure auction. And
3 based on the valuations that we have done - - - right now
4 we just have the allegation in the complaint, in the record
5 before this court. It would have been the fair market
6 value of the collateral in that context, unencumbered by a
7 - - -

8 JUDGE GARCIA: By why would - - -

9 MS. PROCTOR: - - - \$325 million loan.

10 JUDGE GARCIA: - - - the person who had the right
11 to object - - - that Sponsor, let's call it - - - why would
12 they not - - - why would they object when Apollo did it but
13 not object when Spruce did it? That's what I'm having
14 trouble understanding.

15 MS. PROCTOR: Well, the - - - so this is what
16 we're saying. The borrower's bargain was, we get to
17 object. And so what the lenders do is they come in, talk
18 to the managers and say, we'll pay you if you cause the
19 borrower not to exercise - - -

20 JUDGE GARCIA: I understand - - -

21 MS. PROCTOR: - - - that absolute statutory
22 right.

23 JUDGE GARCIA: - - - the alleged backroom deal.
24 But I don't understand is, why do they need Spruce?

25 MS. PROCTOR: Well, I mean - - - so I guess this

1 is a question for Apollo as to why they want to split it.

2 I assume - - -

3 JUDGE GARCIA: And they say - - -

4 MS. PROCTOR: - - - that it looks - - -

5 JUDGE GARCIA: - - - we had a lot of risk.

6 MS. PROCTOR: They don't - - - they - - -

7 JUDGE GARCIA: We had 325 million of a mezzanine
8 loan on a risky development project that was defaulting on
9 because of these payment overruns. So we wanted to get rid
10 of risk. So they say that. What do you say?

11 MS. PROCTOR: Well, but Your Honor, the point is
12 that this project was doing well, right? It had a budget
13 overrun. That's a technical default condition, but they
14 were still projecting cash flows way above their basis
15 point. And - - -

16 JUDGE GARCIA: But it gave them a right to
17 declare a default, right?

18 MS. PROCTOR: And so that's a reason though not
19 to get out of the loan. And so what they do is they split
20 off a junior portion. Now, they could have foreclosed on
21 the 25 million.

22 JUDGE GARCIA: Right.

23 MS. PROCTOR: I don't know why they didn't. But
24 given that they wanted - - -

25 JUDGE GARCIA: So then why is the assignment even

1 relevant?

2 MS. PROCTOR: Well, because they did assign. And
3 they would not have been able to assign at par value.
4 There's no reason for Spruce to come in unless they had
5 Apollo's guarantees that Apollo was going to do what it
6 took to give the Sponsors the payment that Spruce was going
7 to need to offer to induce them not to object to a strict
8 foreclosure. Because otherwise - - -

9 CHIEF JUDGE WILSON: Can I ask you to turn to the
10 tortious interference because your white light is on. I'd
11 like you to get to that. And if you could start with, why
12 isn't - - - why doesn't Delaware law apply there?

13 MS. PROCTOR: So Your Honor, Delaware law does
14 apply to the - - - to the joint venture agreement, the
15 operating agreement and it applies to construction there.
16 So we - - - we agree that Delaware law applies in that
17 context.

18 CHIEF JUDGE WILSON: To the tortious interference
19 claims?

20 MS. PROCTOR: But we - - - well, not to the
21 tortious interference, but to the underlying breach.

22 CHIEF JUDGE WILSON: Well, why wouldn't it apply
23 to the tortious interference claim as well?

24 MS. PROCTOR: Your Honor, all parties have
25 proceeded on the assumption that New York law applies

1 because the tort is committed in the State of New York.
2 And so it would follow under traditional choice of law
3 principles that New York law governs the tortious
4 interference claim. But certainly the underlying breach is
5 governed by Delaware law. And we've adequately pleaded as
6 the - - - as Justice Cohen in the Court of Appeals has
7 recognized, we have adequately pleaded a claim for breach
8 of the implied covenant of good faith and fair dealing in
9 this - - - in this action. Thank you, Your Honors.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. MENNITT: Good afternoon. May it please the
12 court. Gary Mennitt for the Apollo respondents. And I
13 wanted to start with some of the questions that Judge
14 Garcia was asking about the way that Article 8 of the
15 junior loan agreement works. You know, under Section 8.2
16 of that agreement is - - - is the general provisions
17 section. There's a section that talks about the lender's
18 discretion. It says not only that - - - that the lender
19 has sole discretion, but that that shall be final and
20 conclusive. So that was the intent of the parties.

21 And then one of the rights enumerated there in
22 Section 8.9(b) is that the lender may sell, transfer, or
23 assign its rights. Ms. Proctor seems to concede that
24 point. But what I - - - the point I really wanted to make
25 that picks up on some of the questioning by Judge Garcia is

1 then after that it says, notwithstanding those two
2 provisions, not - - - notwithstanding 8.9(b), there are
3 certain types of assignments that cannot be done that are
4 precluded. Some if there's no event of default, some
5 whether or not there's an event of default. So the parties
6 did consider what - - - what kind of restrictions. This
7 goes to the question - - -

8 JUDGE CANNATARO: I assume all of that is
9 correct, that all those provisions are in there, but I
10 don't understand exactly how that removes it from the ambit
11 of the implied warranty.

12 MR. MENNITT: Well, the - - - there - - - whether
13 there is an implied covenant of good faith - - - there's an
14 implied covenant of good faith and fair dealing in every
15 contract. I think this court's - - -

16 JUDGE CANNATARO: Yes.

17 MR. MENNITT: - - - jurisdiction on that is
18 clear.

19 JUDGE CANNATARO: Plenty of courts have said that
20 - - - that it applies also in the context of these sort of
21 discretionary rights.

22 MR. MENNITT: Right. But in - - - but - - - and
23 another - - -

24 JUDGE RIVERA: Can I just - - - if I may just
25 interrupt you just momentarily, I just want to be clear.

1 Is your position that the implied covenant can never be
2 contracted out by the parties?

3 MR. MENNITT: I believe that the implied covenant
4 cannot be contracted out. I think it is inherent in the
5 agreement.

6 JUDGE RIVERA: Okay.

7 MR. MENNITT: I think the - - - but here - - -
8 you know, and this court has never directly addressed this
9 issue at least not - - -

10 CHIEF JUDGE WILSON: So is there a way that you
11 could have breached the implied covenant by making an
12 assignment other than things that are expressly prohibited
13 in the agreement?

14 MR. MENNITT: I - - - and I think this goes to
15 the questioning that Judge Garcia - - -

16 CHIEF JUDGE WILSON: Yes.

17 MR. MENNITT: - - - was making. I think you
18 probably could come up with a hypothetical where that could
19 be possible, but you're talking about - - - and it's
20 something that would be so extremely difficult to plead, it
21 would be a very unusual situation. We're not presented
22 with - - - with anything remotely like that here. And - -
23 -

24 CHIEF JUDGE WILSON: The allegations are pretty -
25 - -



1 MR. MENNITT: Well - - -

2 CHIEF JUDGE WILSON: - - - you know, strong, I
3 guess I'd say - - -

4 MR. MENNITT: As - - -

5 CHIEF JUDGE WILSON: - - - or accusatory.

6 MR. MENNITT: There are lots of - - - there's
7 lots of strong language. And my colleague, you know,
8 talked - - - talks about a sham foreclosure. And they've
9 used - - - they've thrown around the word bribery, although
10 she didn't use it today.

11 JUDGE RIVERA: They say it's a scheme to
12 eliminate all their equity - - -

13 MR. MENNITT: It's a scheme - - -

14 JUDGE RIVERA: - - - and to - - -

15 MR. MENNITT: - - - et cetera.

16 JUDGE RIVERA: - - - and to preserve everybody
17 else who's part of the scheme.

18 MR. MENNITT: But what - - - but the actual
19 conduct that's alleged against Apollo is that we exercised
20 the right to assign the loan which was at par. So we sold
21 \$25 million worth of debt for \$25 million - - -

22 CHIEF JUDGE WILSON: Yeah. But isn't - - -

23 MR. MENNITT: - - - not for more than that.

24 CHIEF JUDGE WILSON: Right. But isn't that a
25 little - - - if this is - - - if the debt is, to some

1 degree, at risk, right? It's probably distressed to some
2 degree, you'd expect the debt to be sold at something less
3 than par, no?

4 MR. MENNITT: It could have been sold at less
5 than par. But there - - - there's certainly nothing - - -

6 CHIEF JUDGE WILSON: I guess to put it
7 differently, why would - - -

8 MR. MENNITT: - - - Apollo didn't get any more
9 than - - -

10 CHIEF JUDGE WILSON: - - - why would Spruce, you
11 know - - - well, I understand why you would want to sell it
12 for par or better. But why would Spruce, an outsider, pay
13 par for distressed debt?

14 MR. MENNITT: Spruce thought that they would - -
15 - presumably thought that they would be able to turn the
16 ship around. There was a \$50 million cost overrun. The
17 project was in arrears. There were defaults. My colleague
18 refers to them as technical defaults. But \$50 million out
19 of balance. And so Spruce presumably thought they were
20 stepping into the the shoes of the - - -

21 CHIEF JUDGE WILSON: Well, the allegations are
22 that Apollo provided them with projections that showed two
23 things, I guess. One is that they would have sort of a
24 four times or something multiple on their purchase price,
25 and that effectively they wouldn't really be buying debt,

1 they'd be buying equity in the project.

2 MR. MENNITT: Well - - -

3 CHIEF JUDGE WILSON: Those are the allegations at
4 least.

5 MR. MENNITT: Yeah. But the allegation that they
6 would be buying - - - they were clearly buying debt. They
7 bought \$25 million worth of debt. The projections were
8 based on the concept that this was - - - this was a loan in
9 default. Certainly one possibility under the UCC, as
10 everyone knew from the beginning, the security for this
11 part of the loan was the pledged shares of the owner
12 entity. So this is mezzanine debt. The borrower owns the
13 entity. The borrower's asset is the ownership entity that
14 in turn owns the real estate. So when the loan goes into
15 default, one possibility is that the lender, the lender
16 closest to the real estate, which here was Spruce after
17 this transaction, would foreclose and take that ownership
18 entity.

19 CHIEF JUDGE WILSON: Well, why do you say they're
20 closest to the real estate?

21 MR. MENNITT: Because of - - - so this is - - -

22 CHIEF JUDGE WILSON: They're the last in the
23 tranche, right?

24 MR. MENNITT: Yeah.

25 CHIEF JUDGE WILSON: They're - - - in terms of



1 priority.

2 MR. MENNITT: That's correct, Your Honor. So
3 there's - - - the debt stack here is over \$700 million.
4 You have AIG. They - - - in some ways, I guess you could
5 think of them as closest to the real estate because they
6 have the mortgage, but they have the most senior position.

7 CHIEF JUDGE WILSON: Yes.

8 MR. MENNITT: Then you have Apollo, which is - -
9 - has the senior mezzanine, which is 300 million, and then
10 this \$25 million junior piece. And so when I say they're
11 closest to the real estate, I mean that they're the first
12 ones to take the risk. They have the risk position. So if
13 they want to foreclose, they can foreclose. If Spruce went
14 into default, then Apollo could foreclose out Spruce. And
15 finally at the end, AIG would take it with the mortgage.
16 So that's what I mean.

17 JUDGE CANNATARO: Does he have to work that way?
18 Do you have to move on the order of the priority of the
19 security interest?

20 MR. MENNITT: In terms of enforcement of rights?

21 JUDGE CANNATARO: Yeah.

22 MR. MENNITT: No. Apollo could have - - - Apollo
23 could have foreclosed and then Spruce would have - - -

24 JUDGE CANNATARO: They could have - - - when they
25 owned the junior mezzanine, they could have foreclosed on

1 either at - - -

2 MR. MENNITT: That's correct.

3 JUDGE CANNATARO: - - - at any time when there
4 was a default, right?

5 MR. MENNITT: That's absolutely correct.

6 JUDGE CANNATARO: Okay.

7 MR. MENNITT: So and then with - - - with respect
8 to the fruits of the bargain argument and that - - - and
9 that the bargain - - - what they were bargaining for was
10 the right to object to the foreclosure. The fruits of the
11 bargain here, from - - - with respect to the Apollo loan,
12 was the \$325 million. The borrower got that \$325 million.
13 The essential deal in a mezzanine loan is that you - - -
14 the borrower has to pay back the amount, obviously on time,
15 and if it's a construction loan, so they have to make
16 certain additional capital contributions. They were \$50
17 million in arrears on that. And essentially the deal at a
18 very basic level is if you don't pay back the loan, you
19 lose control of the - - - of the project. You lose the
20 owner entity.

21 CHIEF JUDGE WILSON: Doesn't one - - - I think
22 one of the - - - I think the agreement incorporates a
23 couple of other agreements, right?

24 MR. MENNITT: Yes. It does, Your Honor.

25 CHIEF JUDGE WILSON: So that the fruits of the



1 deal might not be limited to that one agreement, but rather
2 to the set of agreements that are incorporated, no?

3 MR. MENNITT: In the loan agreements?

4 CHIEF JUDGE WILSON: Yeah.

5 MR. MENNITT: Yes, that's true. That's true,
6 Your Honor. I did want to talk also about the other claim
7 that - - - the tort claim, tortious interference claim. So
8 with respect to the tortious interference - - - tortious
9 interference claim, it is true - - - it is correct that - -
10 - that the underlying claim there, the breach of the joint
11 venture agreement, that's between AmBase who is the - - -
12 the money partner in the underlying real estate joint
13 venture and their joint venture partner, who - - - who is
14 JDS, Stern and Maloney. The underlying transaction there
15 was governed by Delaware law. And what - - - there were
16 major decisions provisions in that joint venture agreement
17 as there are in totally standard set of provisions and it
18 lists the - - - the decisions that they had the right to
19 object to. Things that they had the right to object to.
20 Taking on more debt and things like that.

21 The UCC remedies, which obviously they knew about
22 from the very beginning, because that's the whole nature of
23 this transaction. Those - - - the strict foreclosure is
24 not a major decision. And in fact, they dropped that
25 argument on this appeal. It's a footnote in their reply



1 brief. They reserve the issue in the case below, but
2 they're not pursuing that here. And you know, the - - - in
3 the three complaints that they filed in this action,
4 including the second amended complaint, which is the
5 operative complaint at issue here, they never identified
6 that this alleged implied covenant there, that there would
7 be an objection to the strict foreclosure. They only
8 raised that for the first time before Justice Cohen when we
9 argued this case to him on the motion to dismiss. And now
10 their position is, not only is there - - - this implied
11 duty of good faith and fair dealing, we all should have
12 known about that from the beginning, and we shouldn't have
13 interfered with it. One of the elements, of course, is
14 that we had to know that they had this - - - that there was
15 this obligation and then that we caused a breach of it.
16 And on that record, I submit that it simply cannot be pled.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. MENNITT: Thank you. With respect to
19 collateral estoppel and res judicata, I'll rest on our
20 papers. Thank you.

21 MR. SINATRA: Good afternoon. May it please the
22 Court. Steven Sinatra, counsel for the Spruce respondents.
23 I'd like to begin by touching upon something that hasn't
24 been brought up in the discussion so far before this court.
25 The economic justification defense, which is also referred

1 to as the economic justification privilege. That is what
2 Justice Cohen of the commercial part in New York County
3 focused on.

4 JUSTICE OGDEN: Counsel, why does that apply to
5 Spruce?

6 MR. SINATRA: It applies to spruce because we are
7 a creditor of this borrower with an interest in this
8 borrower, namely its collateral. And the law is clear.
9 And I can quote Justice Cohen here because I think the
10 analysis is controlling. Justice Cohen said, "Spruce" - -
11 - and I'm quoting, "here Spruce, Apollo and AIG are all
12 creditors who have a right to protect their own financial
13 stake in the mezzanine borrower." That interest is their
14 interest in the collateral. This is not a quote. This is
15 just an analysis. The collateral pledged as security for
16 the loan. Strict foreclosure, which is but one of three
17 remedies available under the UCC, was in furtherance of the
18 protection of the security that was given to us. There's
19 nothing nefarious here. It is permitted by law, by the
20 UCC.

21 Now, the economic justification defense has an
22 exception, and it's a very high bar. The only way where
23 you have an economic justification for pursuing your
24 interests here, because obviously breach of contract is not
25 a malum in se. We're all familiar with the concept of

1 economic breach. The only way in which a plaintiff could
2 assert that the economic justification defense doesn't
3 protect a party like Spruce who has an economic interest
4 here is if they can show malice, fraud, or illegal means.
5 Well, let's start with malice.

6 JUDGE CANNATARO: So would that be in distinction
7 to bad faith or unfair dealing?

8 MR. SINATRA: Absolutely right. And the courts
9 make that clear.

10 JUDGE CANNATARO: So the - - - any breach of that
11 implied - - - keep calling it implied warranty - - - would
12 not overcome the economic interest doctrine that you're
13 referring to?

14 MR. SINATRA: Absolutely not. Absolutely not.
15 And courts have said so. That bad faith and malice, fraud,
16 illegal means, of course are distinguishable.

17 CHIEF JUDGE WILSON: And you don't think that's
18 alleged here sufficiently?

19 MR. SINATRA: Absolutely not. Malice?

20 CHIEF JUDGE WILSON: Malice.

21 MR. SINATRA: - - - think about what the very
22 premise of their complaint is. Malice is an intent to
23 harm, okay. The - - -

24 CHIEF JUDGE WILSON: Well, if you're going to
25 steal a couple hundred million dollars from me that - - - I

1 might view it that way.

2 MR. SINATRA: That's an intent to gain, not an
3 intent to harm.

4 CHIEF JUDGE WILSON: I'd feel pretty - - -

5 MR. SINATRA: So - - -

6 CHIEF JUDGE WILSON: - - - pretty harmed if that
7 happened to me.

8 MR. SINATRA: The harm is incidental - - -

9 JUDGE RIVERA: Wiping out all your equity
10 interest?

11 MR. SINATRA: I beg your pardon?

12 JUDGE RIVERA: Wiping out all your equity
13 interest?

14 MR. SINATRA: The intent here was to protect our
15 collateral. The intent here - - -

16 JUDGE RIVERA: That's your story, I get that.

17 MR. SINATRA: And it's their story as well.

18 JUDGE RIVERA: I mean, the same argument that at
19 the end of the day, what you're trying to do is wipe out
20 their equity interest?

21 MR. SINATRA: We're not - - - that's clearly not
22 our goal. Why would that be a goal? What would be gained?
23 Our goal is to put ourselves in a project that we can turn
24 into something that has a viable business entity, a
25 project. We're talking about a construction loan that - -

1 - and a construction project where there may be 50 percent
2 in, 40 - - - 75 percent in. And anyone who steps in is
3 stepping in to \$400 million of mortgage debt, \$300 million
4 of senior mezzanine debt and has to contribute another 50,
5 \$60 million in order to put this back into balance - - - to
6 put the loan back into balance.

7 Our intent was to profit. It's manifest from
8 their complaint. They don't argue that our sole goal was
9 to harm them. That was the incidental benefit. The other
10 word that they throw around - - -

11 CHIEF JUDGE WILSON: Wait. Wait, wait, wait.

12 MR. SINATRA: Yes.

13 CHIEF JUDGE WILSON: First off, I'm not sure that
14 you have to have the sole goal of malice. And second, if
15 malice was an incidental benefit, this sounds pretty bad to
16 me.

17 MR. SINATRA: The malice is not - - - if I said
18 malice is an incidental benefit, I meant to say the loss is
19 the incidental benefit. It is the gain. I apologize if I
20 misspoke. The other word that gets thrown around that
21 doesn't withstand scrutiny is bribery. It's used, we
22 think, mostly for its propaganda value. There's no claim
23 for commercial bribery. The definition of commercial
24 bribery is conferring a benefit on an employee, an agent or
25 a fiduciary, with the intent to subvert the duty owned by

1 the employer to the employee - - - excuse me - - - employee
2 to the employer, agent to the principal, fiduciary to the
3 beneficiary. Sponsor is not the employee of the plaintiff
4 here. Sponsor is not even the employee of the borrower.
5 Agent. Agents take direction from principals. Spruce
6 doesn't take direction from AmBase. Can't possibly be
7 their agent. They're not even the agent of the borrower.
8 They're a principal, as is AmBase, they are principals.

9 And then finally, fiduciaries. The court has
10 already taken note of the fact that they've made several
11 claims, and I don't know how many iterations of a complaint
12 that there was an aiding and abetting a breach of fiduciary
13 duty here. Well, it's fairly clear, under Delaware law,
14 the parties to an operating agreement can waive fiduciary
15 duties. They've done so here. So struggle as they may,
16 there is no exception to the economic justification
17 defense, no exception to the economic justification
18 privilege.

19 There were a handful of points that I want to
20 address that came up before. So he said why wouldn't
21 Sponsor - - - why wouldn't Sponsor object and reap all of
22 the benefits here? One would think, well, Sponsor
23 controlled 38 percent of the equity. If there were
24 hundreds of millions of dollars of equity, why wouldn't
25 Sponsor object and reap its - - - the 38 percent of all of

1 this equity? And maybe more to the point, AmBase, the
2 plaintiff, has over 40 percent of the equity here. If
3 there were hundreds of millions of dollars of equity, why
4 not just satisfy the \$25 million loan and take this
5 foreclosure offline? Even if they didn't have the money,
6 these are sophisticated commercial actors. If there was
7 such clear evidence - - -

8 JUDGE GARCIA: Of the allegation - - -

9 MR. SINATRA: - - - of there being equity here -
10 - -

11 JUDGE GARCIA: I'm sorry. Isn't the allegation
12 that they tried to raise more capital, and they were
13 estopped from doing that?

14 MR. SINATRA: By the plaintiff. By the
15 plaintiff. Sponsor had proposed - - - and what you're
16 referring to is what they also refer to as the plan A and
17 plan B, which I'm going to get to a but for argument that I
18 don't think that they can possibly get past. Plan - - -
19 plan A, they claim, was let's bring in another mezz lender,
20 Baupost. They're going to contribute \$90 million. And
21 they said, but we want a certain guaranteed return. We
22 want 20 plus percent IRR on our \$90 million and \$100
23 million and AmBase said, no. We're not going to vote for
24 this. We are going to object. And the reason why we're
25 going to object is because that would wipe out all of the

1 equity. Well, how can there be hundreds of millions of
2 dollars of equity at the same time that AmBase is saying
3 that \$100 million equity contribution at a 20 percent IRR
4 would wipe out all of the equity?

5 Now, this - - - the but-for argument that I
6 wanted to raise, again, which they can't overcome. They
7 themselves allege that Spruce was plan B. That a plan was
8 already in place by the Sponsor to breach, enlisting others
9 as part of the breach. Baupost is part of this plan of
10 breaching, of stripping out all of their equity. And it
11 was only when that failed that we were brought in.

12 We know, as a matter of law, if you're going to
13 be held liable for tortious interference, you have to be
14 the procuring cause. You have to be the party that
15 actually is inducing the breach. If the party that is
16 breaching is already predisposed to breaching, you can't be
17 the but-for cause. Maybe the quintessential example of
18 this is where there's an employment contract. An employee
19 has an employment contract or a noncompete. The employee
20 decides, I'm going to look around for other jobs and is
21 interviewing with other prospective employers. Well,
22 eventually there is some employer that's going to bite.
23 But there is case law. It's fairly clear in the First
24 Department. If in that instance where one employer finally
25 bites and hires that employee, there's no tortious

1 interference claim there because the employee was already
2 predisposed to breaching.

3 Well, isn't that Spruce here? We're plan B. The
4 other plan that they were trying - - - that they claim was
5 rolling out - - - they were rolling out in this incredible
6 conspiracy, which as Justice Cohen in the commercial part
7 put it to opposing counsel, saying you're ascribing a
8 remarkable amount of esprit de corps among these creditors.
9 It's just inherently implausible. And when you analyze the
10 economics of this and how the parties are motivated, as I
11 said, it doesn't withstand scrutiny. I see I'm out of
12 time. So thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 JUDGE GARCIA: Counsel, I'm sorry. I just have a
15 factual question I'm - - -

16 MS. PROCTOR: Yes, Your Honor.

17 JUDGE GARCIA: - - - I'm not sure of. What's the
18 guarantor obligation of the sponsors under this loan, the
19 \$25 million loan?

20 MS. PROCTOR: Okay. So the guarantor obligations
21 that have - - - that have been raised here - - - and I do
22 want to be clear, we were dismissed on 3211. And Spruce in
23 particular brings in a lot of factual allegations outside
24 the scope of the allegations in the complaint. But there
25 was a non - - -

1 JUDGE GARCIA: But just under the terms of the
2 loan. Yeah.

3 MS. PROCTOR: So there was a nonrecourse carve-
4 out guarantee which basically said, you know, if there were
5 certain misconduct on the part of the borrower, that would
6 permit recourse to the guarantors by the lenders. And so
7 that was the guarantee to which they're referring.

8 JUDGE GARCIA: And guarantors of the individuals
9 in the Sponsor entity. Is that right?

10 MS. PROCTOR: Yes. Michael Stern, Kevin Maloney.
11 But to be clear it is entirely inconsistent with the
12 allegations. Also inconsistent with the agreements to
13 think that those guarantee obligations were at issue here.
14 Because, again, under the UCC, there's an unwaivable
15 absolute right to object to a strict foreclosure. So
16 merely exercising the borrower's absolute statutory right
17 to object would not have triggered these nonrecourse carve-
18 out guarantees.

19 JUDGE GARCIA: As I understand it, though - - -
20 and again, this part I'm a little fuzzy on - - -

21 MS. PROCTOR: Yes.

22 JUDGE GARCIA: - - - is when that strict
23 foreclosure - - - when you - - - your client objected,
24 right. And said you should - - - you need to object,
25 right? They said we don't have a good-faith basis for

1 doing that.

2 MS. PROCTOR: Yes.

3 JUDGE GARCIA: Would - - - putting aside the UCC
4 argument you just made, which I take, would that have
5 triggered the guarantee obligations?

6 MS. PROCTOR: Well, not because of the UCC, but
7 no. Independent of that, because we have alleged in
8 paragraph 99 of the complaint, it's on the record page 154.
9 We allege that there were two good-faith bases for
10 objecting. One is the prospect of getting the surplus
11 value at a public auction.

12 JUDGE GARCIA: And I understand your view, but if
13 it was their view.

14 MS. PROCTOR: Well, but the - - - and the second
15 basis is the prospect of - - - to fully answer your
16 question, Your Honor, is the second basis is a prospect of
17 curing the default by getting an additional investment in
18 the time that it would take to put up a foreclosure
19 auction. And whether they actually believed that or not is
20 a factual question that would need to be developed at
21 trial. So what their actual motivations are, right now the
22 court needs to go with the factual allegations that we have
23 made, which was that there was no good faith basis for them
24 to refuse to object as they did.

25 And I'd also like to comment on Chief Judge



1 Wilson's question. You said, why pay for distressed - - -
2 why pay par for distressed debt? And my friend over here
3 said, well, they thought they could turn the ship around.
4 Spruce thought they could turn the ship around. And that's
5 our point. Precisely. They thought that they were coming
6 into ownership and could right the ship of this project.
7 But why would Spruce believe that it was coming into
8 ownership? The borrower had an absolute statutory right to
9 say no, and there was every reason to say no because of the
10 surplus value in the collateral.

11 CHIEF JUDGE WILSON: Well, they bought the debt
12 at par. And if I'm right, they foreclosed within a week,
13 right?

14 MS. PROCTOR: Right. Within less than a week,
15 within a couple of days. So the whole purpose - - -

16 CHIEF JUDGE WILSON: Yeah. So it's pretty clear
17 that the purpose to buy the debt was to get the capital - -
18 - the collateral, right?

19 MS. PROCTOR: Precisely, Your Honor. And they
20 could not have done that without guarantees from the
21 borrower's managers that the borrower's managers would not
22 cause the borrower to say, whoa, whoa, whoa. We don't want
23 to give up hundreds of millions of dollars of collateral in
24 a strict foreclosure. We want a foreclosure auction. And
25 so they needed guarantees from Apollo not to foreclose in

1 the meantime. They needed guarantees from the borrower.

2 And so this is why they came together. As
3 Spruce's own counsel said, we all got together and agreed.
4 And so the question is whether that agreement deprives the
5 borrower of the fruits of the bargain under the loan
6 agreement and deprives us as the investor of the fruits of
7 the bargain under the operating agreement. And the answer
8 is clearly yes. We - - - both bargains are replete with
9 provisions protecting the surplus value, protecting our
10 investment. And you might ask, well, why not negotiate a
11 provision upfront? And the answer is nobody says, oh, by
12 the way, you can't bribe our managers to waive the
13 contractual protections and the statutory protections that
14 we've bargained our way into.

15 And for those reasons, we respectfully urge the
16 court to reverse.

17 CHIEF JUDGE WILSON: Thank you.

18 MS. PROCTOR: Thank you.

19 (Court is adjourned)

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

I, Bobby Hodges, certify that the foregoing transcript of proceedings in the Court of Appeals of 111 West 57th v. 111 W57 Mezz, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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