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COURT OF APPEALS

STATE OF NEW YORK

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FAVORITE LIMITED,

Appellants,

-against-

NO. 17

CICO,

Respondent.

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20 Eagle Street  
Albany, New York  
February 13, 2024

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 JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: The next case is Number 17,  
2 Favorite Limited v. Cico.

3 MR. JAKAB: May I proceed?

4 CHIEF JUDGE WILSON: Yes.

5 MR. JAKAB: Good afternoon. May it please the  
6 court, Peter Jakab for the appellants. If I could reserve  
7 three minutes, please?

8 CHIEF JUDGE WILSON: Yes.

9 MR. JAKAB: Thank you. First question presented  
10 on this appeal is governed by the principles expressed by  
11 this court in Rudiger and in the broader principles of the  
12 inherent powers doctrine. The principle is that after an  
13 appellate decision, the lower court is not just empowered,  
14 but it's dutybound to consider changed circumstances.  
15 Circumstances that have changed - - -

16 JUDGE RIVERA: I'm sorry before you - - - I'm  
17 sorry to interrupt you, Counsel. Before you get to that, I  
18 - - - I just want a little clarity about something I'm  
19 unsure of regarding this record. The third cause of  
20 action, was that dismissed by the First Department in its  
21 2020 order?

22 MR. JAKAB: No, Your Honor, it was not. And  
23 here's how - - - here's how to look at that. You have the  
24 October 2018 decision. That's at docket 277 of the trial  
25 court. In that decision, page 6, footnote 8, the trial

1 court permits the third cause of action to proceed. Then  
2 you have the appeal of that decision. You have the  
3 briefing and the questions presented. In that case, the  
4 Cicos were the appellants. There's a - - - an opening  
5 brief. There's a reply brief. In none of those documents  
6 is there any argument about the third cause of action,  
7 which is brought by the individuals only, for books and  
8 records.

9 And so you move to the March 3rd, 2020 appellate  
10 decision. That decision says it's reversing the October  
11 2018 decision insofar as appealed from. And if you look at  
12 any of the documents on that appeal, there was not an  
13 argument, not a mention of the third cause of action - - -  
14 the individuals for books and records. All the arguments  
15 were about the company and its claims.

16 JUDGE RIVERA: But they did seek to have the  
17 complaint dismissed, correct?

18 MR. JAKAB: Correct. They appealed to the extent  
19 they appealed. And every argument in the appeal, every  
20 question presented in the appeal, was about the company and  
21 its claims. And so - - -

22 JUDGE RIVERA: Did that - - - was that not the  
23 relief they sought?

24 MR. JAKAB: They sought to attack those claims  
25 that were being brought by the company: something was wrong

1 with the vote; something was wrong with the resolution;  
2 something was wrong with the jurisdiction; the company was  
3 not empowered to do what it did.

4 JUDGE RIVERA: Well, do you read the 2020  
5 Appellate Division decision on the second amended complaint  
6 as saying that the complaint is dismissed?

7 MR. JAKAB: Insofar as appealed from.

8 JUDGE RIVERA: Well, I think the - - - I think  
9 the decision - - - well, all right. The 2022 decision does  
10 seem to state that they viewed the 2020 decision as a  
11 dismissal of the entire complaint - - - the pleading. And  
12 that is the position of both the majority and dissent.  
13 Strikes me if indeed they - - - they read the chronology as  
14 you do - - - let me put it that way - - - that someone  
15 would have mentioned that in the majority of the dissent.  
16 Did you mention that in the Appellate Division briefing?

17 MR. JAKAB: Your Honor, in that briefing - - -

18 JUDGE RIVERA: Yes.

19 MR. JAKAB: - - - there was not - - - there was  
20 almost no argument about the decision that the appellate  
21 court took. That briefing was about defending an exercise  
22 of discretion by Justice Schechter in permitting the - - -  
23 in permitting the amended complaint.

24 JUDGE RIVERA: Did that all - - - I thought it  
25 all turned on whether or not there is a pleading to amend.

1 And if your position is, of course there is because there's  
2 an existing valid third cause of action that was never  
3 dismissed, strikes me that one would anticipate there would  
4 be some discussion of that in the majority and the dissent  
5 below and that you would put it in your briefing and that  
6 they would argue it in their briefing. I wouldn't end up  
7 seeing it only in the reply brief to us in a - - - in two-  
8 sentences, I think.

9 MR. JAKAB: It - - - it is certainly not our  
10 primary position with respect to that - - - you know - - -

11 JUDGE RIVERA: Okay.

12 MR. JAKAB: - - - adage or - - - or catch phrase  
13 about there not being a complaint to amend.

14 JUDGE RIVERA: Let me me ask you a - - - because  
15 I just - - - it is something I'm just trying to clarify in  
16 my own mind. Let say that you are correct, that one looks  
17 at the record and says it may be perhaps that the Appellate  
18 Division made a mistake when it characterized these prior  
19 decisions as disposing of all of the causes of action.  
20 That is to say, dismissing the complaint, right? That the  
21 second cause of action was only permitted on derivative  
22 claims, not on this third cause of action that the  
23 plaintiffs bring on their own behalf. Whatever - - -  
24 whatever way you want to see it. Can we say, since that is  
25 not the basis for the Appellate Division decision here

1 that's being appealed, that we cannot revisit that issue?  
2 We have to take it on - - - do we have to accept - - - let  
3 me put it another way - - - what the Appellate Division  
4 says in the decision that's being appealed now? That,  
5 indeed, it had disposed of all those claims? It had  
6 dismissed the complaint.

7 MR. JAKAB: I don't believe it was before the  
8 Appellate Division in that sense. In the initial appellate  
9 briefing and - - - and ruling, none of this comes up and  
10 none of this comes up because none of these arguments were  
11 made. And in connection with the second appellate ruling,  
12 nobody anticipated a rule of the kind that the Appellate  
13 Division ended up making, and that's under review here  
14 today.

15 JUDGE RIVERA: Okay.

16 MR. JAKAB: Rudiger, the principle is that a  
17 trial court - - - lower court is dutybound to look at  
18 changed circumstances different from those that were before  
19 the appellate court and form the basis of the appellate  
20 decision. And the reason for this rule in Rudiger is  
21 because we learned from Judge Cardozo that looking at the  
22 changed circumstances, it's - - - it's not a negation of  
23 the appellate decision. It is a - - - an enforcement of  
24 it. And - - - and the prime example is our case here. In  
25 our case, after the 2020 appellate decision comes down, job

1 one for the company was to come into compliance with it.  
2 And it retained Delaware counsel. Went to Delaware  
3 Secretary of State. Showed Delaware Secretary of State the  
4 2020 appellate decision. Figured out how to come into  
5 compliance with it. Complied.

6 Same thing in the trial court. Job one in the  
7 trial court was to make sure that there's been compliance  
8 with the appellate decision. Justice Schechter looked at  
9 the new certificates from the Delaware Secretary of State,  
10 analyzed them against the background of the appellate  
11 decision - - - the 2020 appellate decision. Satisfied  
12 herself that there is compliance, and only then goes on to  
13 the question of how now to proceed.

14 JUDGE CANNATARO: Rudiger seems slightly  
15 different to me, though, in the sense that there - - -  
16 between the time the Appellate Division acted and when it  
17 got back to supreme court, some facts had changed, which  
18 necessitated the court's modifying the relief that was  
19 given in the Appellate Division order. Here, it - - -  
20 there was no dispute, you know, the fact that the dismissal  
21 for lack of standing was made in 2020 was accepted by  
22 everyone, including the court. It didn't really modify the  
23 Appellate Division's order. It was a de novo  
24 determination, almost, in your case because now we had new  
25 certificates that granted standing where there were none

1 before. Do you - - - do - - - do you see the distinction  
2 I'm making?

3 MR. JAKAB: Not really, Your Honor. Is it the -  
4 - - is the question directed to when the changed  
5 circumstances happened?

6 JUDGE CANNATARO: The court didn't question this  
7 - - - upon the remittitur, the court didn't question the  
8 validity of the Appellate Division's order. It did - - -  
9 you know, it accepted the dismissal and didn't change  
10 anything in the order. It then entertained a motion  
11 following the issuance of the new certificates. But it  
12 just seems like a slightly different scenario between what  
13 happened here and what was going on in Rudiger.

14 MR. JAKAB: Well, it looks exactly the same to  
15 me. The circumstances have changed and the - - - the  
16 appellate remittitur said dismiss. What was dismissed?  
17 What was dismissed was a claim by a company that had been  
18 revived prior to the vote authorizing the revival. That's  
19 what had been dismissed. Now the circumstances have  
20 changed. We have a company bringing a claim that was  
21 revived after the vote authorizing the revival. That  
22 hasn't been dismissed. So that - - - it's not that the  
23 trial court is changing anything about the 2020 appellate  
24 decision. It - - -

25 JUDGE RIVERA: But that revival was not



1 retroactive, right? It was effective as of the date  
2 granted? That is to say, there would have still been a  
3 period during which the company is not - - - not revived,  
4 if I can put it that way.

5 MR. JAKAB: I believe, Your Honor, the way these  
6 statutes work is that once you get revival - - - once you  
7 get a good standing certificate from whichever state you're  
8 chartered in, it ratifies everything that you've done  
9 before that. I know the New York statute works that way.

10 So to complete the thought for Judge Cannataro,  
11 the - - - the trial court then goes ahead with what has not  
12 been dismissed. A claim by the company that has been  
13 properly revived. Just as in Rudiger, the trial court went  
14 ahead with what had not been considered by the - - - by  
15 this court. And that was a number of things: the city's  
16 condemnation, and also the waste of the natural resources  
17 on the land. And so - - - and it looks perfectly analogous  
18 to me.

19 JUDGE RIVERA: Okay.

20 MR. JAKAB: Yeah. If I could address the - - -  
21 just the second question presented on the appeal having to  
22 do with the statute of limitations. This is governed by  
23 the principles of C.P.L.R. 3025. Those principles say that  
24 when you have a - - - an amended complaint that neither  
25 offers new facts nor advances new legal theories, it

1 relates back to the filing of the original complaint and so  
2 there is no statute of limitations issue. There is a lot  
3 of reference in all three opinions below, as well as in the  
4 briefing to C.P.L.R. 205. And let me just explain its  
5 relevance.

6 Its relevance is that sometime - - - under 3025  
7 motions to amend, there is no time limit to bring those.  
8 There's nothing in the statute about how much time you have  
9 to bring those. And so in the exercise of discretion,  
10 sometimes some courts look to 205 as a kind of yardstick to  
11 determine if that's a reasonable amount of time to bring  
12 the motion to amend. And so that's what you see in the  
13 cases cited in the briefs. It's the motion to amend is  
14 timely, look at 205, it was brought within the six months.  
15 And so that's what happened here. As a yardstick, we are  
16 well within the six months of 205. We have about less than  
17 three months between the time of the 2020 appellate ruling  
18 and the time of the motion for leave to amend.

19 JUDGE RIVERA: Was it - - - was there some  
20 obstacle to filing a new action?

21 MR. JAKAB: Was there an obstacle?

22 JUDGE RIVERA: When you assessed what options you  
23 had and you took a particular choice? I'm not asking you  
24 about that. I'm asking was there an obstacle to actually  
25 filing a new action, as opposed to seeking an amendment?

1 MR. JAKAB: Many obstacles, Your Honor. Chief  
2 among which was the situation in northern Italy in the year  
3 2020. Northern Italy and specifically the Lombardy region,  
4 was the epicenter of Europe's outbreak of COVID-19. The  
5 Lombardy region had the highest per capita deaths from  
6 COVID-19 of anywhere in Europe. This is - - - the Lombardy  
7 region is where, as we last knew, Carla Cico lived. And so  
8 the advice we were getting from Italy counsel was that  
9 Hague Convention Service in northern Italy was not  
10 functioning. Hague Convention Service in Italy has to go  
11 through either the Italy central judicial authority or a  
12 local judicial officer, and the advice we were getting was  
13 that it is not functioning. Nobody could tell us when it  
14 would begin functioning, when it does begin functioning, at  
15 what capacity it would function, what a backlog would be.

16 And then, of course, in COVID, many people moved  
17 away from where they were, particularly if it was  
18 dangerous. Nobody could tell us - - - we had no idea where  
19 Carla Cico actually would be. So that the risk - - - to  
20 answer Your Honor's question is, it's possible we could  
21 never again establish jurisdiction over Carla Cico or  
22 Benedetto Cico for that matter.

23 JUDGE RIVERA: Did she have - - - did she have  
24 counsel at that time? Were they also in Italy?

25 MR. JAKAB: I don't know what her counsel

1 situation is in Italy. My colleague is her counsel here.

2 JUDGE RIVERA: Okay.

3 MR. JAKAB: But we would have to have service of  
4 process in a new action. The Cicos have made clear that  
5 they would be of the - - - of a mind to challenge that when  
6 the time came. It would be traverse hearing with Italy  
7 process service professionals. Not to mention the year  
8 that it would take to get through this, the \$100,000 that  
9 it would take to get through this. Yes, there were many  
10 obstacles to filing a new action.

11 JUDGE CANNATARO: Counsel, to just go back to  
12 your first point for one second before you leave. Would it  
13 have changed your argument in this case in any way, had  
14 supreme court entered a judgment on the remittitur before  
15 the motion to amend?

16 MR. JAKAB: It would change my argument, to  
17 answer your question, in the sense that it would have  
18 changed the process that I used to get the relief.

19 JUDGE CANNATARO: So it just would have been a  
20 different kind of motion - - -

21 MR. JAKAB: Correct.

22 JUDGE CANNATARO: - - - but the same relief? And  
23 you don't see any bar post-judgment that would be damaging  
24 or fatal to your - - - to your - - - to the relief you were  
25 asking for?

1 MR. JAKAB: No, Your Honor. Under 5015, it's  
2 directed to the sound discretion of the trial court.  
3 5015(B) says new circumstances - - - it says new evidence,  
4 but there are cases that interpret it broadly. New  
5 circumstances and good reason for they couldn't have been  
6 brought earlier; prejudice, timing, all of the things that  
7 go into the discretionary calculus. So that's what we  
8 would have done had there been a judgment.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. JAKAB: Thank you.

11 MR. KEMP: Good afternoon. May it please the  
12 court. My name is Sean Kemp, and I'm arguing on behalf of  
13 respondents.

14 Your honors, the First Department majority got it  
15 right. The - - - after the First Department dismissed  
16 appellant's claim in its entirety, there was no longer a  
17 pleading pending before the court that could be amended.

18 CHIEF JUDGE WILSON: Well, let me - - - let me  
19 ask you whether - - - over here. Sorry.

20 MR. KEMP: All right.

21 CHIEF JUDGE WILSON: Whether - - - so put aside  
22 count 3 for a moment. Let's just leave that aside, pretend  
23 it didn't exist. There were counterclaims here, right?  
24 And so supreme court still had in front of it counterclaims  
25 between these two parties.

1 MR. KEMP: That's correct, Your Honor.

2 CHIEF JUDGE WILSON: Had that not been true, had  
3 there been no counterclaims, then, clearly, I think the  
4 Appellate Division's dismissal order would have been final.  
5 Right? It would be a final appealable order. You could  
6 appeal it here.

7 MR. KEMP: That's correct, Your Honor. I - - -

8 CHIEF JUDGE WILSON: But because of the pendency  
9 of the counterclaims, it was not - - - you couldn't take an  
10 appeal here, correct?

11 MR. KEMP: That's correct.

12 CHIEF JUDGE WILSON: Okay. So then if there's  
13 still something pending between these parties in supreme  
14 court after the Appellate Division's ruling, why can't the  
15 plaintiffs there file? You could even think of it in the  
16 form of counterclaims to the existing claims that are  
17 there; the exact same thing they filed before?

18 MR. KEMP: Because I think that there - - - there  
19 was an action pending before the trial court, for sure.

20 CHIEF JUDGE WILSON: Right.

21 MR. KEMP: But there was no longer a complaint  
22 pending that could be amended. And the motion under  
23 3025(B) was to file an amended complaint. If the First  
24 Department had contemplated that, they could have very  
25 simply added with leave to amend or file an amended

1 complaint within a certain period of time. They didn't do  
2 that.

3 CHIEF JUDGE WILSON: They could have, but they  
4 didn't say with prejudice either.

5 MR. KEMP: No. Your Honor, it wasn't on the  
6 merits. That - - - there's no dispute there. This was a  
7 capacity issue, a standing issue.

8 CHIEF JUDGE WILSON: So putting aside for a  
9 moment the statute of limitations issue. The - - - what  
10 your position is, I guess, then, is that what they should  
11 have done is to file a new proceeding alleging exactly the  
12 same things in Supreme Court?

13 MR. KEMP: Correct. After - - -

14 CHIEF JUDGE WILSON: Instead of - - - instead of  
15 seeking leave to amend, to add these claims with the same  
16 parties in front of the court that already had them?

17 MR. KEMP: Yes, Your Honor. And that's how it's  
18 contemplated by the C.P.L.R. Is that you have the six-  
19 months grace period under 205, and they could have  
20 recommenced an action, purchased an index number, and - - -

21 JUDGE SINGAS: Shouldn't we be - - -

22 JUDGE HALLIGAN: Is the reason - - -

23 JUDGE SINGAS:: - - - concerned with judicial  
24 economy? And - - - and why should the plaintiffs have to  
25 buy another index number, only to have it meet up with this

1 case later on? And doesn't the trial court have some  
2 discretion in how to move their calendar, and why should we  
3 interfere with that?

4 MR. KEMP: I think that the trial court does have  
5 discretion to manage their calendar, but I don't think that  
6 that trumps the decision from an Appellate Division. So  
7 there is a sense of judicial economy, I suppose. But at  
8 the same time when you look at the fact that the only thing  
9 that was pending before the court was our answer and  
10 counterclaims, they - - - the appellant hadn't even filed  
11 any type of reply. They - - - they moved to dismiss.

12 JUDGE HALLIGAN: So any - - -

13 MR. KEMP: - - - so while their motion - - - I'm  
14 sorry.

15 JUDGE HALLIGAN: It's okay. No, go ahead.  
16 Finish.

17 MR. KEMP: While their motion to dismiss was  
18 pending, then they went and did the work with the Delaware  
19 Department of State. And then months - - - a month later  
20 or so, they decided to make a motion to amend.

21 JUDGE HALLIGAN: Is there any reason to think  
22 that the Appellate Division had top of mind the  
23 counterclaims? And if so, where in the opinion would we  
24 see that?

25 MR. KEMP: Well, the Appellate Division affirmed



1 the dismissal of the counterclaims the second time around.  
2 I don't think that it was top of mind on the March 3rd,  
3 2020.

4 JUDGE HALLIGAN: That's what I mean.

5 MR. KEMP: Yeah. That's correct.

6 JUDGE HALLIGAN: And so to the extent that - - -  
7 that their order doesn't take account of those and those  
8 remain in the trial court, is it your - - - is it your  
9 position that the C.P.L.R. simply won't allow for it? That  
10 that's not a sufficient hook in order to allow for an  
11 amendment of the complaint? I'm trying to understand why  
12 that is.

13 MR. KEMP: My reading of the cases and the  
14 C.P.L.R. is that if there is no longer a pleading pending,  
15 then there is no motion - - -

16 JUDGE HALLIGAN: And you would distinguish a  
17 pleading from counterclaims, I take it?

18 MR. KEMP: There's - - - well, that would - - -  
19 the counterclaims were respondents pleading that was  
20 pending before the court.

21 JUDGE HALLIGAN: Um-hum.

22 MR. KEMP: Okay.

23 JUDGE HALLIGAN: So it has to be your own  
24 pleading, not your adversary's pleading, you're saying?

25 MR. KEMP: That's correct. Yeah.

1 JUDGE HALLIGAN: And where in the text of the  
2 C.P.L.R. or the cases do you see that limitation?

3 MR. KEMP: I think that the issue is in - - -  
4 established in the caselaw regarding whether or not a party  
5 can amend the pleading after it's been dismissed.

6 CHIEF JUDGE WILSON: If the only place where - -  
7 - in the Appellate Division majority's opinion when they  
8 get to that issue, there's a single case they cite which is  
9 a Third Department case. In that Third Department case  
10 there was no - - - there were no counterclaims. The whole  
11 action was gone. So I'm not sure where the authority is  
12 for that position, at least not in the Appellate Division's  
13 decision.

14 MR. KEMP: I think that the - - - one of the  
15 reasons why there isn't an abundance of authority on that  
16 point in particular, as the facts are set forth in this  
17 case, is that most people will go and just commence a new  
18 action. So it wouldn't get to an appellate level.

19 CHIEF JUDGE WILSON: Or maybe it's because they  
20 are granted leave in that circumstance to restate the  
21 claims they had when they fixed the - - - you know,  
22 nonfatal defect and nobody cares because they're going to  
23 be in litigation with each other anyway.

24 MR. KEMP: I don't think that would be the case,  
25 Your Honor, respectfully. I think that when an action's

1           been dismissed, not on the merits - - - non-merit - - -  
2           non-merits dismissal, that the appropriate thing to do is  
3           to go purchase an index number and - - -

4                       CHIEF JUDGE WILSON: Yes. But I guess you're not  
5           - - - you're saying something a little - - - you said  
6           something a little different before, which is that that's  
7           not what people do - - - that that is what people do in the  
8           circumstance where there still is - - - are counterclaims  
9           pending, they pay the extra fee instead of just joining it  
10          in the existing action between the same parties. I don't -  
11          - - I don't know that.

12                      MR. KEMP: I don't know that to be the case  
13          either, Your Honor. But I know that there's provisions  
14          made in the C.P.L.R. for exactly what happened here. And  
15          making a motion to - - - for leave to amend is not the same  
16          as commencing an action under 205.

17                      CHIEF JUDGE WILSON: There is no question that  
18          the supreme court still has jurisdiction over the parties  
19          because of the pendency of the counterclaims, right?

20                      MR. KEMP: That's correct.

21                      CHIEF JUDGE WILSON: Okay.

22                      JUDGE RIVERA: Well, on the counterclaims, who  
23          are the parties?

24                      MR. KEMP: I - - - I'm sorry?

25                      JUDGE RIVERA: Is it - - - who are the parties?



1 Is the company a party in that counterclaim?

2 MR. KEMP: The individuals?

3 JUDGE RIVERA: Yes.

4 MR. KEMP: The individuals are a party.

5 JUDGE RIVERA: But is the company a party?

6 MR. KEMP: I don't believe so, Your Honor.

7 JUDGE RIVERA: They were limited. And I know  
8 there's another company, but that's the company we're  
9 really talking about.

10 MR. KEMP: Yes. I - - - I don't believe so, Your  
11 Honor.

12 JUDGE RIVERA: Okay. What's your position on  
13 this issue I was asking about before regarding the third  
14 cause of action?

15 MR. KEMP: My position is that the complaint was  
16 dismissed in its entirety, that's what we were seeking.  
17 And that the third cause of action went out with the  
18 dismissal.

19 JUDGE RIVERA: But it does - - - perhaps I've  
20 misunderstood supreme court, but it does seem supreme court  
21 didn't see it that way. There - - - there's 's a bit of  
22 tension there, I agree, because I do think supreme court  
23 recognizes that it's a dismissal. But there are various  
24 notations about this third cause of action. And it is set  
25 forth in the second amended complaint. It's set forth in

1 the third amended complaint.

2 MR. KEMP: It's set forth in the - - - in both  
3 complaints; you're correct, Your Honor. However, I don't  
4 think that the Appellate Division made any distinction when  
5 it rendered its - - - its decision and it said that the  
6 action was dismissed in its entirety. It was an  
7 unconditional dismissal. Like I had mentioned before, they  
8 could have said very easily - - - you know, dismissed with  
9 leave to amend.

10 JUDGE RIVERA: Yes. Or these causes of action  
11 against these parties are dismissed. Was this issue about  
12 that third cause of action raised in the briefs to the  
13 Appellate Division? Again, he raised it in his reply.

14 MR. KEMP: No, Your Honor. I don't believe that  
15 that third cause of action issue is raised in any other  
16 briefing.

17 JUDGE RIVERA: Thank you.

18 MR. KEMP: If there's nothing further, I'll rest  
19 on my papers.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. KEMP: Thank you.

22 MR. JAKAB: Just very briefly to respond to Judge  
23 Rivera's question. It's in the record at 57, first  
24 counterclaim, breach of operating agreement against Upper  
25 East Side Suites; that's the company. The company is party

1 to the counterclaims. A simple answer. I wish all the  
2 answers were so simple.

3 JUDGE RIVERA: Thank you. Let me - - - I'd like  
4 to follow up on some of these questions regarding the  
5 counterclaims. Let's assume for one moment the complaint  
6 is dismissed. Let's put aside this third cause of action  
7 issue. Could you have moved to amend if all that is  
8 pending are counterclaims? What would be amended?

9 MR. JAKAB: It's an - - - it's an excellent  
10 question, and it's a - - - it comes from this adage that we  
11 see in the decision below. We heard counsel just say, no  
12 pleading left to amend.

13 JUDGE RIVERA: Um-hum.

14 MR. JAKAB: Okay. I - - - I tried to touch on  
15 this in the briefing. That adjudication by catchphrase  
16 like this is usually not the best idea. You have to get  
17 beneath the catchphrase, see what its origins are. What  
18 are the principles underneath it? How do they apply to  
19 your case?

20 JUDGE RIVERA: But isn't it - - - isn't it  
21 correct textually that the C.P.L.R. does speak of  
22 pleadings?

23 MR. JAKAB: Yes, certainly.

24 JUDGE RIVERA: I mean, supreme court referred to  
25 the action, but that's not what the C.P.L.R. says.

1 MR. JAKAB: It - - - this adage that there's no  
2 pleading to amend, you know, it conjures the image of a - -  
3 - of a claimant who is looking for the pleading to  
4 physically try to amend it. That's not what goes on. What  
5 goes on is the claimant comes with a revised pleading and  
6 asks to be permitted to proceed with it. And the question  
7 is should he - - -

8 CHIEF JUDGE WILSON: And at that point there  
9 isn't a pleading because the court has already dismissed  
10 it, right?

11 MR. JAKAB: Right.

12 CHIEF JUDGE WILSON: And you typically - - -  
13 forget about an appeal, right? You're just in supreme  
14 court.

15 MR. JAKAB: Okay.

16 CHIEF JUDGE WILSON: The defendant moves to  
17 dismiss, right? And it's past the twenty days, so you've  
18 got to get leave to amend. Defendant moves to dismiss;  
19 court grants the motion to dismiss and grants leave to  
20 amend the pleading. When the court grant - - - dismisses  
21 the pleading, there isn't any pleading any longer, yet you  
22 can still amend it?

23 MR. JAKAB: Precisely. Dismissed pleadings are  
24 amended every day. This happens normally. This adage that  
25 there's no pleading to amend is a - - - it's a terrible

1 adage and - - - and it should be disapproved. It's - - -  
2 the question is, should you be allowed to proceed with your  
3 amended pleading or not? And if it was a dismissal on the  
4 merits, with prejudice, like each one of the cases that  
5 uses this adage is, that's a threshold question and the  
6 answer is going to be no. There are ways to get relief  
7 from dismissals with prejudice. But - - -

8 JUDGE RIVERA: Yeah. We can - - -

9 MR. JAKAB: 3025 is not one of them.

10 JUDGE RIVERA: - - - I understand your point  
11 there about amending something that was dismissed coming  
12 back to the well, but it depends on what you want to amend  
13 it for. So we're back to my question before about the  
14 resuscitation, if you will, of this company.

15 MR. JAKAB: The answer to your Honor's question  
16 is, yes, the counterclaims are another hook for what should  
17 be amended. The answer to that is yes.

18 JUDGE HALLIGAN: But your view is, I take it, is  
19 that any dismissal without prejudice, provided that there's  
20 no entry below, can still be amended; notwithstanding the  
21 Appellate Division's dismissal?

22 MR. JAKAB: No. My position is that it can be  
23 brought to the court for exercise of its discretion.

24 JUDGE HALLIGAN: Yeah. But the - - - but the  
25 court has discretion - - -



1 MR. JAKAB: Has discretion.

2 JUDGE HALLIGAN: - - -in any circumstance, even  
3 where the Appellate Division dismisses, provided that it's  
4 without prejudice.

5 MR. JAKAB: It's very circumstance-specific, but  
6 yes. Rudiger says if there's changed circumstances, yes.  
7 The inherent powers doctrine says if it's about docket  
8 management and litigation management before the trial court  
9 - - - like this case is, then yes. The trial court should  
10 always have discretion to say whether it's going to proceed  
11 with a new action or a - - - an action in the existing case  
12 where everybody is already a party; where there's been lots  
13 of rulings in the case already, important ones; where  
14 discovery is more than half done; and it has - - -

15 JUDGE RIVERA: But again, doesn't it - - -  
16 doesn't it turn on what it is you wish to correct? And  
17 it's whether or not that can be corrected through an  
18 amended pleading. The Appellate Division's position was  
19 no, at that point the only corrective action you could have  
20 taken was to file. You - - - you've dealt with the  
21 certificates, but then you file - - - then you have to file  
22 a new action. Right? That's the import of that.

23 MR. JAKAB: I - - - I don't see why that would be  
24 the case. You certainly have to comply with the  
25 substantive ruling of the appellate decision - - -

1 JUDGE RIVERA: Because - - -

2 MR. JAKAB: - - - and that's what we did.

3 JUDGE RIVERA: - - - because at the time you  
4 filed, you didn't have standing. And you can't cure that -  
5 - - you can't go back to correct that. I understood the  
6 Appellate Division to be - - - majority to be taking that  
7 position. You cannot correct that, other than by  
8 addressing the standing issue and then you file again.

9 MR. JAKAB: Addressing the standing issue and  
10 then coming to the court and asking to proceed. Now that  
11 the standing issue has been - - -

12 JUDGE RIVERA: Except that doesn't cure - - - as  
13 I understood the majority, that doesn't cure the actual  
14 basis for the dismissal. The basis for the dismissal was  
15 you didn't have standing at the time you filed, and that  
16 cannot change. You may - - - you may now be in a position  
17 to be able to file a claim, but you didn't have it at that  
18 time and that's why that's dismissed. That's, again - - -  
19 that's how I understood the majority. And I just want to  
20 be clear on what your response is to that?

21 MR. JAKAB: I'd like to respond to exactly that.

22 JUDGE RIVERA: Yes.

23 MR. JAKAB: The - - - the company had standing  
24 when it filed the action. There came a time when Mr. Cico  
25 resigns quietly, without telling anybody at the Delaware



1 Secretary of State, as the person authorized to accept  
2 service of process. That resignation resulted in the loss  
3 of good standing at Delaware Secretary of State, happened  
4 in the middle of the case. The Cicos, in one of their many  
5 motions, brought that to the court's attention. We  
6 addressed it. We addressed it the way we thought we were  
7 supposed to address it; go and put somebody else in that  
8 position at the Delaware Secretary of State and then  
9 proceed. The 2020 appellate decision said it happened in  
10 the wrong order; should have voted first, revived second.  
11 We disagreed with that, but we acknowledge that it's  
12 binding and we went and complied with it. So our  
13 compliance should relate back to the very beginning.

14 JUDGE RIVERA: Okay.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. JAKAB: Thank you, Your Honor.

17 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Favorite v. Cicos, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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