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## **Yankwitt LLP Prevails in First Department Appeal and Secures Dismissal of Breach of Contract Case Against Hospitality**

### **Clients**

#### **Situation**

When Yankwitt LLP's hospitality client acquired a restaurant chain in New York, it inherited several pending litigations against the acquired company. One case was filed by a website operator that claimed it was owed referral commissions for events under a supposed marketing agreement between the parties. When Yankwitt LLP took over as defense counsel, the litigation had been pending for years, largely sitting dormant.

#### **Approach**

While some defense attorneys let cases they consider meritless to languish, we prefer a more aggressive approach. As this was one such case, we immediately exerted pressure on the plaintiff to either move the litigation forward through discovery or engage in good faith settlement discussions. After the plaintiff did neither and then failed to appear for his deposition by a court-ordered deadline, Yankwitt LLP successfully moved for sanctions precluding the plaintiff from testifying at trial because it "willfully and contumaciously" failed to appear for its deposition. Shortly after the preclusion order was issued, Yankwitt LLP moved for summary judgment, arguing for dismissal of the case because the plaintiff was prohibited from testifying and the documentary evidence it produced was insufficient to support its claims. The success of a summary judgment motion depends in part on factors that we control and for which Yankwitt LLP demands the highest quality, including in-depth legal research, sophisticated writing, and strong fact development. We, however, cannot control a judge's individual approach to managing litigation, and some judges prefer to resolve cases with trials over motion practice. Unfortunately, that held true in this case. Our motion was strong, but the trial court denied it and directed the parties to try the case.

While New York state court may be liberal on allowing appeals, it is stingy in granting them. Undeterred, we appealed the denial of our motion to the First Department, Appellate Division, arguing the trial court should have dismissed the complaint based on the preclusion order. We used the appellate briefing to fine tune our legal arguments and prepared intensively for oral argument before the appellate panel.

#### **Result**

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Our relentless pursuit of dismissal for our client paid off in the Appellate Division. Following oral argument, a four-judge panel of the First Department unanimously agreed with our position that the trial court should have dismissed the complaint based on the preclusion order and the absence of admissible documentary evidence. The panel reversed the trial court's denial of summary judgment and granted Yankwitt LLP's motion, thereby dismissing the case. The case is Funk This Entertainment LLC v. B.R. Guest LLC et al., Index No. 653152/13.