

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13097
Y/mv

_____AD3d_____

Argued - November 3, 2006

ANITA R. FLORIO, J.P.
WILLIAM F. MASTRO
REINALDO E. RIVERA
ROBERT A. SPOLZINO, JJ.

2005-06313

DECISION & ORDER

Tokio Marine and Fire Insurance Co., etc., et al.,
respondents, v Abdor-Florida, Inc., et al., appellants.

(Index No. 8103/01)

Marschhausen & Fitzpatrick, P.C., Garden City, N.Y. (Dirk Marschhausen and Kevin
P. Fitzpatrick of counsel), for appellants.

London Fischer, LLP, New York, N.Y. (Jeremy Cantor of counsel), for respondent.

In an action for contractual indemnification, the defendants appeal from an order of the Supreme Court, Orange County (McGuirk, J.), dated April 10, 2005, which granted the plaintiffs' motion for summary judgment.

ORDERED that the order is affirmed, with costs.

The defendants' contentions are improperly raised for the first time on appeal and therefore are not properly before this court (*see Neuman Distribs. v Jacobi Med. Ctr.*, 298 AD2d 568; *see also Matter of Pennino*, 289 AD2d 248; *Weber v Jacobs*, 289 AD2d 226). Contrary to the defendants' assertions, the issues raised for the first time on appeal do not merely raise legal arguments that would be permitted because they could not have been avoided by the plaintiffs if they had been raised in the Supreme Court (*compare Matter of Wang*, 5 AD3d 788).

FLORIO, J.P., MASTRO, RIVERA and SPOLZINO, JJ., concur.

December 19, 2006

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TOKIO MARINE AND FIRE INSURANCE CO. v ABDOR-FLORIDA, INC.

2005-06313

DECISION & ORDER ON MOTION

Tokio Marine and Fire Insurance Co., etc., et al.,
respondents, v Abdor-Florida, Inc., et al., appellants.

(Index No. 8103/01)

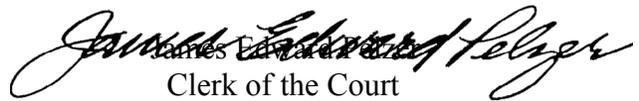
Motion by the respondent on an appeal from an order of the Supreme Court, Orange County, dated April 10, 2005, inter alia, in effect, to strike stated portions of the appellants' brief. By decision and order on motion of this court dated February 7, 2006, that branch of the motion which was, in effect, to strike stated portions of the appellants' brief was held in abeyance and was referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the branch of the motion which was, in effect, to strike stated portions of the appellants' brief is denied.

FLORIO, J.P., MASTRO, RIVERA and SPOLZINO, JJ., concur.

ENTER:


James Edward Helzer
Clerk of the Court