

**R.C. Dolner, Inc. v Breeze Natl., Inc.**

2010 NY Slip Op 31095(U)

May 5, 2010

Supreme Court, New York County

Docket Number: 115097/2007

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 115097/2007  
 RC DOLNER, INC.  
 vs.  
 BREEZE NATIONAL  
 SEQUENCE NUMBER : 003  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 2/16/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3  
4-8  
9-10  
11-13

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Sur-replies

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the general memorandum decision, order of declaration.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/5/10



JANE S. SOLOMON J.S.C.  
NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----X  
R.C. DOLNER, INC. and VIRGINIA SURETY  
INSURANCE CO.,

**UNFILED JUDGMENT**  
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Plaintiff, counsel or authorized representative must  
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141B). INDEX NO 116130/07

-against-

BREEZE NATIONAL, INC. and LIBERTY  
SURPLUS INSURANCE COMPANY,

DECISION, ORDER and  
DECLARATION

Defendants.

-----X

JANE S. SOLOMON, J.

This is a lawsuit for declaratory judgment and breach of contract arising from a construction accident. A construction worker, Gerald Ryan, allegedly hurt his foot while working on a building site in Manhattan on October 17, 2006. Soon thereafter, he sued construction manager R.C. Dolner, Inc. (R.C. Dolner), a demolition sub-contractor, Breeze National, Inc. (Breeze), and the property owner. In Ryan's lawsuit (New York County index number 116130/06, hereafter referred to as the Underlying Action), R.C. Dolner asserted a cross-claim against Breeze for contractual indemnification, and commenced a third-party action against another sub-contractor, Mometal Structures, Inc. (Mometal). The Underlying Action is pending before Justice O. Peter Sherwood of this court.

Breeze's sub-contract with R.C. Dolner required Breeze to indemnify R.C. Dolner and to obtain commercial general liability insurance covering R.C. Dolner for claims arising from

Breeze's work. Breeze procured insurance from defendant Liberty Surplus Insurance Company (Liberty). In July 2007, R.C. Dolner's lawyer notified Liberty of the Ryan claim and sought coverage. Liberty made a partial disclaimer in December 2007.

R.C Dolner and its insurance carrier, Virginia Surety Insurance, Co. (Virginia Surety), sued Breeze and Liberty, seeking declarations that R.C. Dolner is entitled to coverage under the policy Liberty issued to Breeze; that Liberty's disclaimer of coverage for R.C. Dolner was untimely and invalid; and that Breeze is liable to R.C. Dolner for breach of contract in failing to procure insurance and failing to indemnify R.C. Dolner from Ryan's claim. The complaint also demands reimbursement for costs incurred by Virginia Surety in defending the Ryan case. Plaintiffs have discontinued this lawsuit as against Liberty.

Discovery has not proceeded smoothly. Liberty moved to compel disclosure of plaintiffs in motion sequence 01, which was resolved pursuant to the terms of a preliminary conference order on October 6, 2008. Breeze then moved (motion sequence 02) to compel plaintiffs to comply with the preliminary conference order, which resulted in orders directing plaintiffs to provide discovery, precluded plaintiffs from relying on documents at trial not yet produced as of March 23, 2009, and amending the preliminary conference order to require depositions to be

completed by May 31, 2009. The order, dated March 23, 2009, provided that no motion would stay discovery. Breeze sought the depositions as ordered, but R.C. Dolner and Virginia Surety refused to produce witnesses.

Plaintiffs have offered no justification for their failures to comply with the March 23, 2009 order in this action, including their failure to produce witnesses for deposition, so that branch of Breeze's motion seeking to preclude plaintiffs from offering as evidence at trial any document not produced as of the March 23, 2009 order, and from offering a witness to testify at trial, is granted.

In addition to the present lawsuit, R.C. Dolner and Virginia Surety filed a lawsuit (New York County index number 112526/07) against Mometal and its insurer, Commerce and Industry Insurance Company. That lawsuit was assigned to Justice Paul Feinman of this court. Plaintiffs are represented by the same counsel in both actions. In the R.C. Dolner v. Mometal lawsuit, plaintiffs moved in April 2009 to consolidate that action with this one under CPLR 602(a). Justice Feinman granted that motion with the proviso that discovery orders already issued in this action remain in full effect. Justice Feinman subsequently vacated the consolidation with an order dated July 16, 2009, and restored these cases to their separated status.

Before the vacatur, however, plaintiffs filed a note of

issue on June 30, 2009. There have been no depositions in this action. However, discovery was completed in the Underlying Action, which included the depositions of Ryan, R.C. Dolner and Breeze.

Breeze moved for summary judgment in this action (motion sequence 03), and to strike the complaint or preclude plaintiffs from offering evidence at trial that was not produced in compliance with the March 23, 2009 order. Plaintiffs cross-moved for summary judgment in their favor.<sup>1</sup>

While this motion was subjudice, Justice Sherwood decided a summary judgment motion in the Underlying Action, holding that Breeze was not negligent, nor was it liable under Labor Law sections 200, 241(6) or 240(1) (a copy of the decision is attached as Exhibit A to Breeze's sur-reply). The court further held that, as a matter of law, R.C. Dolner was not entitled to a defense or indemnification from Breeze under the terms of their contract. The complaint and RC Dolner's cross-claims were severed and dismissed as against Breeze; the Underlying Action continues as against R.C. Dolner.

In the present motion, Breeze was granted leave to serve a sur-reply with respect to the impact of Justice Sherwood's decision, and plaintiffs were granted leave to respond. Breeze contends that the issue of its involvement in

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<sup>1</sup> Breeze made a separate motion to strike the note of issue (motion sequence 04), but that motion was withdrawn by counsel.

causing Ryan's injury was determined in the Underlying Action, and R.C. Dolner and Virginia Surety are collaterally estopped from pressing their claim against Breeze here.

In opposition, plaintiffs argue that their claims in this action are not barred by res judicata or collateral estoppel because Virginia Surety was not a party to the Underlying Action. It is undisputed that not only did R.C. Dolner have a full and fair opportunity to oppose Breeze in the Underlying Action, it in fact opposed Breeze and lost. Accordingly, on the issue of Breeze's contractual obligation to provide indemnity to R.C. Dolner in connection with Ryan's claim, R.C. Dolner is barred from re-litigating that issue here under the doctrine of res judicata (*see generally*, Siegel, *New York Practice*, § 442, *et seq.*, at 747 (West, 4<sup>th</sup> Ed.)). Virginia Surety's claim against Breeze is wholly derivative of R.C. Dolner's: if R.C. Dolner has no claim against Breeze, neither does Virginia Surety.

Plaintiffs further argue that Justice Sherwood got it wrong, and point to what they contend is evidence that Ryan was injured on the third floor, where Breeze was working, rather than on the fourth floor, where it was not. Justice Sherwood wrote that he relied on the deposition testimony, including that of R.C. Dolner's witness, and documentary evidence, all of which support his decision. Plaintiffs herein argue that a verified bill of particulars prepared by Ryan's attorneys stated that the

accident occurred on the third floor, so a question of fact exists as to the location of the accident. R.C. Dolner made this argument to Justice Sherwood, who found it unpersuasive; Justice Sherwood's determination of this issue appears sound, and is consistent with the finding compelled by the papers submitted in this motion before his decision was made. Accordingly, it hereby is

ADJUDGED and DECLARED that Breeze is not contractually obligated to indemnify R.C. Dolner in connection with the claims presented in the Underlying Action, and Breeze is not obligated to Virginia Surety Insurance Co. in connection with the claims presented in the Underlying Action; and it further is

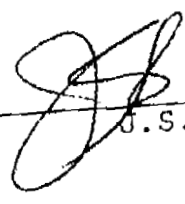
ORDERED that that part of Breeze's motion seeking to preclude plaintiffs from offering evidence at trial that was not produced in compliance with the March 23, 2009 order is granted; and it further is

ORDERED that that part of Breeze's motion seeking summary judgment is granted, and the complaint is dismissed with costs and disbursements to Breeze as taxed, and the Clerk of the Court is directed to enter judgment accordingly; and it further is

ORDERED that plaintiffs' cross-motion is denied.

Dated: May 3, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C

**JANE S. SOLOMON**

**UNFILED JUDGMENT**

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