

Dorador v Trump Palace Condominium

2014 NY Slip Op 31126(U)

April 28, 2014

Supreme Court, New York County

Docket Number: 101992/2009

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IVAN DORADOR,

Plaintiff,

-against-

INDEX NO. 101992/2009
MOTION DATE 03-19-2014
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

TRUMP PALACE CONDOMINIUM,

Defendant.

TRUMP PALACE CONDOMINIUM

Third-Party Plaintiff,

-against-

THIRD-PARTY INDEX# INDEX NO.
590446/2009

AZTEC METAL MAINTENANCE CORP. and
SIGNATURE METAL AND MARBLE MAINTENANCE, LLC.,

Third-Party Defendants.

TRUMP PALACE CONDOMINIUM

Second Third-Party Plaintiff,

-against-

SECOND THIRD-PARTY INDEX# INDEX NO.
590297/2010

R&J COMPANY, LLC and THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC., t/a THE FOOD EMPORIUM, INC.,

Second Third-Party Defendants.

The following papers, numbered 1 to 9 were read on this motion for leave to regargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4,</u>
Answering Affidavits — Exhibits _____	<u>5-6, 7-8</u>
Replying Affidavits _____	<u>9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, the Second Third-Party defendant's (herein A&P) motion for Leave to Reargue is granted. Upon reargument, the Default Judgment Order against A&P is vacated, A&P's Answer is reinstated, and the Second Third-Party action is stayed. Plaintiff's Cross-Motion for denial of Reargument is denied. Plaintiff's Cross-Motion to Sever the Second Third-Party Action is granted.

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

Plaintiff brings this action to recover for personal injuries sustained on April 2, 2007 at 200 East 69th Street, New York, New York (herein Premises), while in the course of his employment with Aztec Metal Maintenance Corp. Cleaning (herein Aztec). Plaintiff commenced an action against Trump Palace Condominium (herein Trump). Trump commenced a First Third-Party action against plaintiff's employer Aztec and Signature Metal and Marble Maintenance, LLC, who Trump alleges is the successor-in-interest to Aztec, and assumed all of the liabilities of Aztec. Trump commenced a Second Third-Party action against R&J Company, LLC, the owner of a commercial unit at the Premises, and The Great Atlantic & Pacific Tea Company, Inc (A&P). Trump seeks contribution and indemnification in both Third- Party actions.

On December 12, 2010 A&P filed for Bankruptcy and on January 3, 2011 an order was issued staying this action due to the bankruptcy proceedings. On February 27, 2012, A&P obtained a limited discharge and permanent injunction from the Bankruptcy Court. On August 1, 2012, this court issued an order vacating all previous stays, however, this court was not provided all necessary documentation in order to render an informed ruling. In an Order dated September 5, 2012, this court struck A&P's answer for failure to appear at a scheduled conference and discovery proceeded absent A&P. Discovery was completed, and the Note of Issue was filed.

A&P retained new counsel and the current attorneys made a motion to vacate the September 5, 2012 order. In an order dated November 26, 2013, this court denied that motion because A&P moved almost one year after the order was issued, entered, and served, and because A&P failed to show a reasonable excuse for their default.

A&P now moves pursuant CPLR § 2221(d) for Leave to Reargue seeking to vacate the September 5, 2012 order, reinstating their Answer, and vacating this court's August 1, 2012 order to the extent it lifts the stay of the Second Third-Party action. In support of this motion, A&P attaches the February 27, 2012 Bankruptcy Court Order.

Plaintiff opposes A&P's motion for Leave to Reargue and Cross-Moves pursuant to CPLR § 603 and CPLR § 1010 to Sever the Second Third-Party action. Plaintiff argues that the automatic stay issued by the Bankruptcy Court expired, and this court's order lifting the stay was proper. Plaintiff claims that the Second Third-Party Action should be severed in order to avoid maintaining plaintiff's case in limbo and great prejudice to plaintiff.

Trump opposes A&P's motion for Leave to Reargue and plaintiff's Cross-Motion to sever the Second Third-Party action. Trump argues that A&P offered no reasonable excuse or a meritorious defense for failing to appear at the conference. Trump asserts that severing the Second Third Party action would create an inconvenience and prejudice Trump because it is entitled to indemnification from A&P and Trump would have to participate in two trials.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

[* 3]

The decision whether to entertain reargument is committed to the sound discretion of the court (Rostant v. Swersky, 79 A.D.3d 456, 912 N.Y.S.2d 200 [1st Dept., 2010]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (V.Veerewamy Realty v. Yenom Corp., 71 A.D. 3d 874, 895 N.Y.S.2d 860 [2nd Dept. 2010]), but to point out controlling principles of law or fact that the court may have overlooked (Simon v. Mehryahi, 16 A.D. 3d 664, 792 N.Y.S.2d 543 [2nd Dept. 2005]). A motion to reargue is not based on new proof, rather, it seeks to convince the court that it was wrong and ought to change its mind (Siegel, New York Practice 5th Edition, §254).

CPLR § 5015(a)(4) allows the court that rendered a judgment or order the discretion to relieve a party from such an order or judgment, upon motion, if the court lacked jurisdiction to render the judgment or order. "A party who moves to vacate a judgment entered on default on the ground of lack of personal jurisdiction is not required to demonstrate a reasonable excuse for the default or a potentially meritorious defense" (Dime Sav. Bank of Williamsburg v. 146 Ross Realty, LLC, 106 A.D.3d 863, 864, 966 N.Y.S.2d 443, 445 [2nd Dept., 2013] citing to, Toyota Motor Credit Corp. v. Lam, 93 A.D.3d 713, 939 N.Y.S.2d 869 [2nd Dept., 2012]).

CPLR § 603 gives the court discretion to order separate trials or sever claims prior to the trial of the other claims. It has been generally held that "the balance of the equities lies with plaintiffs when one defendant has received an automatic stay pursuant to 11 USC § 362(a) [the bankruptcy law] and codefendants request a stay of the entire action" (Rosenbaum v. Dane & Murphy, Inc., 189 A.D.2d 760, 592 N.Y.S.2d 391, 392 [2nd Dept., 1993]). The potential inconvenience to a defendant is outweighed by requiring a plaintiff to await the conclusion of a bankruptcy proceeding before obtaining any remedy (Moy v. St. Vincent's Hosp. and Medical Center of New York, 92 A.D.3d 651, 938 N.Y.S.2d 328 [2nd Dept., 2012]).

Here, A&P provides the Bankruptcy Court Order granting A&P a broad permanent injunction from commencing or continuing any claims or causes of actions against A&P. A&P's prior counsel failed to provide this court with the necessary documentation in August of 2012. Although a Motion to Reargue may not be based on new evidence, this court nonetheless lacks jurisdiction to lift the Bankruptcy Court stay as against A&P. The Note of Issue has been filed and this matter is on the trial calendar. The potential inconvenience to Trump and Aztec is outweighed by requiring plaintiff to await the conclusion of A&P's bankruptcy proceedings.

Accordingly, it is ORDERED that A&P's motion for leave to Reargue is granted, and it is further

ORDERED, that this court's Default Judgment Order and Order striking A&P's Answer dated September 5, 2012 is vacated, and it is further

ORDERED that A&P's Answer is reinstated, and it is further

ORDERED, that plaintiff's Cross-Motion to deny Leave to Reargue is denied, and it is further

ORDERED, that plaintiff's Cross-Motion to sever the Second Third-Party action is granted, and it is further

ORDERED, that the parties are hereby enjoined and restrained from instituting or further prosecuting this Second Third-Party action or proceeding with any pretrial conference, trial, application for judgment or proceedings on judgment or settlement in this action in which A&P is obligated to defend pending the determination of the Bankruptcy Court, and it is further

ORDERED, that A&P serve a copy of this Order on the Clerk of this Court who will then Sever A&P (Second Third-Party Action) from the rest of the case.

MANUEL J. MENDEZ
J.S.C.

Enter:

Dated: April 28, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE