

Dorador v Trump

2020 NY Slip Op 30279(U)

January 28, 2020

Supreme Court, New York County

Docket Number: 101992/2009

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X
IVAN DORADOR,

Plaintiff,

INDEX NO. 101992/2009
MOTION DATE 08/12/2019
MOTION SEQ. NO. 022

- v -

DONALD TRUMP, TRUMP PALACE CONDOMINIUM S/H/I
AS TRUMP PALACE COMPANY, TRUMP
ORGANIZATION, LLC, THE TRUMP ORGANIZATION,
INC., AZTEC METAL MAINTENANCE CORP, SIGNATURE
METAL & MARBLE MAINTENANCE, LLC, R&J COMPANY,
LLC, THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
INC T/A THE FOOD EMPORIUM, INC.,

DECISION + ORDER ON
MOTION

Defendants.

-----X

TRUMP PALACE CONDOMINIUM S/H/I AS TRUMP PALACE
COMPANY,

Plaintiff,

Third-Party
Index No. 595134/2016

-against-

AZTEC METAL MAINTENANCE CORP.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 022) 495, 496, 497, 498,
499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519,
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were read on this motion for

REARGUMENT

Lester Schwab Katz & Dwyer, LLP, New York, NY (John Sandercock of counsel), for
defendant/second third-party plaintiff/third third-party plaintiff Trump Palace Condominium.
Shaub Ahmuty Citrin & Spratt, LLP, New York, NY (Jonathan P. Shaub and Christopher R.
Theobalt of counsel), for third third-party defendant Aztec Metal Maintenance Corp.

Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by a worker on April 2, 2018, when he fell from a scaffold while cleaning brass embellishments on the exterior of a building located at 200 East 69th Street, New York, New York.

In motion sequence number 022, third third-party defendant Aztec Metal Maintenance Corp. (Aztec) moves, pursuant to CPLR 2221, to reargue that part of this court's January 28, 2018 decision and order (the Prior Order), which denied Aztec's cross motion for summary judgment dismissing the third cause of action of the third third-party complaint. In that cause of action, the court determined that defendant/third-party plaintiff/second third-party plaintiff/third third-party plaintiff Trump Palace Condominium (Trump) sought recovery for breach of contract for the failure to procure insurance.¹

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221 [d] [2]). A party may not use a motion to reargue as a vehicle to advance arguments different from those provided on the original application (*see Mariani v Dyer*, 193 AD2d 456, 458 [1st Dept 1993]), or to argue a new theory of law or raise new questions not previously advanced (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

Here, Aztec argues that the court misapprehended the gravamen of the third cause of action, which the court initially interpreted as one seeking damages for breach of contract for the failure to procure insurance. In fact, Aztec argues, the third cause of action merely restates Trump's demand for contractual indemnification. Upon further review of this cause of action, the court agrees with Aztec's position.

In the Prior Order, the court, *inter alia*, dismissed Trump's common-law and contractual indemnification claims against Aztec. The third cause of action, which is inartfully pleaded, appeared, upon the court's initial review, to sound in, among other things, breach of contract for the failure to procure insurance.² The parties raised no arguments about that claim, and so it survived.

¹ Though the Prior Order was issued on January 28, 2018, it was not served with notice of entry until June 28, 2019. This motion, filed the same day, is therefore timely.

² As relevant, the third cause of action asserts that (1) Aztec was obligated to procure insurance on behalf of Trump, (2) that plaintiff's accident fell within the ambit of the insurance that Aztec was obligated to procure and (3) that:

"If the plaintiff was caused to sustain injuries . . . through carelessness, recklessness and/or negligence or other culpable conduct, other than that of the plaintiff and the third-party defendant and second third-party defendants, said injuries and damages, and those of [Trump] were caused by a breach of the aforesaid contracts/agreements and/or in furtherance of and/or as a result of the activities pursuant to the aforesaid contracts . . . and if

The court has reviewed the third third-party pleadings. Although the third cause of action discusses insurance procurement, Aztec is correct that it does not seek relief arising from the failure to procure such insurance but, rather, for relief arising under a theory of contractual indemnification. Indeed, Trump underscores this position when it affirms that the third cause of action alleges that the “injury to the plaintiff was an event within the scope of the contract or contracts . . . in which Aztec agreed to indemnify Trump” (affirmation in opposition, Doc No. 558, ¶ 29).

The Prior Order already dismissed Trump’s contractual indemnification claims “because the record is devoid of any contractual provision that requires Aztec to indemnify Trump for the injuries sustained herein” (Prior Order at 18-19). To the extent that Trump’s indemnification claims against Aztec are restated in the third cause of action, such claims were already considered and dismissed by the Prior Order.

To the extent that Trump now argues that the third cause of action does, in fact, seek damages for Aztec’s failure to procure insurance, such argument is unavailing as Trump acknowledged that Aztec procured insurance (*see* affirmation in opposition, Doc No. 558, ¶ 48 [“Aztec cannot dispute that its primary insurer, Aspen Specialty Insurance Company, agreed to defend and indemnify [Trump] in this litigation”]).

Given the foregoing, the court finds that the third cause of action seeks relief under a theory of contractual indemnification. Extensive arguments were raised by Aztec with respect thereto, resulting in the dismissal of Trump’s indemnification claims against Aztec. Accordingly, Aztec was then, and now is, entitled to the dismissal of the entirety of the third third-party complaint.

Accordingly, it is hereby

ORDERED that Aztec’s motion for leave to reargue that part of its cross motion for summary judgment on the cause of action identified as one for breach of contract for the failure to procure insurance is granted; and it is further

ORDERED that, upon reargument, the court rescinds that portion of the decision and order, dated January 28, 2018, that denied Aztec’s cross motion for summary judgment, and, hereby, grants Aztec summary judgment dismissing the third third-party complaint as against it in full, and the third third-party complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

any judgment is recovered herein against [Trump], they will be damaged thereby and [Aztec] will be primarily responsible therefore, and [Trump] will be entitled to contribution and/or indemnification, in whole or in part, from [Aztec] as a result thereof” (Third third-party complaint ¶ 27).

ORDERED that the Clerk is directed to enter judgment accordingly.

1/28/2020

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE