SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

Case No.
2023-04925

Supreme Court Index No.:
452564/2022

NON-PARTY APPELLANTS' AFFIRMATION IN OPPOSITION TO PLAINTIFF-RESPONDENT'S MOTION TO DISMISS

Brian J. Isaac, Esq. and Michael S. Ross, Esq., attorneys duly admitted to practice law before the Courts of the State of New York, hereby affirm the following statements to be true under the penalties of perjury:

1. Brian J. Isaac, Esq., a partner at the law firm Pollack Pollack Isaac & DeCicco, LLP and Michael S. Ross, Esq., the Principal of the Law Offices of Michael S. Ross, represent Non-Party Appellants Clifford S. Robert, Esq. ("Robert and Robert PLLC"), Michael Farina, Esq.

("Robert and Robert PLLC"), Christopher M. Kise, Esq. ("Continental PLLC"), Michael Madaio, Esq. ("Habba Madaio & Associates, LLP"), and Armen Morian, Esq. ("Morian Law, PLLC") (collectively, "Non-Party Appellants or "Counsel") in connection with the above-captioned appeal. We are fully familiar with the facts and circumstances of this matter based upon a review of the files maintained by our offices.

2. This affirmation is submitted in opposition to the motion of the Plaintiff-Respondent, People of the State of New York, by Letitia James, Attorney General of the State of New York ("NYAG"), seeking an order dismissing the appeal of Defendants-Appellants ("Appellants") and Non-Party Appellants from an order of the Supreme Court, New York County, dated September 27, 2023 (1) granting summary judgment to NYAG on the first cause of action, (2) denying Appellants' motion seeking summary judgment and dismissal of the complaint, and (3) granting NYAG's motion for sanctions against the Non-Party Appellants in the amount of $7,500 each (the "Summary Judgment Decision").

3. We have reviewed the opposition papers submitted by Appellants in connection with the subject motion. To avoid repetition and to conserve resources, Non-Party Appellants adopt the arguments contained therein. Non-Party Appellants would only add that they specifically moved to sever their appeal from that portion of the Summary Judgment Decision imposing sanctions, which motion was opposed by NYAG vigorously, leading to a denial of that application by this Court. NYAG's about-face in the motion effectively seeks the reverse outcome of the Court's order on the motion to sever.

4. As set forth in Appellants' opposition papers, assurances by NYAG that Appellants and Non-Party Appellants would not forfeit constitutionally guaranteed appellate rights by appealing only from a final judgment, leaving aside all of the timing problems that would be caused

by such an order that are fully outlined in Appellants' opposition papers, are meaningless in light of undisputed case law that establishes that appellate jurisdiction is not controlled by litigants but, rather, the courts. See, e.g., In re: Shaw, 96 NY2d 7, 13 [2001]; Commissioner of Social Services of City of New York v. Harris, 26 AD3d 283, 286 [1st Dept. 2006]. Appellants correctly point out that parties cannot create or consent to appellate jurisdiction where it would not otherwise exist (Porco v. Lifetime Entertainment Services LLC, 176 AD3d 1274, 1275 [3d Dept. 2019]) and that appellate jurisdiction is conferred by the Constitution and limited by statute (Ocean Accident & Guarantee Corp., Ltd. v. Otis Elevator Co., 291 NY 254, 255 [1943]).

5. As such, NYAG's assurances as to appealability ring hollow as its beliefs and assertions do not define the jurisdiction of this Court to hear and decide appeals.

6. Non-Party Appellants wish to note, specifically, their concern regarding jurisdiction based upon Bonczar v. Am. Multi-Cinema, Inc., 38 NY3d 1023 [2022]. Quite frankly, prior to Bonczar, counsel had always understood that an appeal from a final judgment brought up for review all unappealed interlocutory orders, including the grant or denial of summary judgment. Indeed, in Cano v. Mid-Valley Oil Co., Inc., 151 AD3d 685 [2d Dept. 2017], undersigned counsel Isaac secured a reversal of the denial of summary judgment on a Labor Law §240(1) claim on a subsequent appeal from a post-motion judgment.

7. Bonczar changed the landscape significantly. In this regard, in Dyszkiewicz v. City of New York, 218 AD3d 546 [2d Dept. 2023], another appeal handled by undersigned counsel Isaac, the Second Department, based in Bonczar, held that plaintiff's appeal from those "portions of the Supreme Court's order dated October 10, 2019 denying that branch of the plaintiff's motion which was for summary judgment on the issue of liability on so much of the cause of action alleging a violation of Labor Law §241(6)" predicated "upon violations of 12 NYCRR §23-1.7(d)

and §23-3.3(e)" was *not* reviewable on plaintiff's appeal from the subsequently entered judgment because the order did "not necessarily affect the judgment, and therefore cannot be reviewed on the appeal from the judgment" (218 AD3d 548). The Second Department further held that because the prior order did not "necessarily remove (those) legal issue[s] from the case so that there was no further opportunity during the litigation for the parties to address them" (id.), plaintiff could *not* raise the issue of whether his motion for summary judgment on his Labor Law §241(6) claim was proper in the appeal.

8. Significantly, proving the propriety of the claims set forth in appellants' opposition papers, in Dyszkiewicz, the Appellate Division noted that "although defendants did not raise the issue of reviewability, we address this issue *sua sponte* because it is jurisdictional in nature" (218 AD3d at 547).

9. As such, Appellants' concern is not only real, but fully supported by the Dyszkiewicz decision. The proper procedural course is for this Court to permit both appeals to proceed, as perfected separately. However, if the Court disagrees and holds that the two appeals must be combined into the final judgment, the Court should expressly hold, as the NYAG concedes, that the "dismissal of the Interlocutory Summary Judgment Appeal will not preclude [Appellants] from raising any of their arguments challenging the summary-judgment decision to this Court." NYSCEF No. 30 at 8.

10. Based upon the foregoing, this Court should deny NYAG's motion in full.

WHEREFORE, for the foregoing reasons, we respectfully request that the within application be in all respects denied, and that this Court issue any other, further or different relief it deems just, proper and equitable.

Dated: New York, New York
June 14, 2024

Brian J. Isaac, Esq.

Michael S. Ross, Esq.