

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

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

Petitioner,

-against-

THE TRUMP ORGANIZATION, INC.; SEVEN SPRINGS LLC; ALLEN WEISSELBERG; ERIC TRUMP; CHARLES MARTABANO; MORGAN, LEWIS & BOCKIUS, LLP; and SHERI DILLON,

Respondents.

Hon. Arthur F. Engoron

Index No. 451685/2020

Motion Sequence No.: 007

AFFIRMATION OF COLLEEN K. FAHERTY IN SUPPORT OF THE OFFICE OF THE ATTORNEY GENERAL'S MOTION FOR LEAVE TO REARGUE

Colleen K. Faherty, an attorney duly admitted to practice before the Courts of this State, does hereby state the following under penalty of perjury:

1. I am an Assistant Attorney General in the Office of New York State Attorney General who appears on behalf of the People of the State of New York in this special proceeding.

2. I submit this Affirmation in support of the Office of the Attorney General's motion by order to show cause for an Order, pursuant to C.P.L.R. 2221(d), granting Petitioner leave to reargue a discrete issue from Petitioner's motion to compel, in connection with the Court's privilege rulings regarding communications between Respondents and Ralph Mastromonaco, and upon such reargument, amending the Court's prior privilege rulings in supplemental orders dated October 16 and 30, 2020, and ordering all such communications with third party Ralph Mastromonaco produced.

3. I am familiar with the facts and circumstances set forth in this Affirmation, which are based upon my personal knowledge and information contained in the files of the Office of the Attorney General (OAG) or addressed in this underlying litigation.

4. Annexed hereto as “Exhibit A,” for the Court’s convenience is this Court’s supplemental order dated October 16, 2020, concerning certain privilege rulings over documents withheld by respondent the Trump Organization.

5. Annexed hereto as “Exhibit B,” for the Court’s convenience is this Court’s supplemental order dated October 30, 2020, concerning certain privilege rulings over documents withheld by respondent Charles Martabano.

6. Additionally, in lieu of attaching the voluminous record generated to date, petitioner refers to the following NYSCEF filings in this matter:

Docket No. 1	Verified Petition dated August 21, 2020
Docket No. 13	Memorandum of Law in Support of the Attorney General’s Special Proceeding and Application to Compel Respondents to Comply with Investigatory Subpoenas, dated August 21, 2020
Docket No. 14	First Affirmation of Matthew Colangelo in Support of the Office of the Attorney General’s Order to Show Cause to Compel Compliance with Investigatory Subpoenas, dated August 21, 2020 (the “First Colangelo Affirmation”)
Docket Nos. 15-180	Exhibits 1-166 to the First Colangelo Affirmation
Docket No. 192	Petitioner’s prior Order to Show Cause – Motion to Compel dated September 2, 2020
Docket No. 211	Answer filed by Respondent Charles Martabano, Esq. dated September 16, 2020
Docket No. 215	Affirmation of George J. Calcagnini, Esq. dated September 16, 2020
Docket No. 217	Memorandum of Law on Behalf of Charles Martabano in Opposition to Motion to Compel dated September 16, 2020
Docket No. 221	Verified Answer to Verified Petition filed by TTO and Eric Trump dated September 16, 2020

Docket No. 237	Memorandum of Law of the Trump Organization, Inc., DJT Holdings LLC, DJT Holdings Managing Member LLC, Seven Springs LLC and Eric Trump in Opposition to the Office of the Attorney General's Petition and Motion to Compel Compliance with Investigatory Subpoenas, dated September 16, 2020
Docket No. 240	Reply Memorandum of Law in Support of the Attorney General's Special Proceeding and Application to Compel Respondents to Comply with Investigatory Subpoenas, dated September 22, 2020
Docket No. 255	Decision and Order dated September 23, 2020

7. The instant motion seeks reargument in that the Court may have overlooked or misapprehended the law regarding the *Kovel* doctrine, which establishes narrow circumstances under which the attorney-client privilege can be extended to cover communications with a non-client third party; and may have overlooked or misapprehended the facts and law regarding the waiver of privilege claims when a party selectively discloses information to an adversary, including—as here—to the Internal Revenue Service

8. Specifically, the Court's October 16 ruling regarding documents identified on the TTO privilege log designated 20 communications with Mr. Mastromonaco as privileged.

9. Additionally, the Court's October 30 ruling regarding documents identified on the Martabano privilege log designated 32 communications with Mr. Mastromonaco as privileged.

10. In reaching its privilege conclusions on October 16 and 30, 2020, the Court appears to have relied on Respondents' blanket characterization on the TTO and Martabano privilege logs that "an engineering consultant qualifies as a privileged agent under *Spicer v. GardaWorld Consulting (UK) Ltd.*, 181 A.D.3d 413 (1st Dep't 2020)." *E.g.*, Oct. 30 Court Ruling on Martabano Privilege Log (entry for NYAGREV00170866) (the "Oct. 30 Log"); Oct. 16 Court Ruling on TTO Privilege Log (entry for NYAGREV00049607) (the "Oct. 16 Log").

11. Petitioner respectfully seeks reargument on the grounds that the Court may have overlooked or misapprehended that:
- a. the doctrine extending the attorney-client privilege to include third parties only applies where the third party is acting as an interpreter whose participation is necessary for attorney and client to understand one another, *not* where the third party's role is merely to assist an attorney in performing her work;
 - b. even if providing assistance to an attorney did suffice to extend the attorney-client privilege, Mr. Mastromonaco was performing independent engineering work, not assisting Mr. Martabano—an experienced land-use attorney—with any aspect of understanding local land-use law; and
 - c. TTO waived any attorney-client privilege that may have attached through selective disclosure.
12. Petitioner respectfully requests that the Court review this application on an expedited basis. OAG is conducting a continuing investigation regarding whether the Trump Organization and Donald J. Trump (Mr. Trump) improperly inflated the value of Mr. Trump's assets on annual financial statements in order to secure loans and obtain economic and tax benefits. One particular focus of this inquiry, as relevant here, is whether the Trump Organization and its agents improperly inflated, or caused to be improperly inflated, valuations of the Seven Springs Estate in Westchester County, which were then used to claim an apparent \$21.1 million tax deduction for donating a conservation easement on the property in tax year 2015, and in submissions to financial institutions as a component of Mr. Trump's net worth. Prompt resolution of the discrete issue presented in this motion for leave to reargue will assist in avoiding any delay to this aspect of OAG's investigation.

13. In particular, OAG has had an outstanding subpoena for testimony from Mr. Mastromonaco since December 2019, and Mr. Mastromonaco provided certain sworn testimony in January 2020, as Petitioner previously advised the Court. *See* First Colangelo Aff. ¶¶ 231, 241 (NYSCEF No. 14). That subpoena hearing has remained open, and Petitioner is respectfully awaiting final determination from this Court in order to conclude Mr. Mastromonaco's Executive Law 63(12) examination. An expeditious ruling on Petitioner's motion for leave to reargue would permit OAG to efficiently conclude that aspect of its investigation.

14. OAG's investigation also involves additional subpoenas for documents and testimony that would benefit from the Court's clarification of its view on any privileges that may attach to communications with a non-client third party. Because of the confidential nature of this ongoing investigation, OAG does not here disclose the identity of such additional third parties; however, one such dispute (involving respondent Morgan, Lewis & Bockius LLP and an engineer involved in the Trump Golf LA transaction) is still before the Court as identified in petitioner's underlying special proceeding. *See* OAG Mem. 50 (NYSCEF No. 13). Prompt resolution of Petitioner's motion for leave to reargue would assist in completing such other areas of this investigation as it concerns subpoenas for documents and testimony to those third parties.

WHEREFORE, Petitioner respectfully requests that the Court grant Petitioner's application for leave to reargue; upon reargument amend this Court's October 16 and October 30, 2020 supplemental orders; order that such documents involving Mr. Mastromonaco be produced; and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 19, 2020


Colleen K. Faherty