

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28003
Y/kmg

_____AD3d_____

Argued - March 23, 2010

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
ANITA R. FLORIO
RUTH C. BALKIN, JJ.

2009-06942

DECISION & ORDER

Rigo Cobenas, et al., plaintiffs, v Ginsburg Development Companies, LLC, et al., defendants second third-party plaintiffs-respondents, Leopard Framing Corp., defendant third-party plaintiff-respondent; Mauricio Soares, third-party defendant, second third-party defendant-appellant (and third- and fourth-third-party actions).

(Index No. 3729/06)

Craig P. Curcio, Middletown, N.Y. (Tony Semidey of counsel), for third-party defendant, second third-party defendant-appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP (Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success, N.Y. [Christopher Simone, Gerard S. Rath, and Deirdre E. Tracey] of counsel), for defendants second-third-party plaintiffs-respondents.

Goldberg Segla, LLP (Gannon, Rosenfarb & Moskowitz, New York, N.Y. [Peter J. Gannon] of counsel), for defendant third-party plaintiff-respondent.

Ginarte, O'Dwyer, Gonzalez, Gallardo & Winograd, LLP, New York, N.Y. (Richard M. Winograd of counsel), for plaintiff Rigo Cobenas.

In an action to recover damages for personal injuries, etc., the third-party defendant second third-party defendant Mauricio Soares appeals from an order of the Supreme Court, Orange County (Lubell, J.), entered June 3, 2009, which granted the motion of the defendant third-party

June 29, 2010

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plaintiff, Leopard Framing Corp., and the separate motion of the defendants second third-party plaintiffs, Ginsburg Development Companies, LLC, Ginsburg Development Companies Corp., GDC Construction & Development Corp. and Fairways Wallkill, LLC, pursuant to CPLR 3126(3) to strike his respective answers to the third-party complaint and the second third-party complaint for failure to appear for a deposition, and directed the entry of default judgments against him.

ORDERED that the order is modified, on the law, by deleting the provisions granting the respective motions of the defendant third-party plaintiff, Leopard Framing Corp., and the defendants second third-party plaintiffs, Ginsburg Development Companies, LLC, Ginsburg Development Companies Corp., GDC Construction & Development Corp., and Fairways Wallkill, LLC, pursuant to CPLR 3126(3) to strike the respective answers of Mauricio Soares to the third-party complaint and the second third-party complaint for failure to appear for a deposition and directing the entry of default judgments against him and substituting therefor a provision granting the motions to the extent of precluding Mauricio Soares from offering any testimony at trial; as so modified, the order is affirmed, with one bill of costs to the appellant payable by the respondents appearing separately and filing separate briefs.

In the absence of evidence that the appellant willfully and contumaciously failed to appear for an examination before trial, the Supreme Court should not have stricken his answer (*see Cambry v Lincoln Gardens*, 50 AD3d 1081; *Conciatori v Port Auth. of N.Y. & N.J.*, 46 AD3d 501). The appropriate remedy was to preclude the appellant from offering any testimony at trial (*see Patel v DeLeon*, 43 AD3d 432; *Williams v Ryder, TRS, Inc.*, 29 AD3d 784).

MASTRO, J.P., DILLON, FLORIO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court