

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

D31244
Y/kmb

_____AD3d_____

Submitted - April 27, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-05963

DECISION & ORDER

Michael Stewart, appellant, v Raymond Corp.,
et al., respondents.

(Index No. 23100/08)

Sweetbaum & Sweetbaum, Lake Success, N.Y. (Marshall D. Sweetbaum of counsel),
for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, New York, N.Y. (Patrick J.
Lawless, Phillip A. Tumbarello, Richard E. Lerner, and Charles DeMartino of
counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Spodek, J.), dated May 26, 2009, which denied his motion for leave to enter judgment against the defendants on the ground that they failed to appear or answer the complaint, and granted the application of the defendants Raymond Corporation, Abel Womack, Inc., and Womack Material Handling Systems, Inc., to compel him to accept their late answers.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied the plaintiff's motion for leave to enter a default judgment against the defendants, which was made on the ground that the defendants failed to appear or answer the complaint. After the action was commenced in August 2008, but before their time to answer expired, the defendants filed a notice to remove the action to federal district court. By this act, the defendants appeared in the action and, thus, could not have been deemed in default (*see City*

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of Newburgh v 96 Broadway LLC, 72 AD3d 632, 633; *Carlin v Carlin*, 52 AD3d 559, 561; *Quinn v Booth Mem. Hosp.*, 239 AD2d 266; *see also Benifits By Design Corp. v Contractor Mgt. Servs., LLC*, 75 AD3d 826, 828; *Matter of Sessa v Board of Assessors of Town of N. Elba*, 46 AD3d 1163, 1164). Accordingly, the Supreme Court properly denied the plaintiff's motion for leave to enter a default judgment against the defendants and properly granted the application of the defendants Raymond Corporation, Abel Womack, Inc., and Womack Material Handling Systems, Inc., to compel the plaintiff to accept their late answers.

MASTRO, J.P., FLORIO, LEVENTHAL, BELEN and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court