

Juseinoski v Board of Education of the City of New York

2005 NY Slip Op 30079(U)

August 4, 2005

Supreme Court, Queens County

Docket Number: 0000845/0845

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10
Justice

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ALI JUSEINOSKI, No. 845/03

Plaintiff, Motion
-against- Date May 31, 2005

THE BOARD OF EDUCATION OF THE Motion
CITY OF NEW YORK, THE NEW YORK Cal. No. 7&8
CITY SCHOOL CONSTRUCTION
AUTHORITY AND THE CITY OF NEW
YORK,

Defendants.

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This order disposes of two separate motions.

Plaintiff commenced this action seeking to recover damages alleged to have been sustained on June 19, 2002, at P.S.29 located at 125-10 23rd Avenue, College Point, County of Queens, City and State of New York during the course of his employment in renovation work at said school.

Plaintiff moves for an order precluding defendants from calling as witnesses at trial their examining physicians Allan R. Miller, MD and Dr. Douglas Cohen, based upon the order dated February 7, 2005, Appellate Division Second Department, which determined that defendants had defaulted in appearing and, therefore, are not entitled to participate

in discovery.

Plaintiff also seeks transfer of this matter to the non-City trial calendar.

In a separate motion, defendants move for an order pursuant to CPLR 5015 vacating the default judgment entered against them.

Contentions of the Parties

Plaintiff argues that a prior order of the court (Schulman, J.) had found that defendants defaulted in answering. Upon re-argument the court vacated such prior order and permitted defendants to interpose an answer. Plaintiff appealed the re-argument order which resulted in the reinstatement of the default judgment against defendants by order dated February 7, 2005 of the Appellate Division 2d Department. During the time when defendants had been permitted to answer, plaintiff was required to participate in court ordered discovery proceedings including physical examinations of plaintiff by two physicians retained by defendants. Defendants would not have been able to obtain such discovery if the original default had been adhered to initially. A defaulting defendant forfeits the right to discovery by defaulting in answering the complaint.

As to the request for transfer to the non-City trial calendar, plaintiff asserts that the action is being defended by private counsel retained by AIG Insurance Company (AIG). Since defendant City's own legal department is not defending and any judgment will be paid by AIG, there is no reason for this action to remain in a City trial part.

Defendants contend that the default judgment should be vacated as a meritorious defense exists, they have a reasonable excuse for the default and the default judgment resulted from misrepresentation or misconduct. Defendants contend that plaintiff's counsel directly contacted the defendants even though he must have been aware that they were represented by counsel. Plaintiff's counsel sent letters directly to the defendants notifying them of his intention to seek default judgments against them. This occurred after defendants' counsel had appeared at the 50-h

hearing. Plaintiff's counsel had orally consented to an extension of time for the defendants to answer but then

moved for the subject default judgment.

Decision of the Court

The motion by plaintiff is granted solely to the extent that this matter is hereby removed from the City part and is to be re-assigned in the regular order to a non-City part and to be placed on the non-City trial calendar in the appropriate place. In all other respects, the plaintiff's motion is denied.

The motion by defendants to vacate the default judgment is denied.

By prior order dated July 28, 2003, (Schulman, J) the court granted plaintiff's motion for leave to enter a default judgment against the defendants and set the matter down for an inquest for an assessment of damages. Defendants' motion to reargue said order was granted by order dated September 26, 2003 (Schulman, J). Upon re-argument the court denied plaintiff's motion for a default judgment. Upon appeal, the Appellate Division 2d Department rendered a decision and order dated February 7, 2005 which, inter alia, reversed the September 26, 2003 order and adhered to the July 28, 2003 order thereby resulting in a default judgment against the defendants.

The prior order of the Appellate Division 2d Department, 15 AD3d 353, clearly found that defendants had "failed to establish that they were not in default in answering the complaint, they did not offer a reasonable excuse for their default and neither their opposition to the original motion nor their motion for leave to reargue contained an affidavit of merit." Defendants further "failed to submit sufficient evidence that the plaintiff agreed to extend their time to answer."

Defendants' original argument as to a reasonable excuse for their default, based upon their insurance carrier's delay, was found to be insufficient by the appellate court.

There was also insufficient evidence that plaintiff's counsel had agreed to an extension of time to answer. On the instant motion, defendants' argument is premised upon the ground that plaintiff's counsel, by his conduct in directly contacting the defendants, with knowledge that they were represented by counsel, prevented defendants' counsel from immediately responding to the complaint and proceeding with the merits of the case in a timely fashion. Defendants again argue that plaintiff's counsel consented to an extension.

All of the factors now claimed by defendants were before the Appellate Division. Allegations of misconduct by plaintiff's counsel were presented to such court as defendants' appellate brief specifically noted his direct contact with the defendants and that he should have been aware of defendants' being represented by counsel. Further, language with respect to such issue appeared in the order dated September 26, 2003 which was the subject of the appeal.

With respect to plaintiff's motion to preclude defendants, it appears that defendants obtained certain discovery during the period of time from the re-argument order to the decision on appeal. The action was treated as a contested matter and discovery continued in accord with the court's procedures. No stay of the matter pending appeal was in effect. As defendants are entitled to defend on the issue of damages at the inquest, discovery which they properly obtained while the appeal was pending will not be precluded.

As defendants are not being represented by the municipality's Corporation Counsel's Office, the action need not proceed in the City Part. Therefore, re-assignment to a non-City Part is appropriate.

Accordingly, the motion by defendants to vacate the default judgment is denied. The motion by plaintiff is granted solely to the extent that this matter is hereby removed from the City part and is to be re-assigned in the regular order to a non-City part and to be placed on the non-City trial calendar in the appropriate place. In all other respects, the plaintiff's motion is denied.

Plaintiff is directed to serve a copy of this order with notice of entry upon defendants and file with the Clerk of the Court with proof of such service and the Trial Term Clerk within 30 days of the entry date of this order.

Dated: August 4, 2005

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HON. DAVID ELLIOT