

<b>Gonzalez v American Steel Processing Co.</b>
2006 NY Slip Op 30808(U)
May 10, 2006
Supreme Court, Suffolk County
Docket Number: 05-19000
Judge: Thomas F. Whelan
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This opinion is uncorrected and not selected for official publication.



**ORDERED** that the defendant's answer attached as an exhibit to this motion shall be deemed served upon the plaintiff upon defendant's service of a copy of this Order with Notice of Entry; and it is further

**ORDERED** that movant herein shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiff within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

**ORDERED** that a Preliminary Conference is scheduled for **June 6, 2006**, at 9:30 a.m., in the DCM Part, at the courthouse located at 235 Griffing Avenue - Annex, Riverhead, New York

In this personal injury action, plaintiff alleges he was injured while on the defendant's property uncoupling a trailer from a tractor. Plaintiff moved in November, 2005 for a default judgment and his unopposed motion was granted by Order, dated December 23, 2005.

Defendant now moves by Order To Show Cause (Whelan, J.) dated February 8, 2006, for an Order vacating its default for failing to answer plaintiff's complaint, directing plaintiff to accept defendant's answer and canceling the inquest now scheduled for May 26, 2006. According to the affidavit of Richard Kingry (hereinafter "Kingry"), defendant's General Manager, dated February 7, 2006, defendant does not deny receipt of the summons and complaint at its Hicksville office where the accident occurred. Kingry further states that upon receipt of the summons and complaint, it was promptly forwarded to its Florida office, which in turn sent it to its insurer. The insurer disclaimed coverage.<sup>1</sup> Unfortunately, instead of sending the disclaimer notice, which was addressed to Kingry, to the Hicksville office, the insurer sent it to the Florida office. Again, for reasons not set forth in the record, this disclaimer letter was not forwarded to Kingry at the Hicksville office and it was not until Kingry received this Courts' Order, dated December 23, 2005, did defendant become aware of the fact it was in default.

Upon receipt of the Order, Kingry immediately contacted its Florida office and corporate office in Pennsylvania at which time he learned for the first time of the disclaimer by their insurer from the Florida broker. Upon the recommendation of their corporate counsel, local counsel was retained. Kingry states that defendant believed at the time it forwarded the summons and complaint to Florida, a legal defense would be provided by their insurer; that because of an error in mailing the denial of coverage, defendant in the Hicksville office did not realize the claim had been denied until it received the notice of default in the Court's Order; that while defendant did business with plaintiff's employer, a non-party to this action, the sole responsibility for the usage and operation of the trailer was that of plaintiff's employer; that defendant was not responsible to plaintiff, who was injured when struck by a crank handle while attempting to lower a trailer leg; that plaintiff's employer was responsible for all aspects of plaintiff's work, training and operation of the trailer and its parts, not defendant; and that although the complaint alleges in its various causes of action that

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<sup>1</sup> The record before the Court does not indicate the reasons the disclaimer was issued.

defendant was responsible for the accident occurring, Kingry denies this fact as set forth in the complaint.

Upon being retained by defendant, counsel contacted plaintiff's counsel to attempt settlement negotiations and to vacate the default. Although plaintiff's counsel was amenable to this based upon certain conditions being met, including defendant's reimbursement of plaintiff's costs for the inquest, this amenable agreement was terminated when plaintiff's counsel was informed that defendant sold the trailer before the lawsuit was commenced.

While it is the avowed public policy of this State which favors the resolution of issues on their merits (see *Delgado v York*, 245 AD2d 123, 655 NYS2d 885 [1<sup>st</sup> Dept 1997]), it is still incumbent upon the moving party to show a reasonable excuse for the default. Among the factors to be considered by a Court are whether the neglect was excusable, the lack of prejudice to the plaintiff, a good faith intent to defend, the meritorious nature of the defense and the extent of the delay (see *Thompson v Steuben Realty*, 18 AD2d 864, 795 NYS2d 470 [2d Dept 2005]; *Stolpiec v Wiener*, 100 AD2d 931, 474 NYS2d 820 [2d Dept 1984]; *Weissbalum v Mostafzafan Found.*, 99 AD2d 70, 474 NYS2d 1 [1<sup>st</sup> Dept 1984]).

The determination as to the sufficiency of the moving defendant's application is a matter committed to the proper exercise of the Court's discretionary authority (see *Phillips, Nizer, Benjamin, Krim & Ballon v Matteo*, 271 AD2d 422, 706 NYS2d 898 [2d Dept 2000]; *Liberty Mut. Ins. Co. v Hermes Agency and Ship Supplies Corp.*, 251 AD2d 381, 672 NYS2d 817 [2d Dept 1998]). A defendant must demonstrate a meritorious defense by submitting an affidavit containing evidentiary facts by a person with personal knowledge of the facts (see *Vernon v Nassau Cty. Med Ctr.* 102 AD2d 477 NYS2d 24 [2d Dept 1984]; *Essner v Keavy*, 104 AD2d 632, 480 NYS2d 12 [2d Dept 1984]; *Hatcher v City of New York*, 99 AD2d 481, 470 NYS2d 420 [2d Dept 1984]). "The defendant is not required to establish its defense as a matter of law; it need only set forth sufficient facts to make out a prima facie showing of a meritorious defense" (*Quis v Bolden*, 298 AD2d 375, 751 NYS2d 388 [2d Dept 2002]; *citations omitted*).

Here, defendant has provided the Court with a reasonable excuse for its default based upon a series of unfortunate errors which occurred between diverse regional offices of the corporation and the apparent lack of centralization in handling legal matters. The defendant was forthright in its admission as to the reasons for not responding to plaintiff's complaint and subsequent motion papers. Further, when served with this Court's Order, defendant promptly moved, without delay, and retained local counsel, thus obviating any lingering indica of willfulness on defendant's part to avoid notice of this action (see *Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]).

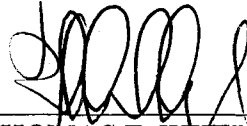
The record indicates that the defendant's default was reasonable under the facts circumstances presented and not intentional or the result of bad faith (see *Bradley v Evans*, 297 AD2d 392, 746 NYS2d 617 [2d Dept 2002]).

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Accordingly, the motion is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED:

5/19/06



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THOMAS F. WHELAN, J.S.C.