

Keating v City of New York

2007 NY Slip Op 30404(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0115098

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
J.S.C.
Justice

PART 5

KEATING,
- v -
CITY

INDEX NO. 115098-06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2, 3, 4</u>
<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

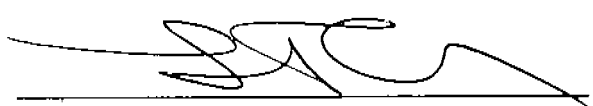
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NEW YORK
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EILEEN A. RAKOWER
J.S.C.

Dated: 3/23/07


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
EVA KEATING,

Plaintiff,

Index No.
115098/06

- against -

Decision and Order

CITY OF NEW YORK; THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION;
METROPOLITAN HOSPITAL CENTER; LOUIS
MARTIR; JOSE SANCHEZ; MATTHEW TAYLOR;
FRANCISCO MERCADO; CHARLES DELANY; DR.
NANDINI GADKAR; DR. HUSSEIN MATARI; JOHN
COSTELLO; ANDREW MORALES; AND NEW YORK
MEDICAL COLLEGE,

Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for injuries sustained when she was allegedly exposed to a toxic substance during her employment. Plaintiff also claims damages as a result of "retaliatory personnel action" taken by her employer in violation of New York Labor Law §740 and §741. Plaintiff now moves for default judgment against defendants Louis Martir ("Martir") and New York Medical College ("NYMC"). Martir and NYMC oppose plaintiff's motion. Defendants The City of New York ("City"), New York City Health and Hospitals Corporation ("HHC"), Metropolitan Health Center ("MHC"), Jose Sanchez, Matthew Taylor, Francisco Mercado, Charles Delany, Dr. Nandini Gadkar, Dr. Hussein Matari, John Costello, and Andrew Morales do not submit papers in this matter.

Plaintiff alleges that while she was employed at MHC she was exposed to carbon monoxide which was present in the hospital's ultrasound room. As a result of this exposure, plaintiff had to seek emergency medical treatment on at least four occasions. Plaintiff reported the hazard to the Occupational Safety and Health Administration ("OSHA") via telephone and fax. After her last emergency room visit, plaintiff did not return to work and applied for worker's compensation benefits.

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Thereafter, she was terminated from her employment.

I. Plaintiff's Motion for a Default Judgment Against Martir

Plaintiff, in support of her motion, argues that she served Martir by personal delivery and on November 3, 2006 and that he was required to file and answer by November 23, 2006. Plaintiff asserts that, to date, Martir has not appeared.

Martir, represented by the Corporation Counsel, opposes the motion. Martir first argues that his delay in answering was reasonable. Plaintiff served most of the individually named HHC defendants at Metropolitan Hospital, but because Martir was no longer employed at the time of service, he was served at his home. Shortly thereafter Martir made a request to be represented by Corporation Counsel. In response, Corporation Counsel did an investigation to determine whether Martir was eligible for representation. Martir argues that this is a time consuming process. Additionally, Martir contends that the issue was further complicated because he had filed a Notice of Claim upon the City relating to his loss of employment with HHC and the proper ethical protocols had to be followed in order to protect Martir's rights in both cases. Martir next argues that he has a meritorious defense. Martir attaches an amended answer to his moving papers in which he joins in the defenses of his co defendants and claims that he, as an individual acting in the exercise of discretion in the performance of a governmental function and/or in the exercise of professional judgment, is immune from suit.

CPLR §3012(d) states:

“Upon the application of a party the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”

The court in *Bunch v. Dollar Budget*, 12 A.D.3d 391 (2nd Dept. 2004) held that:

“The defendant's delay in appearing and answering was brief, the default was not willful, and there was no evidence that the plaintiff was prejudiced... Moreover, public policy favors the resolution of cases on the merits.”

II. Plaintiff's Motion for Default Judgment Against NYMC

Plaintiff argues that it served NYMC on October 19, 2006 pursuant to New York Not for Profit Corporation Law §306 via the New York Secretary of State ("Secretary"). NYMC was required to file its answer by November 30, 2006. To date, NYMC has not done so.

NYMC, in opposition, argues that it never received the summons and complaint from the Secretary of State and, thus, it has a reasonable excuse for the delay in serving the answer. NYMC claims that the Secretary apparently sent a copy by certified mail but that the envelope was returned and marked "Attempted Unknown/Not Known."

By way of reply, plaintiff claims that when she entered the USPS certified number on its track and confirm website it confirmed delivery and displayed a signature of C. Shaw. Upon further investigation, plaintiff discovered that C. Shaw was Calvin Shaw and that he worked in NYMC's mail room.

NYMC provides a proposed verified answer with affirmative defenses. It asserts that NYMC has a meritorious defense in that, among other things, plaintiff abandoned her job.

While Plaintiff did properly serve NYMC pursuant to §306, and NYMC's excuse for its delay is no more than intra office failure, the delay in answering has not been so long as to prejudice the plaintiff and NYMC provides a meritorious defense.

Wherefore it is hereby

ORDERED that plaintiff's motion for a default judgment against defendant Louis Martir is denied; and it is further


ORDERED that plaintiff's motion for a default judgement against defendant New York Medical College is denied; and it is further

ORDERED that defendant Louis Martir's answer is deemed timely filed and served in the form appended to the opposition papers upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant New York Medical College's answer is deemed timely filed and served in the form appended to the opposition paper upon service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 22, 2007



EILEEN A. RAKOWER, J.S.C.

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