

Paez v Shah

2007 NY Slip Op 30715(U)

March 30, 2007

Supreme Court, Suffolk County

Docket Number: 0001184/2006

Judge: William B. Rebolini

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 7 - SUFFOLK COUNTY

P R E S E N T :

Hon. WILLIAM B. REBOLINI
Justice of the Supreme Court

MOTION DATE 4/11/06 (#001,002)
6/15/06 (#003)
8/17/06 (#004)
ADJ. DATE 6/21/06 (001,002,003)
8/23/06 (#004)

Mot. Seq. # 001 - MD
002 - XMG
003 - MD
004 - MG

-----X
ERIC PAEZ, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 HEMAL SHAH and SURENDRA SHAH, :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 24 read on the motion by plaintiff pursuant to CPLR 3215 for a default judgment on the issue of liability against defendant Surendra Shah, and on the cross motion by Surendra Shah to compel plaintiff to accept his answer; and on the motion by plaintiff pursuant to CPLR 3215 for a default judgment on the issue of liability against defendant Hemal Shah; and on the motion by Hemal Shah to vacate any default judgment entered against him and for leave to serve a late answer; Notice of Motion/ Order to Show Cause and supporting papers 1-4, 10-16; Notice of Cross Motion and supporting papers 5 - 9; Answering Affidavits and supporting papers 17 - 22; Replying Affidavits and supporting papers 23 - 24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motions are consolidated and decided together; and it is further

ORDERED that the motion for a default judgment by plaintiff against defendant Surendra Shah is denied; and it is further

ORDERED that the cross motion by defendant Surendra Shah to compel plaintiff to accept said defendant's answer is granted and the answer in the form attached to this defendant's papers shall be deemed served upon service of a copy of this order; and it is further

ORDERED that the motion for a default judgment by plaintiff against defendant Hemal Shah is denied; and it is further

ORDERED that the branch of the motion by defendant Hemal Shah for leave to serve a late answer is granted and the answer in the form attached to this defendant's papers shall be deemed served upon service of a copy of this order.

This is an action for personal injuries allegedly sustained by plaintiff on August 25, 2005 while working on a renovation project at 84 Iceland Drive in Huntington Station, New York (the "premises"). Plaintiff contends that at the time of the accident, he was using an electric table saw that lacked a guard, and as a result, his fingers came in contact with the blade causing him to sustain serious injuries, including losing a portion of one of his fingers.

Plaintiff commenced this action against the defendants for violations of Labor Law § 241(6) and § 200 and for common-law negligence. In his complaint, plaintiff alleges that Hemal Shah is the record owner of the premises and that Surendra Shah has an equitable ownership interest in the premises. It is also alleged that Surendra Shah was the general contractor for the renovation project and hired plaintiff's employer to perform the work. Additionally, the complaint contains allegations that both defendants controlled and supervised the renovation project.

In support of his motions for a default judgment, plaintiff asserts that both defendants were served with a summons and complaint, and has annexed the affidavits of service of the process server. Plaintiff asserts that as of the date of the instant motions, the defendants were in default as neither had timely interposed an answer to the complaint, timely requested an extension of time to do so, or otherwise appeared in the action. Thus, plaintiff maintains he is entitled to the entry of a default judgment against each defendant on the issue of liability.

Surendra Shah cross-moves to compel plaintiff to accept his late answer pursuant to CPLR 30.2(d), and argues that plaintiff's motion is defective. Hemal Shah moves to vacate any default judgment entered against him and for leave to serve a late answer, and argues that plaintiff's motion is premature as it was filed prior to the expiration of his time to answer or appear. Additionally, the defendants argue that there is no legal or factual basis to hold them liable for plaintiff's accident.

On an application for a default judgment for failure to answer or otherwise appear in the action, the plaintiff has the burden of submitting "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due" (CPLR 3215[f]). Additionally, the court retains the discretionary obligation to determine whether the movant has met the burden of stating a prima facie case (*see, Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314 [2005]; *Dyno v Rose*, 260 AD2d 694, 687 NYS2d 497, *lv denied* 94 NY2d 753, 700 NYS2d 426 [1999]). If it is determined that the proffer of proof is insufficient to establish the prima facie validity of the causes of action, the movant is not entitled to the relief requested in the complaint, even on default (*see, Beaton v Transit Facility Corp.*, *supra*; *Dyno v Rose*, *supra*).

In the case at bar, plaintiff has failed to establish that, at the time the motion was made, Hemal Shah was in default. Based on the affidavit of the process server, Hemal Shah was served pursuant to

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CPLR 308(4) by affixing a copy of the summons and complaint to the door of his residence on March 16, 2006, followed by the requisite mailing on March 17, 2006. According to the court's records, the affidavit of service of the process server was filed in the Clerk's Office on April 14, 2006. Service was completed ten days later, i.e., on April 24, 2006 (*see*, CPLR 308[d]), giving Hemal Shah until May 24, 2006, thirty days after service was completed, to answer or otherwise appear in the action (*see*, CPLR 320[a]; CPLR 3012[c]). Therefore, when plaintiff filed the motion against this defendant on May 19, 2006, his time to answer or otherwise appear in the action had not yet expired. Consequently, plaintiff is not entitled to the entry of a default judgment against Hemal Shah (*see*, *Paracha v County of Nassau*, 228 AD2d 422, 643 NYS2d 637 [1996]; *Cooper v Mansfield*, 6 Misc3d 402, 789 NYS2d 648 [2004]).

Additionally, the court will exercise its discretion and grant the motion by Hemal Shah and the cross motion by Surendra Shah to file a late answer. The fact that each defendant failed to seek an extension prior to the expiration of the time in which to serve an answer is not a bar to the court's excusing the short delay and granting such permission (*see*, CPLR 2004; *Sumner v Reich*, 92 AD2d 590, 459 NYS2d 481 [1983]). Moreover, the total absence of any prejudice to plaintiff is evident from the fact that Hemal Shah's time to answer had not yet expired at the time plaintiff made his motion (*see*, *Sumner v Reich*, *supra*). On the other hand, both defendants would be unduly prejudiced since the allegations in plaintiff's complaint, even if taken as true, are purely conclusory (*see*, e.g., *Beaton v Transit Facility Corp.*, *supra*).

Furthermore, in opposition to the motion each defendant has established that a possible meritorious defense exists. Hemal Shah asserts that he resides at the premises which is a single-family dwelling, and that he did not direct or control the work, provide any equipment or supervise the method or manner in which the injury-producing work was performed. Therefore, this defendant has a potential meritorious defense that he is entitled to the protection of the homeowner exemption (*see*, Labor Law § 241; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]) and that he cannot be held liable under Labor Law § 200 or for common-law negligence (*see*, *Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Baez v Cow Bay Constr.*, 303 AD2d 528, 756 NYS2d 281 [2003], *lv denied* 2 NY3d 701, 778 NYS2d 459 [2004]).

Similarly, the affidavit submitted by Surendra Shah in opposition to the motion and in support of the cross motion raises a potential meritorious defense. Surendra Shah denies that he owns or has an interest in the premises, hired plaintiff's employer, or that he controlled or directed the renovation project in any manner. Consequently, as liability under the Labor Law "rests upon the fact of ownership" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560, 606 NYS2d 127, 130 [1993]), Surendra Shah has raised a potential defense as to whether a basis exists to hold him liable for plaintiff's accident under the Labor Law or for common-law negligence (*see*, *Berrios v TEG Management Corp.*, 7 AD3d 555, 777 NYS2d 163 [2004]; *Mangiameli v Galante*, 171 AD2d 162, 574 NYS2d 842 [1991]).

Dated: March 30, 2007

William B. Reardon

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION