

Latef v New York City Hous. Auth.

2007 NY Slip Op 30834(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0120906/2003

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

RASHIDA LATEF,
Plaintiff,

Index No.: 120906/03

- v -

Motion Date: 12/12/06

NEW YORK CITY HOUSING AUTHORITY,
ARCH-CONCEPT CONSTRUCTION, INC., AND
SASCO WATERPROOFING COMPANY, INC.,
Defendants.

Motion Seq. No.: 03

Motion Cal. No.: OSC

ARCH-CONCEPT CONSTRUCTION, INC.,
Third-Party Plaintiff,

- v -

SASCO WATERPROOFING COMPANY, INC.,
Third-Party Defendant.

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion to vacate.

| PAPERS NUMBERED | |
|-----------------|--|
| 1, 2 | |
| 3 - 5 | |
| | |

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

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall deny the plaintiff's motion to vacate the default in opposing the defendants' summary judgment motions that were granted by this court on default after oral argument in an Order dated January 31, 2006.

This court's Order granting summary judgment dismissing plaintiff's complaint dated January 31, 2006, was entered on February 8, 2006. Plaintiff now moves to vacate that Order by

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

Order to Show Cause signed on November 6, 2006, nearly nine months later. Plaintiff's counsel argues that the original Order to Show Cause was not opposed because of counsel's need to depose a non-party witness in order to submit complete opposition. Plaintiff argues that the action has merit based upon the plaintiff's and witness' affidavits submitted in support of the motion. Defendants oppose the motion and the court agrees that plaintiff has failed to present a sufficient excuse and facts to support relief under CPLR 5015 (a).

Plaintiff's counsel fails to present any reasonable excuse for the failure to submit opposition to the summary judgment motion. He states that "your affirmant prepared opposition but inadvertently failed to serve same and failed to oppose the motion. Your affirmant believed that the opposition papers had been served and filed." He also admits that he sought the consent of defense counsel to extend his time to serve opposition papers. Based on his description of what took place, plaintiff's counsel could have sought leave of court to submit late opposition papers or brought an Order to Show Cause to vacate the default when the court heard oral argument on this motion on January 31, 2006. Further, since plaintiff's counsel was on notice of the hearing date of the defaulted motions, he could have promptly thereafter made an application rather than waiting for nearly a year. Thus, plaintiff's counsel has not established

the ever ready excuse of law office failure to justify the default. See Johnson v Nello Homes, Inc., 159 AD2d 562 (2d Dept 1990) ("While the plaintiff's initial default in opposing the defendants' motion for summary judgment may have been the result of excusable law office failure, he failed to adequately justify his almost six-month delay in moving to vacate that default."); contrast Weekes v Karayianakis, 304 AD2d 561, 562 (2d Dept 2003) ("plaintiff's failure to submit papers in opposition to the defendant's cross motion for summary judgment was neither willful nor deliberate"). Nor does his excuse that he needed a non-party affidavit establish excusable default, as plaintiff's counsel was free to state his need for additional discovery in any opposition papers.

As to the merits of plaintiff's claim, in her affidavit, plaintiff states that she is legally blind and did not see the instrumentality, claimed to be a "log", railroad tie or piece of lumber, which caused her fall. By affidavit, Lewis Barrett, an employee of defendant New York City Housing Authority ("NYCHA"), asserts that Arch-Concept Construction, Inc., NYCHA's general contractor, was responsible for the wood posts depicted in the photographs attached to plaintiff's notice of claim. While such assertion constitutes circumstantial evidence sufficient to establish a meritorious claim, plaintiff's counsel's failure to

demonstrate a reasonable excuse is fatal to plaintiff's application to vacate summary judgment granted on default.

Accordingly, it is

ORDERED that the motion is DENIED.

This is the decision and order of the court.

Dated: April 16, 2007

ENTER:

~~11 11 2006~~
J.S.C.
DEBRA A. JAMES
J.S.C.

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