

New Hampshire Ins. Co. v Cedillo

2008 NY Slip Op 31787(U)

June 25, 2008

Supreme Court, New York County

Docket Number: 0101544/2007

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 25

NEW HAMPSHIRE INSURANCE CO.

INDEX NO. 101544/07

- v -

MOTION DATE _____

CESAR CORDILLO

MOTION SEQ. NO. 3

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 26 2008

NEW YORK COUNTY CLERKS OFFICE

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

Dated: 6/25/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

-----X

NEW HAMPSHIRE INSURANCE COMPANY
a/s/o ABRAHAM KNOPLER AND NEW HAMPSHIRE
INSURANCE COMPANY, Individually,

Plaintiffs,

Index No.
109544/07

-against-

CESAR CEDILLO, 641 MYRTLE AVENUE CORP.,
KATHY & TANIA, INC., "JOHN DOE 1,"
the name being fictitious and
intending to designate the general
contractor, and "JOHN DOE 2," the name
being fictitious and intending to
designate the excavation contractor,

Defendants.

-----X

WALTER TOLUB, J.:

FILED
JUN 28 2008
NEW YORK
CLERK'S OFFICE

Defendants 641 Myrtle Avenue Corp. and Kathy & Tania, Inc.
(collectively referred to as the Corporate Defendants) seek; (1)
an order vacating this court's order dated October 10, 2007,
which granted plaintiffs' motion for summary judgment on the
issue of liability by default and referred this matter to a
Special Referee to conduct a hearing on the issue of damages; and
(2) a stay of the hearing on the issue of plaintiffs' damages
pending the hearing and determination of the motion. This court
granted a stay pending the determination of the instant motion.

This action seeks damages arising from defendants' alleged
negligent excavation, demolition and construction of a building
located at 641 Myrtle Avenue, Brooklyn, New York (the Subject
Premises), which caused the building to collapse and caused

structural damage to an adjoining building at 639 Myrtle Avenue, Brooklyn, New York, owned by plaintiff's subrogee, Abraham Knopler. This action was commenced by filing a summons and complaint with this court on July 11, 2007 and serving defendants on July 20, 2007. Since defendants failed to appear or otherwise respond to the summons and complaint after service, plaintiffs moved for a default judgment pursuant to CPLR 3215. On October 10, 2007, the application was granted on default on the issue of liability, and the issue of plaintiffs' damages was referred to a Special Referee to hear and report.

Now defendants move, pursuant to CPLR 317 and 5015 (a) (1), to vacate the default judgment. In their supporting papers, defendants initially claim that the service of the summons and complaint was improper and that they have meritorious defenses to the action and an excusable default. However, in their reply papers, defendants argue for the first time that the default judgment is defective based on plaintiffs' failure to submit any evidentiary proof of liability in support of their application. They note that plaintiffs' application contained only an attorney's affidavit containing no facts of personal knowledge and an unverified complaint. Thus, plaintiffs maintain that the default judgment should be vacated based on this error. In their sur-reply affirmation, plaintiffs' counsel does not deny this error, but instead argues that defendants improperly raise this

new issue in their reply. Plaintiffs' counsel seeks to correct this error by now proffering plaintiffs' verification to the complaint.

Although defendants raise this argument for the first time in their reply papers, it may be considered since plaintiffs had an opportunity to respond and did in fact submit a sur-reply (see Valure v Century 21 Grand, 35 AD3d 591 [2d Dept 2006]). Further, as noted by defendants, CPLR 3215 (f) requires a party seeking a default judgment to submit proof of the facts constituting the claim. It "'does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action'" (Guzetti v City of New York, 32 AD3d 234, 235 [1st Dept 2006], quoting Joosten v Gale, 129 AD2d 531, 535 [1987]).

Here, a review of the underlying motion papers reveals that plaintiffs did not submit an affidavit in support of their motion, their counsel's affidavit did not contain any personal knowledge of the facts constituting their claim and the complaint filed by them was unverified. These submissions are insufficient to sustain the entry of a default judgment (see Guzetti v City of New York, 32 AD3d 234, supra). Therefore, the entry of a default judgment against defendants was in error and must be deemed a nullity (Feffer v Malpeso, 210 AD2d 60 [1st Dept 1994]).

