

Kent Waterfront Bldrs. LLC v Prowse

2008 NY Slip Op 33323(U)

December 9, 2008

Supreme Court, New York County

Docket Number: 105692/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT:

J.S.C.
Justice

PART 11

Index Number : 105692/2007
KENT WATERFRONT BUILDERS LLC
VS.
PROWSE, HECTOR
SEQUENCE NUMBER : # 001
DEFAULT JUDGMENT

INDEX NO. 105692-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is determined in accordance with the annexed decision and order

FILED
DEC 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 9, 2008

J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

KENT WATERFRONT BUILDERS LLC,

Plaintiff,

INDEX NO. 105692/07

-against-

HECTOR PROWSE,

Defendants.

-----X

JOAN A. MADDEN, J.:

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

In this action asserting claims for malicious prosecution and injunctive relief, plaintiff Kent Waterfront Builders LLC ("Kent") moves for an order granting a default judgment based on defendant Hector Prowse's failure to appear and answer. Defendant Prowse, pro se, submits an affidavit in opposition to the motion.

The following facts are not disputed unless otherwise noted. From approximately March to September 2005, defendant Prowse was employed by plaintiff Kent as a construction supervisor; on September 6, 2005, his employment was terminated. Shortly thereafter, in September 2005, Prowse, pro se, filed an action against Kent in Queens County Small Claims Court, to recover two weeks wages (Hector Prowse v. Kent Waterfront Builders, LLC, Index No. SCQ 5940/05, Civil Court of the City of New York, County of Queens, Small Claims Part). On July 24, 2006, the Hon. Joseph J. Esposito issued a judgment, after trial, in favor of Kent, dismissing Prowse's claims. Prowse subsequently took an appeal and on December 12, 2007, the Appellate Term, Second Department issued a decision and order affirming the dismissal.

Meanwhile, in about October 2005, Prowse, pro se, filed a complaint against Kent with the Equal Employment Opportunity Commission (“EEOC”), which he subsequently withdrew.

In or about April 2006, Prowse, through counsel, commenced an action against Kent, *inter alia*, in Supreme Court, Kings County (Hector Prowse v. Kent Waterfront Builders, LLC, BFC Construction Corp., Peter Ferrara, and Martin Berkowitz, Index No. 10821/06, Supreme Court, County of Kings). The complaint seeks \$2 million in damages and asserts 11 causes of action, including hostile work environment, age discrimination, assault, battery, defamation, racial discrimination and breach of contract. That action is presently pending.

In August 2006, Prowse, pro se, commenced an action against Kent in Civil Court, Queens County, seeking \$9,600 in back wages for overtime (Hector Prowse v. Kent Waterfront Builders LLC, Index No. 101606/06, Civil Court of the City of New York, County of Queens). By a decision and order dated February 16, 2007, the Hon. Maureen A. Healy granted Kent’s motion to dismiss on the grounds of res judicata. Judge Healy noted that at the trial in Small Claims Court, Prowse “specifically discussed the fact that he worked many hours of overtime, and was not paid for the time. Judge Esposito found for the defendant, and dismissed plaintiff’s complaint. By the within action, plaintiff seeks to be compensated for the same period of time [and] seeks a larger sum than in the Small Claims action.” Judge Healy held that Prowse was precluded from again suing Kent “for the same cause of action in the regular part of the court even if plaintiff seeks more damages than claimed in the small claims action.” Judge Healy, however, explicitly “declin[d] to enjoin plaintiff from filing further actions inasmuch as he is a lay person unfamiliar with the concept of collateral estoppel, and this is only the second filing in

this Court. The Court is aware of the power to take such actions if future actions of plaintiff are deemed an abuse of the judicial process and done solely out of ill will or spite.”

In April 2007, Kent commenced the instant action against Prowse in this court, asserting a first cause of action for malicious prosecution, and a second cause of action for injunctive relief. The malicious prosecution claim seeks an unspecified amount of compensatory damages and punitive damages in the amount of \$500,000. The complaint alleges that Prowse “maliciously filed and prosecuted” three lawsuits, “with the intent to harm KWB [Kent] and without excuse or justification,” that such lawsuits “interfered with KWB’s person and property,” and that Kent “suffered damages as a result of the improper and wrongful filing and prosecution of the Lawsuits, in an amount to be proven at the trial of this action.” The complaint further alleges that Prowse’s conduct “was wanton, willful and malicious,” and that [b]y reason of the foregoing, punitive damages should be assessed against Prowse.”

In the second cause of action, Kent seeks an injunction “permanently restraining and enjoining Prowse from filing, commencing or prosecuting any lawsuit or proceeding against KWB [Kent] or any of its current or former members, affiliates, employees or agents without obtaining prior leave of court.” The complaint alleges that Prowse, “a disgruntled former employee of KWB [Kent], has demonstrated that he will continue to file baseless actions and proceedings against KWB and those affiliated with KWB unless enjoined,” and absent injunctive relief, Kent “will be faced with the necessity of continuing to expend legal fees to defend Prowse’s onslaught of frivolous and vexatious claims.”

Kent is now moving for a default judgment on the issue of liability as to its first cause of action for malicious prosecution, and for a default judgment as to its second cause of action for

an injunction. Although Prowse has not served an answer, he has appeared pro se and submits an affidavit in opposition to Kent's motion.

As a general rule, a defendant opposing a motion for a default judgment or seeking to vacate his default in answering, must demonstrate a reasonable excuse for the default, and the existence of a meritorious defense. See CPLR 5015(a); Eugenc DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141 (1986); Theatre Row Phase II Assocs v. H & I, Inc., 27 AD3d 216 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful, and the opposing party is not prejudiced. See Harris v. City of New York, 30 AD3d 461 (2nd Dept 2006); Heslek's West 38th Street Corp. v. Gotham Construction Co., LLC, 14 AD3d 306 (1st Dept 2005).

The court finds that Kent is not entitled to a default judgment against Prowse. From the face of the complaint, Prowse had meritorious defenses, as the claims asserted against him appear to be without merit. The elements of the first cause of action for malicious prosecution of a civil action are: 1) prosecution of a civil action against plaintiff, 2) by or at the instance of defendant, 3) without probable cause, 4) with malice, 5) which terminates in plaintiff's favor, and 6) causes special injury to plaintiff. See Engle v. CBS, Inc., 93 NY2d 195, 204 (1999); Wilhelmina Models, Inc. v. Fleisher, 19 AD3d 267 (1st Dept 2005). The special injury requirement requires a "highly substantial and identifiable interference with person, property or business," such as the arrest of a person, attachment of property, or any other "verifiable burden substantially equivalent to the provisional remedy effect." Engle v. CBS, Inc.,

supra at 205. In other words, “what is ‘special’ about special injury . . . is some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit.” Id.

Here, Kent fails to satisfy the special injury requirement, as the complaint merely alleges that Prowse “interfered” with Kent’s “person and property,” and that Kent “suffered damages as a result of the improper and wrongful filing and prosecution of the Lawsuits, in an amount to be proven at the trial of this action.” Such vague and conclusory allegations fail to show a concrete identifiable harm necessary to establish special injury and sustain a claim for malicious civil prosecution. See id; Howard v. City of New York, 294 AD2d 184 (1st Dept 2002). Absent special injury, plaintiff’s malicious prosecution claim facially lacks merit.

In the second cause of action for injunctive relief, Kent seeks to enjoin Prowse from filing, commencing or prosecuting any lawsuit or proceeding against Kent without obtaining prior leave of court. Kent previously sought and was denied the identical relief by Judge Healy in February 2007, who declined to “enjoin [Prowse] from filing further actions inasmuch as he is a lay person unfamiliar with the concept of collateral estoppel, and this only the second filing in this Court.” Kent does not assert that Prowse has commenced any additional lawsuits since Judge Healy’s dismissal in February 2007. Thus, as the circumstances remain unchanged, this court is bound by Judge Healy’s determination denying the identical injunctive relief, and Kent’s claim for such relief is facially lacking in merit.

As his excuse for his default, Prowse asserts that he did not answer the complaint “because [I] did not know about it.” Specifically, Prowse states that the summons and complaint

were left at the door of his residence on May 21, 2007, but he did not receive it since he underwent hernia surgery three days before that date and went to Florida for six weeks “to get well.” When these circumstances are considered together with the lack of evidence in the record that Prowse’s default was willful, and in the absence of any demonstrable prejudice (Kent does not allege that any prejudice has been sustained), and in view of the meritorious defenses and the strong public policy favoring the resolution of disputes on the merits, Prowse has established excusable default. See Harris v. City of New York, supra; Theatre Row Phase II Assocs v. H & I, Inc., supra; Heslek’s West 38th Street Corp. v. Gotham Construction Co., LLC, supra; Stephenson v. Hotel Employees, Restaurant Employees Union Local 100, 293 AD2d 324 (1st Dept 2002); Navarro v. A. Trenkman Estate, Inc., 279 AD2d 257 (1st Dept 2001).

Based on the foregoing, Kent’s motion for a default judgment is denied. Although Prowse has not submitted a formal cross-motion to vacate his default and serve a late answer, in light of his pro se status and the apparent lack of merit as to the claims asserted against him, the court will treat his affidavit in opposition as including a request for such relief, which the court is granting. Thus, Prowse’s default is vacated, and within 30 days of the date of this order, Prowse shall serve and file either an answer or a pre-answer motion to dismiss the complaint.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for a default judgment is denied; and it is further

ORDERED that defendant’s default is vacated and defendant shall serve and file an answer, or a pre-answer motion to dismiss the complaint, within 30 days of the date of this order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 22, 2009, at 2:00 p.m., in Part 11, Room 351, 60 Centre Street..

The court is notifying the parties by mailing copies of this order.

DATED: December 9, 2008

ENTER:



J.S.C.

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