

Cardona v 45 W. 36th St. Realty Co.

2009 NY Slip Op 30110(U)

January 12, 2009

Supreme Court, New York County

Docket Number: 116603/06

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 116603/2006
CARDONA, VIRGILIO
vs.
45 WEST 36TH STREET REALTY
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in 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

motion (a) and cross-motion(c)
decided in accordance with
the annexed decision/order
of even date.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/09/09

JUDITH J. GISCHE, J.S.C. *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 10

-----X

VIRGILIO CARDONA,

Plaintiff,

-against-

45 WEST 36TH STREET REALTY CO., DORIS
H. SMITH AFFILIATES MANAGEMEN CORP.
and CPS GROUP INC.,

Defendants.

-----X

45 WEST 36TH STREET REALTY CO., DORIS
H. SMITH, SMITH AFFILIATES MANAGEMENT
CORP.,

Third-Party Plaintiffs,

-against-

T-BYTE COMPUTER & WIRELESS, INC., VALLEY
FORGE INSURANCE COMPANY and CNA
INSURANCE COMPANY,

Third-Party Defendants.

-----X

Decision/Order

Index No.: 116603/06

Seq. No. : 003

Present:

Hon. Judith J. Gische

J.S.C.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers

Numbered

Pltf's motion [d j/mt] w/CJG affirm in support, exhs 1

Upon the foregoing papers, the decision and order of the court is as follows:

The main action is for personal injury and the third-party action is for contribution and indemnification. Defendants/Third Party Plaintiffs 45 West 36th Street Realty Co., Doris H. Smith and Smith Affiliates Management Corp. move, pursuant to CPLR §

3215, for an order directing the Clerk of Court to enter a default judgment in their favor and against third-party defendants T-Byte Computer & Wireless, Inc. ("T-Byte"), Valley Forge Insurance Company ("Valley Forge") and CNA Insurance Company ("CNA") on the issue of liability and setting this matter down for an inquest on the issue of damages. This motion is itself submitted to the court on default, though proof of service has been filed.

The third-party plaintiffs have provided proof that T-Byte, Valley Forge and CNA were each served with the amended summons and complaint. The third-party plaintiffs served T-Byte by serving a copy of the third-party summons and complaint on the Secretary of State on February 12, 2008. The third-party plaintiffs served both Valley Forge and CNA by service of the third-party summons and complaint on the Superintendent of Insurance on March 3, 2008. None of these third-party defendants have appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the Court extending their time to do so. Accordingly, T-Byte, Valley Forge and CNA have defaulted in this action.

The third-party plaintiffs are entitled to a default judgment, provided they otherwise demonstrate that they have a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd dept. 2001). While a default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984)], the third-party plaintiffs must still establish their *prima facie* cause of action.

Common law indemnification permits one who has been compelled to pay for the

wrong of another to recover from the wrongdoer the damages it paid to the injured party (Baron v. Grant, 48 AD3d 608 [2d Dept 2008]).

Plaintiff seeks to recover for personal injuries allegedly sustained on April 12, 2004 at the premises known as 45 West 36th Street, New York, New York (the "premises"). The third-party plaintiffs have provided the affidavit of Adam Smith, who is employed as the property manager for the premises. Mr. Smith claims based upon a letter from plaintiff's attorney, plaintiff sustained his injuries while working for T-Byte inside the space leased by defendant CPS Group, Inc., at the premises. Mr. Smith further maintains that "[u]pon information and belief, before beginning work at the building in question, [T-Byte] agreed to purchase insurance for the benefit of third-party plaintiff 45 West 36th Street Realty ("45 West"). Mr. Smith has provided a copy of a Certificate of Insurance dated March 25, 2005 which states that 45 West is an additional insured on the policies of insurance issued to T-Byte by Valley Forge and CNA.

For at least the following reasons, plaintiff is not entitled to a default judgment at this time. The record is devoid of any evidence that T-Byte, Valley Forge or CNA performed any act which caused, contributed to and/or aggravated plaintiff's injuries.. Therefore, the movants have not met their burden on this motion with respect to their claim for common law indemnification. As for the third-party plaintiffs' claim for contractual indemnification, the movants have not even established that there was a contractual relationship between any of them and T-Byte, Valley Forge or CNA. Failure to demonstrate that the third-party defendants contractually obligated themselves to defend and/or indemnify the third-party plaintiffs is fatal to this claim.

Finally, the claim for contribution must also fail. A claim for contribution exists only when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectfully owed to the injured party (Sommer v. Federal Signal Corp., 79 NY2d 540 [1992]). Here, movants have failed to demonstrate that T-Byte, Valley Forge and/or CNA breached a duty it owed to plaintiff which thus contributed to plaintiff's alleged damages.


Therefore, the third-party plaintiffs' motion is granted only to the extent that T-Byte, Valley Forge and CNA's default in appearing is hereby noted. All issues regarding liability and damages are to be decided at an inquest which may be held at the time of the trial of plaintiff's claims in this action.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
January 12, 2009

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK