

Smith v O'Neill

2010 NY Slip Op 31729(U)

June 25, 2010

Sup Ct, Richmond County

Docket Number: 102547/06

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND DCM PART 3

Index No.102547/06
 Motion No.:003,004

ROBERT SMITH,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

JUDITH O'NEILL and
 DAVID O'NEILL,

Defendants

The following items were considered in the review of the following motions: 1) motion for a summary judgment on the complaint based on default, and 2) motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4
Answering Affidavits	2, 5
Replying Affidavits	3, 6
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves for a default judgment against the defendant, David O'Neill. The defendant, Judith O'Neill moves for an order granting her summary judgment dismissing the plaintiff's complaint. The plaintiff's motion is granted to the extent that a default judgment is found against the defendant David O'Neill. The defendant's motion for summary judgment is denied.

Facts

This is an action for personal injuries allegedly sustained as a result of an automobile accident on March 25, 2004. During his examination before trial the plaintiff testified that while he was operating his U.S. Postal Service vehicle the defendant, David O'Neill struck his vehicle while operating a dark sedan. According to Smith at the scene of the accident O'Neill

approached him and asked to use his cell phone. Mr. Smith testified that he obliged. Upon returning the phone to Smith, it is alleged that O'Neill told Smith that he had his cell phone number and he should not call the police or give the police a description of his car.

Smith was picked up at the scene of the accident by his manager and taken to the hospital. Smith's postal supervisor remained at the scene with the postal vehicle and the mail. Smith gave an account to a postal inspector and the matter was investigated. Smith alleges that during the course of the postal inspector's investigation O'Neill called and left a threatening message on his cell phone.

Judith O'Neill appeared for an examination before trial and testified that on the date of the accident, March 25, 2004 she was en route to Florida. She testified further that on the date of the accident she owned two cars, a Sable and a Cadillac. But, during the same examination she testified that she did not own the Cadillac. And she further testified that David O'Neill had told he was in an automobile accident.

By decision and order of this court dated January 5, 2010 this court denied the defendant's insurance carrier's motion to be relieved of the effect of the order dated May 12, 2005. In denying the insurance carrier's motion, this court cited to the statement entered on the record before J.H.O. Pizzuto during a hearing on insurance coverage which admitted coverage of the alleged offending vehicle in this action, which was owned by Judith O'Neill and operated by David O'Neill. Additionally, a March 17, 2008 decision and order of this court directed Hartford Insurance Company to appear on behalf of both David O'Neill and Judith O'Neill. But, the insurance carrier never appeared on behalf of David O'Neill.

The plaintiff now moves for an order holding David O'Neill in default. The counsel for Judith O'Neill opposes this motion arguing that the plaintiff has not acted within one year of the defendant's default. However, since the court's decision and order of January 5, 2010 no answer has been entered on behalf of David O'Neill.

Discussion

Judith O'Neill's Motion for Summary Judgment

It is well established that summary judgment should be granted only if there are no material and triable issues of fact. Summary judgment is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the evidence presented should be scrutinized carefully in the light most favorable to the party opposing the motion.¹

The initial burden on a motion for summary judgment rests with the movant. If, on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and movant's motion should be denied without regard to the sufficiency of the opposition papers.

The Judith O'Neill has come forward with evidence showing that she was en route to Florida on the date of the accident. But, she offers conflicting testimony as to whether she owned the vehicle described by the plaintiff. At one point during her examination before trial she testified that she owned two cars, and at another she testified that she owned only one car having transferred ownership in a Cadillac to her son. However, the record does not reveal any evidence demonstrating a transfer in ownership.

¹ *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

Given the drastic nature of summary judgment, this court finds that the evidence offered by the defendant Judith O'Neill does not satisfy her initial burden on a motion for summary judgment. There is a question of fact as to the ownership of the offending vehicle that must be determined by a trier of fact. Judith O'Neill's motion for summary judgment dismissing the plaintiff's complaint is denied in its entirety.

Plaintiff's Motion for a Default Judgment

The plaintiff moves for summary judgment on this complaint pursuant to CPLR § 3212. The plaintiff's attorney states that he did not move for summary judgment or default within one year of this court's March 17, 2008 decision and order due to the defense counsel's representations that they were moving to be relieved from the effect of that order. Given that the fact that the defense counsel moved to be relieved from their obligation to defendant Judith and David O'Neill, the plaintiff could not move for a default judgment until this court rendered its decision and order in January. As such, the court finds that the plaintiff's time to move for a default did not accrue until after this court's January 5, 2010 decision and order.

Accordingly, it is hereby:

ORDERED, that Judith O'Neill's motion for summary judgment dismissing the plaintiff's complaint is denied; and it is further

ORDERED, that Robert Smith's motion for summary judgment and default against the defendant David O'Neill is granted; and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, July 26, 2010 at 9:30 a.m.** for a pre-trial conference .

ENTER,

DATED: June 25, 2010

Joseph J. Maltese
Justice of the Supreme Court