

Bennett v Hucke

2010 NY Slip Op 31997(U)

July 22, 2010

Supreme Court, Suffolk County

Docket Number: 10131-2007

Judge: Melvyn Tanenbaum

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SHORT FORM ORDER

INDEX NO.10131-2007
INDEX NO. 1872-2005

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #002 & 003 Mot D
R/D: 02/02/10
S/D: 04/14/10

JOSEPH BENNETT, as Guardian of
JAMES BENNETT, an incapacitated person,
and TRACEY BENNETT,

PLTF'S/PET'S ATTY:
GATHMAN & BENNETT, LLP
191 New York Avenue, 2nd Floor
Huntington, NY 11743

Plaintiffs,

-against-

WILLIAM POISSON, ESQ.
(Pltf.- TRACEY BENNETT)
95 Froehlich Farm Boulevard
Woodbury, NY 11797

MICHAEL HUCKE, CINDY HUCKE, ALAN
KIRK, ALAN H. KIRK, INC., ALAN KIRK CUSTOM
HOMES, INC., A&LP CONSTRUCTION CO., INC.,
and ANDREW PERCOCO,

DEFT'S/RESP'S ATTY:
MAZZARA & SMALL, P.C.
(Defts.- KIRK)
800 Veterans Memorial Highway
Hauppauge, NY 11788

Defendants.

JAMES BENNETT and TRACEY BENNETT,

SCHONDEBARE & KORCZ, ESQS.
(Defts.- HUCKE)
353 Veterans Memorial Highway
Ronkonkoma, NY 11779

Plaintiffs,

-against-

MICHAEL HUCKE, CINDY HUCKE, ALAN KIRK,
ALAN H. KIRK, INC., ALAN KIRK CUSTOM HOMES,
INC., A&LP CONSTRUCTION CO., INC. and
ANDREW PERCOCO

ANN BALL, ESQ.
(Defts.- A&LP & PERCOCO)
357 Veterans Memorial Highway
Commack, NY 11725

Index # 1872-2005 Defendants.

Upon the following papers numbered 1 to 29 read on this motion for an order pursuant to CPLR Sec 3212 & 3215 & 22NYCRR 130-1.1 Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-21 Answering Affidavits and supporting papers Replying Affidavits and supporting papers 22-25,26-29 Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants ALAN KIRK and ALAN H. KIRK, INC. s/h/a ALAN KIRK CUSTOM HOMES, INC. ("KIRK") seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiffs complaint and the cross motion by plaintiff JOSEPH BENNETT as Guardian of JAMES BENNETT, an incapacitated person ("BENNETT") seeking an order pursuant to CPLR Section 3215 & 22 NYCRR 130-1.1 granting a default judgment and imposing sanctions against defendants "KIRK" are determined as follows:

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On December 19, 2003 plaintiff JAMES BENNETT ("BENNETT") suffered brain damage as a result of falling from a scaffold during construction of a dwelling on premises owned by defendants MICHAEL HUCKE and CINDY HUCKE. Defendants ALAN KIRK, ALAN H. KIRK, INC., ALAN KIRK CUSTOM HOMES, INC., A&LP CONSTRUCTION CO., INC. and ANDREW PERCOCO were individuals and contracting firms which provided labor, material and equipment at the construction site.

By Order (Leis, J.) dated April 15, 2004 TRACEY BENNETT ("BENNETT's" wife) was appointed his guardian. On January 18, 2005 plaintiffs JAMES BENNETT and TRACEY BENNETT commenced an action asserting claims of negligence and Labor Law violations against each defendant named in this action. On April 13, 2005 the "KIRK" defendants commenced a third party action against BENNETT BUILDING, INC. and J. BENNETT BUILDING, INC. seeking indemnification and contribution from "BENNETT's" employer. By Order dated March 13, 2006 this Court granted a default judgment against the third party defendants on the issue of liability.

By Order (Leis, J.) dated September 14, 2006 JOSEPH BENNETT was appointed interim Guardian of JAMES BENNETT for a period of ninety days. By Order (Leis, J.) dated October 16, 2006 JOSEPH BENNETT was permitted to continue as the interim Guardian of JAMES BENNETT and authorized to retain counsel on "BENNETT's" behalf. On April 13, 2007 plaintiffs incoming counsel commenced this action on behalf of "BENNETT" as an incapacitated person. The complaint sets forth an additional cause of action based upon defendants alleged failure to obtain workmen's compensation insurance.

By Order dated March 18 2008 defendants "KIRKS'" motion to dismiss plaintiffs complaint was granted but plaintiffs were granted permission to re-plead. Plaintiffs served an amended summons and complaint dated September 2, 2008 and appealed from the March 18, order. The amended pleading did not contain a worker's compensation claim. Defendants served an answer to the amended complaint on September 18, 2008. By Decision and Order dated July 7, 2009 the Appellate Division, Second Department reversed the trial court determination on the basis that defendants CPLR Section 3211 motion was untimely not having been made within the time period to serve an answer (citing CPLR Section 3211[e]).

Defendants motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming that another action seeking the identical relief against the same parties is presently pending in this Court (under Index # 1872-2005) and that plaintiffs additional worker's compensation claim is barred by the principles of res judicata and collateral estoppel. In support and in opposition to plaintiffs cross motion, defendants submit two affirmations of counsel and claim

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that the second complaint must be dismissed since it is identical to the 2005 action seeking damages for injuries sustained in the December 19, 2003 accident. Defendants also claim that plaintiffs worker's compensation claims are barred as a result of the default judgment entered against the third party defendants BENNETT BUILDING INC. and J. BENNETT BUILDING INC. and plaintiff's admission set forth in the 2006 verified bill of particulars that "BENNETT" was self employed as a contractor and employed by "J. BENNETT BUILDING INC." Defendants assert that there are no claims set forth in any complaint that "BENNETT" was a "special employee" or a "loaned employee" of any corporate defendant. Defendants argue that plaintiffs cross motion seeking an order granting a default judgment against the "KIRK" defendants on the basis that they failed to serve an answer to the complaint must be denied since plaintiffs served an amended complaint which superseded the original complaint. Defendants claim that they served a timely answer to the amended complaint and therefore plaintiffs application is moot. Defendants also claim that plaintiffs have delayed prosecuting this action and plaintiff's application seeking sanctions must also be denied.

In opposition and in support of the cross motion plaintiffs submit two affirmations of counsel and claim that it was necessary to commence a second action to name the correct party in interest (plaintiff's legal guardian) and substitution could not be made to cure the original plaintiff's lack of capacity to maintain the action. Plaintiffs claim that defendant's summary judgment motion must therefore be denied. Plaintiffs also claim that a default judgment must be granted against the "KIRK" defendants since they have never served an answer to the original complaint. Plaintiffs assert that service of the July 7, 2009 Appellate Division Order, which reinstated the complaint, was completed on July 17, 2009 and that defendants failed to timely serve an answer. It is plaintiffs position that absent a reasonable excuse for defendants default and an affidavit of merit, a default judgment must be granted. Plaintiffs also argue that sanctions should be imposed based upon defense counsel's frivolous conduct.

Defendants summary judgment motion seeks dismissal of this complaint based upon grounds set forth pursuant to CPLR Section 3211(a)(4) claiming that another action is pending between the same parties for the same cause of action. However the second action is clearly necessary since the Court appointed Guardian was required to commence an action in his representative capacity for the benefit of the incapacitated party (see Pinto v. Ancona, 262 AD2d 472, 692 NYS2d 128 (2nd Dept., 1999)). Accordingly defendants motion seeking an order dismissing the complaint pursuant to CPLR Section 3212 must be denied.

The remaining issue concerns which complaint remains viable: the September 2, 2008 amended complaint; or the April 13, 2007 original complaint. In most instances when an amended complaint is served, the original complaint is superceded (Felder v. Wank, 227 AD2d 442, 642 NYS2d 695 (2nd Dept., 1996)). Similarly, in most instances, when a trial court's dismissal order is reversed on appeal, the original complaint is reinstated (IJE Construction v. Dollar Federal Savings & Loan, 92 AD3d 525, 459 NYS2d 439 (1st Dept., 1983)). In this case the Appellate Division

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Second Department's July 7, 2009 decision was clearly intended to reinstate the original complaint even though plaintiff had served the September, 2008 amended complaint.

The law provides that a party seeking to vacate a default in appearing in an action must demonstrate an acceptable excuse for the delay and a meritorious defense to the action (Gray v. B.R. Trading Company, 59 NY2d 649, 463 NYS2d 192 (1983)). The delay must not be wilful, lengthy or prejudicial (A & J Concrete Corp. v. Acker, 54 NY2d 870, 444 NYS2d 905 (1981)). Defendants have provided a reasonable excuse for the delay in serving an answer to the original complaint since they promptly served an answer to plaintiff's amended complaint and clearly had no intention of defaulting in serving an answer. Moreover the amended answer and the proposed answer included with defendants opposition papers set forth an arguably meritorious defense to plaintiff's complaint. Under the circumstances defendants delay was neither wilful nor prejudicial since the parties have not conducted discovery. Plaintiffs application for a default judgment against the "KIRK" defendants must therefore be denied.

Finally the second cause of action set forth in plaintiff's complaint states an arguably viable claim against the defendants premised upon a theory of plaintiff's claimed "special employee" status as a loaned worker for the defendant contractors. Entry of a default judgment against plaintiff "BENNETT's" primary employers does not have res judicata effect of barring recovery against other defendants which may be proven to have "specially" employed "BENNETT" when he sustained injuries at the construction site (see Cabrera v. Two-Three Nought-Four Associates, 46 AD3d 1255, 848 NYS2d 748 (3rd Dept., 2007)). Defendants motion to dismiss the second cause of action set forth in plaintiff's original complaint is therefore denied. Accordingly it is

ORDERED that defendants "KIRK" motion for an order pursuant to CPLR Section 3212 is denied, and it is further

ORDERED that plaintiff's cross motion for an order pursuant to CPLR Section 3215 & 22 NYCRR 130-1.1 is denied, and it is further

ORDERED that the proposed answer attached to defendants motion papers shall be deemed served nunc pro tunc to the date of service of the motion. Responsive pleadings, if any, shall be served in accordance with the provisions of CPLR Section 3025(d), and it is further

ORDERED that the Court sua sponte hereby joins the two actions under Index #'s 1872-2005 & 10131-2007 for the purpose of conducting joint trials of the actions (CPLR Section 602), and it is further

ORDERED that the two actions will proceed under the joint caption as hereinabove set out, and it is further

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ORDERED that the parties shall file a separate Note of Issue and Certificate of Readiness and pay the appropriate calendar fees on each of these actions, and it is further

ORDERED that all parties shall exchange any matter previously secured through pre-trial discovery with the party so demanding, and it is further

ORDERED that all matters of trial practice, including the right to open and close are reserved until trial, and it is further

MELVYN TANENBAUM

Dated: July 22, 2010

J.S.C.