

**Quezada v NY Towing & Auto Repair**

2011 NY Slip Op 30932(U)

April 6, 2011

Supreme Court, New York County

Docket Number: 113329/10

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number : 113329/2010

QUEZADA, FAUSTO

vs

NY TOWING & AUTO REPAIR

Sequence Number : 001

DISMISS

INDEX NO. 113329/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
1
2
3

Cross-Motion:  Yes ~~AR~~ No

Upon the foregoing papers, It is ordered that this motion

FILED

APR 13 2011

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ..... 001

Dated: 4/9/11

  
HON. EILEEN A. RAKOWER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 15

-----X  
FAUSTO QUEZADA,

Plaintiff,

Index No.  
113329/10

- against -

Mot. Seq. 001  
Decision and  
Order

NY TOWING & AUTO REPAIR and  
ANTHONY GENTILE, JR.,

**FILED**

Defendants.

APR 13 2011 X

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff brings this action for personal injuries allegedly sustained when he was working as a mechanic for Don-Glo Auto Service Center of Manhattan II, Inc. ("Don Glo"), located at 409 West 218<sup>th</sup> Street, in the County and State of New York. On March 4, 2010, plaintiff was using a drill press and a drill bit allegedly flew off and hit him in the neck area. Plaintiff commenced the instant action against defendants Anthony Gentile, Jr. and NY Towing and Auto Repair ("Towing") on November 10, 2010. Neither Towing nor Gentile have answered the complaint.<sup>1</sup> On April 6, 2010, plaintiff commenced another action which also names Towing as a defendant, as well as Automobile Club of New York, Inc., and Van John Realty, LLC<sup>2</sup> ("Action #2").

Plaintiff alleges that he was injured as the result of having to use a hammer and a screw driver to tighten the drill bit, which caused the bit to break. Plaintiff claims that the key that should have been used no longer worked and would not tighten the bit properly because a "plate" was missing from the drill. On the date of his injury, plaintiff filled out a Workers' Compensation report. Thereafter, plaintiff began

<sup>1</sup>Gentile represents that plaintiff granted him an extension of his time to answer.

<sup>2</sup>The action was discontinued against Van John Realty, LLC.

to dismiss under 3211(a)(4), as that section states that the court “need not dismiss upon this ground but may make such order as justice requires.” (*see*; CPLR 3211[a][4]). Here, plaintiff cross-moves to consolidate the two actions, which indisputably arise from the same occurrence and contain common questions of law or fact. (*see* CPLR 602[a]). Finally, dismissal under CPLR 3211[a][10] is not warranted, as plaintiff does not allege that the drill press contained a manufacturing defect. Rather, plaintiff alleges that defendants’ alteration or repair of the drill press caused his injuries.

On a motion to dismiss under CPLR 3211(a)(7), “...the court’s task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory.” (*Ladenburg Thalmann & Co., Inc. v. Tim’s Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]). When evidentiary material is considered, the question becomes whether plaintiff “has a cause of action, not simply whether he has stated one.” (*Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633[1976]).

CPLR 3211(a)(2) states:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more cause of action asserted against him on the ground that:

(2) the court has not jurisdiction of the subject matter of the cause of action.

Workers’ Compensation Law §11 states, in relevant part:

§ 11. Alternative remedy

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . .

“[W]hen a defense based on the exclusivity of the statutory remedy is interposed, no suit against an employer may be maintained for an accidental injury that may be fairly described as arising out of and in the course of the employment .” (*M. Burlew v. American Mutual Insurance Company*, 63 NY2d 412[1984]).

Plaintiff is not suing his employer, Don Glo. Rather, plaintiff claims that Towing, a separate entity, also owned and controlled the drill press. Gentile claims, for the first time in reply, that he has no connection to Towing, and that Towing does not exist at the subject location. Gentile attempts to supplement his initial submission with an affidavit to this effect. However, a movant may not “remedy basic deficiencies” contained in the initial moving papers by submitting new evidence in reply, even if that evidence is in response to plaintiff’s opposition. (*See Merchants Bank of New York v. Gold Lane Corp.*, 28 AD3d 266 [1<sup>st</sup> Dept. 2006]).

Whether or not Towing exists, and whether it and Don-Glo are “so entwined that they constitute a single employer for purposes of workers compensation,” are issues that cannot be resolved here. (*Lopez v. Gem Gravure Co.*, 4 Misc.3d 1021(A)[Sup. Ct. Kings Cnty. 2004])(see also; *Ramnarine. v. Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218[1<sup>st</sup> Dept. 2001]).

As to Gentile’s personal liability, according to the NYS Division of Corporations, Towing is not a registered corporation. “One who contracts in the name of a nonexistent ... principal or a principal without legal status or existence, renders himself personally liable . . .” (*Artech Information Systems, LLC v. Tee*, 280 AD2d 117[1<sup>st</sup> Dept. 2001]).

Wherefore, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that defendant Anthony Gentile is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion is granted without opposition; and it is further

ORDERED that the above captioned action is consolidated in this Court with FAUSTO QUEZADA v. AUTOMOBILE CLUB OF NEW YORK, INC., NY TOWING & AUTO REPAIR AND VAN JOHN REALTY, LLC, Index Number 104445/10, and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

FAUSTO QUEZADA,

Plaintiff,

Index No.113329/10

-against-

AUTOMOBILE CLUB OF NEW YORK, INC, VAN JOHN REALTY, LLC, NY TOWING & AUTO REPAIR, AND ANTHONY GENTILE,

Defendants.

-----X

Eileen A. Rakower, J.S.C.

;and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his/her records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the parties in the consolidated action shall appear for a Preliminary Conference on Tuesday June 7, 2011 at 9:30 a.m. in Room 308 at 80 Centre Street.

DATED: April 6, 2011



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EILEEN A. RAKOWER, J.S.C.

**FILED**

APR 13 2011 5

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