

Amponsah v Ray

2024 NY Slip Op 35100(U)

December 10, 2024

Supreme Court, Queens County

Docket Number: Index No. 726568/23

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. DUFFICY
Justice

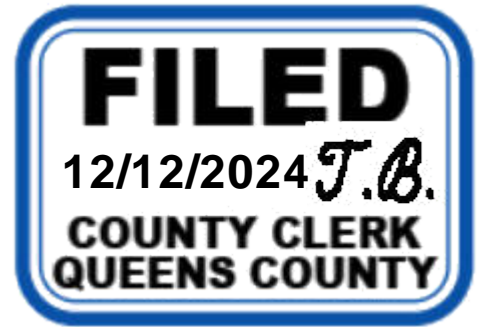
PART 35

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EMANUEL AMPONSAH,
Plaintiff,

Index No.: 726568/23
Mot. Date: 9/17/24
Mot. Seq.: 1

-against-

ROBERT RAY, STROEHMANN LINE-HAUL,
L.P., JERMAINE WILLIAMS, and WATSON'S
PLUMBING, HEATING & BUILDING
SERVICES, INC.,
Defendants.



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The following papers were read on this motion by plaintiff for an order (i) deeming service of process of the Summons and Complaint on defendant Jermaine Williams, performed after the 120 days, timely, *nunc pro tunc*, or in the alternative, extending plaintiff's time to serve defendant Jermaine Williams; and (ii) for an order, pursuant to CPLR 3215, granting, *inter alia*, plaintiff a default judgment in his favor and against defendant Watson's Plumbing, Heating & Building Services, Inc.; and, on the cross-motion by defendant Jermaine Williams for an order, pursuant to CPLR 3211(a)(1); (a)(5) and (a)(7), dismissing plaintiff's complaint and any and all cross-claims against defendant Jermaine Williams.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion - Affirmation - Exhibits.....	EF 10-20
Affidavit in Opposition - Exhibits	EF 25-39
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 30-36
Affirmation in Opp to Cross-Motion-Exhibits.....	EF 37
Plaintiff's Affirmation in Reply.....	EF 40
Affirmation in Reply to Cross-Motion.....	EF 41

Upon the foregoing papers, the cross-motion by defendant Williams is granted, and the motion by plaintiff is denied, as moot.

This is an action for the personal injuries arising from a motor vehicle accident, that occurred on September 25, 2023, in the County of Queens, New York. Plaintiff Emmanuel

Amponsah (Amponsah) contends he was injured when he was struck by a motor vehicle operated by defendant Robert Ray (Ray) and owned by defendant Stroehmann Line-Haul, L.P. (Stroehmann), while the plaintiff and defendant Jermaine Williams (Williams) were standing on the side of the Brooklyn Queens Highway. The vehicle Williams was operating, was owned by defendant Watson's Plumbing, Heating & Building Services (Watson's Plumbing).

Plaintiff filed his Summons and Complaint on December 14, 2023. Plaintiff served defendant Ray with the Summons and Complaint via personal service, on December 30, 2023. Plaintiff served defendant Stroehmann via the Secretary of State, pursuant to BCL § 306, on January 24, 2024. Plaintiff personally served Kenroy Watson, the purported owner of defendant Watson's Plumbing, on December 28, 2023. Additionally, the plaintiff served defendant Watson's Plumbing via the Secretary of State, pursuant to BCL § 306, on January 24, 2024. Issue was joined by defendants Ray and Stroehmann by service of an Answer, on February 15, 2024.

Plaintiff was unable to timely serve defendant Williams. However, the plaintiff was able to serve defendant Williams, via substitute service, on May 22, 2024. On June 4, 2024, the plaintiff moved to deem the service on defendant Williams timely, and for a default judgment against defendant Watson's Plumbing. Defendant Williams filed a cross-motion to dismiss, in lieu of an Answer, and opposes plaintiff's motion. Plaintiff opposes Williams cross-motion. Defendant Watson's Plumbing has not appeared in the matter.

The Court will first address the cross-motion by defendant Williams.

A motion to dismiss a complaint, pursuant to CPLR 3211 (a) (1), may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 804 [2020]). Where evidentiary material is submitted and considered on a motion to dismiss a complaint, pursuant to CPLR 3211 (a) (7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d at 804).

Under the Workers' Compensation Law, "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured

or killed by the negligence or wrong of another in the same employ" (Workers' Compensation Law § 29 [6]). Thus, the Workers' Compensation Law "offers the only remedy for injuries caused by [a] coemployee's negligence" in the course of employment (*Tikhonova v Ford Motor Co.*, 4 NY3d 621, 624 [2005]; see Workers' Compensation Law §§ 11, 29 [6]).

"[A] defendant, to have the protection of the exclusivity provision, must himself [or herself] have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort" (*Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543 [1980]; see *Power v Frasier*, 131 AD3d 461 [2d Dept 2015]).

"[W]henever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving noncoverage falls on the plaintiff" (*Rodriguez v King Kullen Grocery Co., Inc.*, 2021 N.Y. Misc. LEXIS 21019 (Qns. Sup. 2021)(Caloras, J.), citing *Murray v City of New York*, 43 NY2d 400, 407 [1977]).

Here, in support of their motion to dismiss, defendant Williams presented evidence that the plaintiff, an employee of Watson's Plumbing, was injured in the course of his employment, and that Watson's Plumbing maintained a Workers' Compensation policy on the date of the accident. Accordingly, the defendants established *prima facie* that the exclusivity provisions of Workers' Compensation Law § 11 bars the plaintiff from seeking a recovery in tort against defendant Williams (see *Vitello v Amboy Bus Co.*, 83 AD3d 932 [2d Dept 2011]; *Beaucejour v General Linen Supply & Laundry Co., Inc.*, 39 AD3d 444 [2d Dept 2007]). In opposition, plaintiff failed to raise a triable issue of fact as to the exclusivity provisions of the Workers' Compensation Law (see *DiTommaso v Marino*, 6 AD3d 572 [2d Dept 2004]).

In light of the foregoing, the branch of plaintiff's motion seeking an order deeming service on defendant Williams timely is rendered moot.

Additionally, with respect to the branch of plaintiff's motion seeking a default judgment against defendant Watson's Plumbing, such is denied.

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and, (3) proof of the defendant's default in answering or appearing.

(See CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; see also *Liberty County Mut. v Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Plaintiff demonstrates service of the Summons and Complaint upon defendant Watson's Plumbing, as well as their failure to appear. A defendant's default does not, however, give rise to a "mandatory ministerial duty" to enter a default judgment against it (*Gagen v Kipany Prods.*, 289 AD2d 844, 846 [2d Dept 2001]). Rather, a plaintiff must support its motion for a default judgment with "enough facts to enable [the clerk or the] court to determine that a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

Based on the facts of this matter, as discussed above, the plaintiff has failed to demonstrate a viable cause of action against defendant Watson's Plumbing.

As such, plaintiff's motion for a default judgment against defendant Watson's Plumbing is denied.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion seeking an order deeming service of the Summons and Complaint on defendant Jermaine Williams timely, *nunc pro tunc*, is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking an order, pursuant to CPLR 3215, granting plaintiff a default judgment in his favor against defendant Watson's Plumbing, Heating & Building Services, is denied; and it is further

ORDERED that the cross-motion by defendant Jermaine Williams for an order, pursuant to CPLR 3211, dismissing the plaintiff's action, as well as any and all cross-claims against him, is granted, and the matter is dismissed, in its entirety, as against defendant Jermaine Williams.

Dated: December 10, 2024



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.