SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 16

JUAN VICENTE ECHEVERRIA,

Plaintiff,

INDEX NO.: 018666/2002
MOTION DATE: 07/11/2005
MOTION SEQUENCE: 007

-against-

THE ESTATE OF MARVIN L. LINDER, a partnership, NORMAN A. SHEFER, T&O ASSOCIATES LIMITED, JEK ENTERPRISES, INC., KENNY DOYLE, GEORGE ALBRO and PREFERRED BACKHOE SERVICE,

Defendants.

T&O ASSOCIATES LIMITED,

Third-Party Plaintiff,

-against-

ALWAYS EQUIPMENT INCORPORATED,

Third-Party Defendant.

The following papers read on this motion:

Order to Show Cause, Affidavits, Affirmations & Exhibits Annexed..... 1
Affirmation in Opposition & Exhibits Annexed..... 2
Reply Affirmation in Further Support & Exhibit Annexed..... 3

This motion by defendants JEK Enterprises, Inc. and its president, Kenny Doyle, for an order vacating a default judgment granted plaintiff on the complaint, dated June 4, 2003

(Phelan, J.), and this Court's award of damages dated March 2, 2005, is denied as to both the default judgment and award for damages.

The complaint avers that defendants were negligent, reckless, careless and responsible for the severe, serious and permanent personal injuries sustained by plaintiff Juan Vicente Echeverria while employed by, and on the job site of defendants.

In seeking vacatur of the Court's default judgment (Phelan, J.) in favor of plaintiff, defendants aver that due to their reasonable excuse for default and meritorious defense, it would be just, proper and equitable to be allowed their day in court.

For purposes of clarity, the allegations of the complaint concerning injury are as follows at paragraphs "47" and "48": On or about the 1st day of September, 2000, at approximately 2:00 p.m., plaintiff was performing his duties on the job site of the defendants when he fell approximately fifteen (15) feet from a scaffold/elevator work platform. Plaintiff alleges that the injuries occurred solely due to the defendants' negligence in maintaining an unsafe work environment, and in particular, that the defendants did not meet industry safety standards with regard to the scaffolding and elevator work platforms. Mr. Echeverria's injuries consisted of:

a) significant head trauma with loss of consciousness with frontal and occipital scalp lacerations which required staples and resulted in scarring;

b) fracture on the left 4th and 5th metacarpals requiring closed reduction;

c) compression fracture of L1;

d) lacerations of the front left torso resulting in striated scar deformities;

e) possible fracture at the base of the 3rd metacarpal;

f) possible dislocation of the coccyx;

g) constant and daily back pain, with aching, stiffness and decreased range of motion in the cervical and lumber spines with pain radiating into both arms;

h) low back pain with moderate intensity which is daily but prolonged by sitting and standing; pain radiating into the back into legs; subluxation complexes at L2-3, L3-4, L4-5, and T10-11. The foregoing vertebral subluxation complex was confirmed with diagnostic ultrasound;

i) on December 8, 2003, plaintiff underwent a posterior spinal fusion from T12 to L2 with application of 15 cc's of cancellous allograft bone chips with posterolateral arthrodesis under general anesthesia with all of the risks attendant to said general anesthesia with surgical scarring.

Defendants were served with the Summons and Complaint in December, 2002. All but defendants Kenny Doyle and JEK Enterprises answered the complaint, and as a result, a motion for default judgment was served upon them in March, 2003. This was followed by defendants' receipt of the Court's Order (Phelan, J.) dated June 4, 2003, granting default judgment against defendants, who were then informed by the Court (Phelan, J.) in a notice dated June 11, 2003 of a conference scheduled for July 7, 2003 to assess damages. The answering defendants all subsequently settled with plaintiff. Defaulting defendants, movants herein, received another notice from the Court dated March 24, 2004, followed by this Court's decision on damages dated March 2, 2005. "Defendants" hereinafter will refer to Kenny Doyle and JEK Enterprises, Inc.

Pursuant to CPLR 5015(a)(1), in order to have a default judgment vacated, the moving party must, within one year of having been served a copy of the judgment, show that the default was reasonably excusable and that there is a meritorious defense to the original complaint filed by plaintiff. *Wells v. South 8th, LLC,* 17 A.D.3d 580, 793 N.Y.S.2d 185. Although defendants argue that they have met these requirements, the Court does not agree.

Addressing the issue of reasonable excuse for their default, defendants claim they were under the impression that their interests were being fully represented by the law firm of Katz & Stanton, a firm which the defendants had retained for a Workers' Compensation action brought by the same plaintiff in this case. The defendants further claim that all paperwork was promptly forwarded to Katz & Stanton over the course of approximately two years. Only upon being notified of the Court's notice of Judgment do defendants claim to have discovered that Katz & Stanton was not in fact representing them in this action.

Defendants are essentially basing their reasonable excuse on law office failure. Under CPLR §2005, "the Court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure." *Roussomido v. Zafiriadis,* 238 A.D.2d 569, 657 N.Y.S.2d 68. The circumstances leading to the delay in this case are not isolated mistakes or neglect, such as a misplaced file or even due to illness. (*see, Robinson v. New York City Transit Authority,* 203 A.D.2d 351; *Gannon v. Johnson*

Scale Co., 189 A.D.2d 1052, 592 N.Y.S.2d 881). Rather, defendants' conduct amounts to a "serious lack of concerned attention to the progress of [the] action." (*see, Lauro v. Cronin,* 184 A.D.2d 837, 839). Moreover, defendants have not submitted any proof relating to their contention that Katz & Stanton was in fact responsible for the delay.

The Court is not convinced that a reasonable excuse for default has been presented. There is no indication that defendants had inquired about the status of this action for two years, (*see, Fishman v. Beach,* 246 A.D.2d 779, 780), nor explanation as to why they failed to keep apprised of the status of the litigation other than the fact that they believed their interests were being fully protected by Katz & Stanton. (*see, Fishman v. Beach, supra*). Defendants failed to submit an affidavit from Katz & Stanton confirming the alleged circumstances leading to the default. Additionally, the Court finds it doubtful that a law firm would ignore paperwork over the course of two years without either returning such paperwork to the sender or perhaps contacting the sender with an offer to represent both actions. However, even if what defendants are alleging is to be believed by the Court, the circumstances are way beyond the scope of law office failure. (*see, Berlew-Watkins v. Wood,* 225 A.D.2d 973; *Santiago v. New York City Health and Hosps. Corp.,* 10 A.D.3d 393, 394, 780 N.Y.S.2d 764, 766). "Although CPLR 2005 ... empower[s] the court to exercise discretion in determining motions to vacate a default emanating from law office failure, the legislation did not intend to sanction the routine vacatur of such defaults (*see, Eveready Ins. Co. v. Devissiere,* 134 A.D.2d 323, 520 N.Y.S.2d 800, 801).

As far as a meritorious defense is concerned, the Court is not persuaded that one exists, nor, as plaintiff's counsel points out, has one been offered by defendants. Under Labor Law §240(1), "All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person employed." McKinney's Labor Law §240.

As pointed out by plaintiff's counsel, in an order dated August 2, 2004 Justice Phelan granted summary judgment to plaintiff against the answering defendants, the Estate of Marvin L. Linder, a partnership, Norman A. Shefer and T & O Associates Limited, on the issue of liability

pursuant to Labor Law §240 after the default judgment had already been granted against defendants Kenny Doyle and JEK Enterprises, Inc. This Court sees no evidence to suggest that liability would have been applied any differently to the defaulting defendants, and the Court does not disagree with the summary judgment ruling against the answering defendants.

Defendants have asked the Court to, at the very least, vacate the damages portion of the default. They argue that plaintiff had a severe pre-existing back injury which resulted from lifting heavy furniture at a previous job two years prior to the accident, and that the injuries sustained were in fact largely related to the pre-existing condition and not the fall from the scaffolding. Defendants further allege that plaintiff went back to work as a furniture mover shortly after the accident, and was briefly employed as a "barback" at a bar and grill restaurant, which also involved heavy lifting.

In reply, plaintiff's counsel argues that these allegations, aside from being "too little too late," are "vague, conclusory, hearsay and double hearsay." With the exception of an affidavit from plaintiff's cousin, Yuri Eduardo Galdamez, which happens to include a fair degree of speculation, defendants have not submitted any evidence lending credence to their assertions. There is no affidavit from the owner of the bar and grill restaurant, the owner of the furniture store, or even plaintiff's aunt, confirming the post-accident employment claims. Furthermore, there is nothing in the independent medical examination produced by the answering defendants indicating that there was a pre-existing injury or that anything but the accident was a cause of plaintiff's injury.

The allegations presented by defendants are not sufficiently persuasive to convince this Court to vacate the default judgment, even with respect to damages. The motion is hereby denied.

Dated: August 22, 2005

J.S.C.