

Commissioners of the State Ins. Fund v Persaud

2012 NY Slip Op 32923(U)

December 4, 2012

Sup Ct, New York County

Docket Number: 400794/08

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

COMMISSIONERS OF THE STATE
INSURANCE FUND

INDEX NO. 400794/08

MOTION DATE _____

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

- v -
VISHAI PERSAUD

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
DEC 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 4, 2012 _____
J.S.C.

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 11

-----X

COMMISSIONERS OF THE STATE INSURANCE FUND,

INDEX NO. 400794/08

Plaintiff,

-against-

VISHAI PERSAUD d/b/a VP CONSTRUCTION,

Defendant.

-----X

FILED
DEC 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this action to recover worker's compensation insurance premiums, defendant moves for an order vacating this court's order dated October 5, 2012, which granted plaintiff's motion for summary judgment on default; and/or an order pursuant to CPLR 2221 allowing defendant to renew and reargue plaintiff's prior motion and to vacate the court's October 5, 2012 order; and/or an order pursuant to CPLR 3215, setting aside the judgment awarded to plaintiff and referring the matter for an inquest to determine the amount to which plaintiff is entitled. Plaintiff opposes the motion.

Plaintiff commenced this action on April 15, 2008. Defendant initially defaulted by neither appearing nor answering. Plaintiff moved for a default judgment and this court issued an order dated January 27 2009 granting the motion. On June 29, 2009, a judgment was entered in the total amount of \$39,515.06. In December 2009, the parties filed a so-ordered stipulation dated August 10, 2009, vacating the default judgment and permitting defendant to answer. The stipulation also provided that both parties agreed to be bound by plaintiff's audit determination

and defendant agreed to execute a confession of judgment for the audit amount together with 18% collection costs.

In June 2010, plaintiff moved by notice of motion for summary judgment, returnable in the motion submissions part, Room 130, on July 19, 2012. Defendant once again defaulted by not appearing or submitting opposition papers on July 19, 2012. On October 5, 2012, this court issued an order granting plaintiff's motion for summary judgment on default, and "based on the parties so-ordered stipulation," directed the Clerk to enter judgment against defendant in the amount of \$49,516.22, together with interest on the principal amount of \$29,516.22 and statutory collection costs in the amount of \$5,313.00. On or about October 23, 2012, defendant filed the instant order to show cause to vacate the order granting plaintiff summary judgment on defendant's default.

A party seeking to vacate his default must demonstrate both a reasonable excuse for his default and a meritorious defense to the action. See Eugene DiLorenzo, Inc v. A.C. Dutton Lumber Co, Inc, 67 NY2d 138, 142-143 (1986); Koutrakos v. Vernon Sutton Realty, 40 AD3d 355 (1st Dept 2007); Facsimile Communications Industries, Inc v. NYU Hospital Center, 28 AD3d 391 (1st Dept 2006). Here, defendant has not adequately established either requirement.

In seeking to establish a reasonable excuse for defendant's default, his counsel submits an affirmation that he did not intend to default on plaintiff's summary judgment motion. Specifically, defendant's counsel alleges that on June 21, 2012 when he and plaintiff's counsel appeared for a status conference "your court clerk agreed that the submission of the summary judgment papers would be adjourned to October 18, 2012 to mirror with the adjourned conference date."

Defendant's claimed excuse is not reasonable under the circumstances. While defendant's counsel points to the order issued at the June 21, 2012 status conference, the order simply states that plaintiff's summary judgment motion is *pending* in motion support, and does not mention any adjournment of the motion. Plaintiff's summary judgment motion was on for the first time in the motion submissions part on July 19, 2012; defendant defaulted by neither appearing nor submitting opposition papers. Since the motion was in the submissions part and defendant had not yet submitted opposition, absolutely no reason existed to adjourn the motion and the status conference to same date. Notably, this court has nothing to do with motions in the submissions part, and any request for an adjournment would have to be made directly to motion support, by application or stipulation. Moreover, plaintiff's counsel asserts that both he and the court understood that July 19, 2012 was the return date of the motion, that date was posted on the court's website, and the June 12, 2012 status conference order mentions nothing about an adjournment of the motion. Under these circumstances, any misunderstanding on the part of defendant's counsel as to the return date of the motion, is neither reasonable nor excusable.

However, even if defendant's proffered excuse were reasonable, he has failed to make a sufficient showing of a meritorious defense. Disputing the amount of plaintiff's audit, defendant submits an affidavit from his accountant to support his argument that he is entitled to an inquest as to damages. The accountant's affidavit merely states in a conclusory fashion that the "premium being demanded by plaintiff is grossly inaccurate and has unequivocally been inflated," and "[t]here is absolutely no possible way that defendant's premium should be as high as the plaintiffs are demanding. It is literally criminal." Noticeably absent from the accountant's affidavit is any factual basis for these conclusions. It is well settled that in order to

demonstrate a meritorious defense, defendant must submit an affidavit from an individual with knowledge of the facts, and that such affidavit "must make sufficient factual allegations [and] do more than merely make conclusory allegations or 'vague assertions.'" Peacock v. Kalikow, 239 AD2d 188, 190 (1st Dept 1997) (quoting National Recovery Systems v. Weiss, 226 AD2d 289, 290 [1st Dept 1996]); accord Koutrakos v. Vernon Sutton Realty, supra at 356; Facsimile Communications Industries, Inc v. NYU Hospital Center, supra at 392; see also Ap X-Power Media, Inc v. Ocean Bridge, Inc, 83AD3d 612, 613 (1st Dept 2011).

Thus, since defendant has established neither a reasonable excuse for his default nor a meritorious defense to the action, he is not entitled to the requested relief and the motion must be denied.

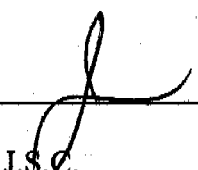
Accordingly, it is

ORDERED that defendant's motion is denied in its entirety.

DATED: December 4, 2012

ENTER:

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 J.S.C.