

**Napolitano v East Coast Orthotic & Prosthetics**

2012 NY Slip Op 33268(U)

June 19, 2012

Sup Ct, Suffolk County

Docket Number: 0023374/2009

Judge: Jr., John J.J. Jones

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO.: 0023374/2009  
SUBMIT DATE: 4/4/2012  
MTN. SEQ.#: 009; 010

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.  
Justice

**COPY**

MOTION DATE: 3/19/2012  
MOTION NO.: 009 - MD  
010 - XMD

-----X  
GREGORY NAPOLITANO,

Plaintiff,

-against-

EAST COAST ORTHOTIC & PROSTHETICS,  
PROCIDA TILE, JOHN DOE #1, a fictitious name  
used for identification, JOHN DOE #2, a  
fictitious name used for identification and 75  
BURT DRIVE, LLC,

Defendants.

SCHWARTZAPFEL PARTNERS, PC  
By: Joseph E. Gorczyca, Esq.  
Attys. for Plaintiff  
300 Jericho Quadrangle, Suite 180  
Jericho, NY 11753

AHMUTY, DEMERS & McMANUS, ESQS.  
Attys. for Defendant  
East Coast Orthotic & Prosthetic Corp.  
s/h/a East Coast Orthotic & Prosthetics  
750 Roanoke Avenue  
Riverhead, NY 11901

BAXTER, SMITH & SHAPIRO, PC  
By: Harold A. Campbell, Esq.  
Attys. for Defendant  
Procida Tile  
99 North Broadway  
Hicksville, NY 11801

-----X  
PROCIDA TILE IMPORTERS, INC.,

Third-Party Plaintiff,

-against-

SHAHAB SYED,

Third-Party Defendant.

FOX & LEFKOWITZ, LLP  
Attys. for Defendant  
75 Burt Drive, LLC  
666 Old Country Road, Suite 201  
Garden City, NY 11530

SHAHAB SYED  
816 Deer Park Avenue  
Dix Hills, NY 11746

Upon the following papers numbered 1 to 24 read on this motion for a default

CAA

judgment against third-party defendant and cross-motion for an order dismissing the third-party complaint; Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-19; Answering Affidavits and supporting papers 23-24; Replying Affidavits and supporting papers 20-22; Other \_\_\_\_\_; it is

**ORDERED** that this motion by defendant/third-party plaintiff, Procida Tile Importers, Inc., incorrectly sued in this action as Procida Tile (Procida), for an order granting a judgment of default against third-party defendant, Shahab Syed, is denied; and it is further

**ORDERED** that the cross-motion by plaintiff, Gregory Napolitano, named in this action as Greg Napolitano, for an order dismissing the third-party complaint pursuant to CPLR 3215(c) is also denied.

Plaintiff Greg Napolitano commenced this action to recover damages for personal injuries allegedly sustained on March 25, 2008 while he was performing volunteer work at the offices of East Coast Orthotic & Prosthetics in Deer Park, New York, when a pallet of tile fell on him. It is alleged that plaintiff was injured while he and others were unloading pallets of tile from a lift gate on a box truck. Defendant/third-party plaintiff Procida commenced a third-party action against Shahab Syed, alleging active, affirmative and primary negligence against him and seeking recovery in contribution and/or indemnification. The allegations in the third-party complaint are alleged “upon information and belief”, the source of which is not identified, and the third-party complaint is verified by counsel. According to the affidavit of service that was filed on February 4, 2011, service of the third-party summons and complaint was effected on January 25, 2011 pursuant to CPLR 308(4). As no answer to the third-party complaint was served, defendant/third-party plaintiff now moves for a default judgment against Syed. In support of the motion, movant has submitted the affidavit of Omar Umanzor, who was employed by Procida on the day of plaintiff’s accident and who states that he witnessed the accident. It is averred by Umanzor that he “did not operate the controls of the truck lift” and that “if plaintiff was actually injured in the manner he alleges, it was due to his own negligence, that of Third-Party Defendant Shahab Syed and/or that of a party other than Procida.” In addition, movant submitted an affidavit by Michael Kearns which purports to verify the third-party complaint “except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe to be true.” All of the allegations in the third-party complaint, however, were made “upon information and belief.” Although Mr. Kearns purports to have submitted his affidavit on behalf of Procida, the office or position which he holds with Procida is not identified in the affidavit.

Shahab Syed testified at a deposition that he never touched the truck lift gate and that only Omar Umanzor, an employee of Procida, operated the lift. It was also Syed’s testimony that the Procida employee pushed the pallet of tile, and “then he went too far”



and the pallet as well as a pump jack “slid off the truck and fell on top of Greg.” Plaintiff testified at his deposition that he and Syed were assisting the Procida employee move the pallets of tile off the truck when the Procida employee instructed plaintiff to move the truck forward. Plaintiff then moved the truck “a couple of feet”, whereupon the bed of the truck was on a slight incline, with the front of the truck higher than the back. After he turned off the engine, plaintiff returned to the rear of the truck and was standing on the left driver’s side of the truck close to the back while Syed was on the right side. As the Procida employee, identified as Omar Umanzor, used a pump jack to move the pallet of tiles, neither plaintiff nor Syed gave him any instructions. Umanzor “pushed the pallet out towards the back of the truck and then it stopped” between the lift and the back of the truck. According to plaintiff’s testimony, it appeared that the wheels of the pump jack stopped in a “slight space” between the truck and the lift gate. It was plaintiff’s testimony that Umanzor attempted to pull the pallet back into the truck, “he lost control over the pallet and the jack and it rolled off the truck” and crushed plaintiff.


According to the deposition testimony of Omar Umanzor, an employee of Procida, a pallet of tiles that was “a few thousand” pounds heavier than the other pallets was being moved at the time of the plaintiff’s accident. Umanzor moved the pallet within the truck approximately thirteen feet and stopped it right before the lip of the lift gate. The lift was fully raised and Umanzor testified that he told plaintiff and Syed that the lift gate was not going to support the weight of the pallet. Umanzor moved the load onto the lift gate, and “a split second” later, the pallet and jack fell off the back of the truck onto the plaintiff. The lift gate did not break.

The moving papers fail to establish that the defendant/third-party plaintiff has a viable cause of action against the defaulting third-party defendant, since no factually specific affidavit or third-party complaint verified by a party with personal knowledge of the facts was submitted to the Court in support of this motion (*see* CPLR 3215[f]). Moreover, the transcripts of deposition testimony fail to establish that the third-party defendant bears liability for the accident. The evidence before this Court is insufficient to demonstrate some proof of liability against the third-party defendant and, since defendant/third-party plaintiff has not satisfied the requirement that it establish *prima facie* validity of the uncontested cause of action, the application for a default judgment must be denied (*see New South Ins. Co. v Dobbins*, 71 AD3d 652, 894 NYS2d 912 [2d Dept 2010]; *see also Henriquez v Purins*, 245 AD2d 337, 666 NYS2d 190 [2d Dept 1997]).

Although it is alleged by defendant/third-party plaintiff that the third-party defendant was served on January 31, 2011 by personal service, the affidavit of service that was submitted to the Court (Exhibit “F”) indicates that service of the statement pursuant to CPLR 3402(b) with the third-party summons and complaint was effected on January 25, 2011 under CPLR 308(4). Nevertheless, plaintiff’s cross-motion is based on the assumption that the third-party defendant was personally served on January 31, 2011, as is alleged but

unsupported by defendant/third-party. Since plaintiff has not demonstrated that dismissal of the third-party action pursuant to CPLR 3215(c) is appropriate, the cross-motion must also be denied.

DATED: 19 June 2012

  
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HON. JOHN J. JONES, JR.  
J.S.C.

CHECK ONE:  FINAL DISPOSITION

NON-FINAL DISPOSITION