

Roque v 475 Bldg. Co., LLC
2017 NY Slip Op 32192(U)
September 14, 2017
Supreme Court, Bronx County
Docket Number: 305076/2014
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

ALEJANDRO ANTONIO ROQUE,
Plaintiff,

Index No: 305076/2014

-against-

475 BUILDING CO., LLC and
475 MANAGING MEMBER, LLC,

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants.

_____ X

The following papers numbered 1 to 6 read on this **motion for summary judgment**

No	On Calendar of June 16, 2017	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1, 4</u>
	Answering Affidavit and Exhibits-----	<u>2, 5</u>
	Replying Affidavit and Exhibits-----	<u>3, 6</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint in this Labor Law action. Plaintiff cross-moves for a default judgment against defendants for their failure to serve an answer to the amended complaint. Defendant, 475 Managing Member, LLC, (Managing), moves pursuant to CPLR 3211(a)(8) to dismiss the amended complaint as against it for lack of personal jurisdiction. This action arose as a result of personal injuries sustained by plaintiff when a nail he was attempting to remove from a scaffold, struck him in the eye. Plaintiff admitted to having goggles at home the day of his injury, that were provided by a previous employer.

The affidavit of service indicates that service of process was made upon Managing, a foreign limited liability corporation, pursuant to Limited Liability

Company Law 303, by serving the Office of the Secretary of the State of New York. Plaintiff admits that the attempted service was made pursuant to LLCL 304 not LLCL 303 as indicated on the affidavit of service.

However, LLCL 304 requires not only service upon the Office of the Secretary of the State of New York, but pursuant to LLCL 304(c)(1) or (2), there must be some form of service of process made upon the foreign limited liability company from a list of specified alternative forms of service. Admittedly, none of the specified forms of service in LLCL 304(c)(1) or (2) were employed by plaintiff. Accordingly, process was not properly served upon Managing.

With respect to the defendants' motion to dismiss on substantive grounds, the Labor Law 200 and 240(1) causes of action are dismissed without opposition.

With respect to plaintiff's Labor Law 241(6) cause of action, all the predicate alleged Industrial Code violations cited in plaintiff's Bill of Particulars are dismissed without opposition except Industrial Code 23-1.8(a). Plaintiff cites to the following case.

At the very least, in our view, a viable cause of action raising triable issues was presented under Labor Law § 241 (6), and more particularly pursuant to the regulation promulgated by the Industrial Board of Appeals (12 NYCRR 23-1.8 [a]), which provides: "*Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.*" (Emphasis added.)

Cappiello v. Telehouse Int'l Corp. of Am., 193 A.D.2d 478, 479 [1st Dept

1993]).

The facts of Cappiello are similar to the facts of this action. Cappiello was a carpenter who was driving a nail into plywood to attach it to underlying concrete. The nail flew back and hit him in the eye. Whether Industrial Code 23-1.8(a) was violated in the instant action is an issue of fact and cannot be decided as a matter of law.

Plaintiff's motion for a default judgment is denied. Defendants provided a reasonable excuse for their failure to timely interpose an amended answer, and provided a meritorious defense. Accordingly, the Verified Answer to the Amended Verified Complaint, served with the cross-motion to dismiss the complaint, is deemed timely served upon plaintiff.

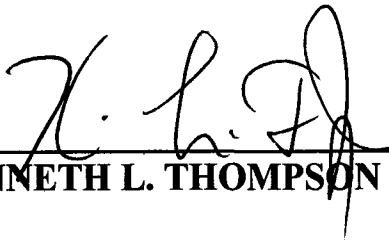
CONCLUSION

Defendant, 475 Managing Member, LLC's motion pursuant to CPLR 3211(a)(8) to dismiss the amended complaint as against it for lack of personal jurisdiction is granted. Defendants motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted to the extent that plaintiff's claims of violation of Labor Law 200 and 240(1) are dismissed, and the plaintiff's claim of violation of Labor Law 241(6) is dismissed to the extent that all the predicate alleged Industrial Code violations cited in plaintiff's Bill of Particulars are dismissed except Industrial Code 23-1.8(a). Plaintiff's cross-motion for a default

judgment against defendants for their failure to serve an answer to the amended complaint is denied. The Verified Answer to the Amended Verified Complaint, served with the cross-motion to dismiss the complaint is deemed timely served upon plaintiff.

The foregoing constitutes the decision and order of the Court.

Dated: 9/14/2017


KENNETH L. THOMPSON JR. J.S.C.