

Careplus Med. Supply Inc. v Travelers Home & Mar. Ins. Co. (2006 NYSlipOp 50479(U))

Decided on March 27, 2006

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

PRESENT: : PESCE, P.J., WESTON PATTERSON and
RIOS, JJ 2005-617 K C.

Careplus Medical Supply Inc. a/a/o Carlo Tejada, Appellant,

against

**The Travelers Home and Marine Insurance Company A/K/A TRAVELERS
PROPERTY CASUALTY CORPORATION, Respondent.**

Appeal from orders of the Civil Court of the City of New York, Kings County (Dolores L. Waltrous, J.), each dated March 3, 2005. The orders granted defendant's motion to dismiss the complaint for failure to comply with discovery demands, and, inter alia, denied plaintiff's motion for summary judgment as moot.

Appeal dismissed.

After plaintiff failed to interpose a written response to defendant's dismissal motion or to provide the discovery for which it stipulated, the court granted the motion and dismissed the action, rejecting plaintiff's oral application for a protective order as "untimely [and] unnoticed." Such an order must be deemed to be entered on plaintiff's default, and since plaintiff limits its appeal to the propriety of said order, the appeal is dismissed as no appeal lies from an order entered on default (*Flake v Van Wagenen*, 54 NY 25 [1873]; *Fox v T.B.S.D., Inc.*, 278 AD2d 612 [2000]; *301 Oriental Blvd. v Rovner*, 5 Misc 3d 134[A], 2004 NY Slip Op 51480[U] [App Term, 2d & 11th Jud Dists]). This result pertains even where, as here, the appealing party appears on the motion's return date and orally opposes the motion. Such arguments are not part of

the record, and in any event, as unsworn, they are without evidentiary value (*Brown v Chase*, 3 Misc 3d 129[A], 2004 NY Slip Op 50371[U] [App Term, 2d & 11th Jud Dists]; *see also Vanderveer Apts. v Moore*, 2 Misc 3d 132[A], 2004 NY Slip Op 50123[U] [App Term, 2d & 11th Jud Dists]).

In view of the foregoing, the appeal from the order which, inter alia, denied plaintiff's motion for summary judgment is dismissed as academic. In any event, plaintiff raises no issue as to said order.

Pesce, P.J., Weston Patterson and Rios, JJ.,
concur. Decision Date: March 27, 2006