

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D29639
C/kmb

_____AD3d_____

Argued - December 9, 2010

PETER B. SKELOS, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2010-02863

DECISION & ORDER

Faustino Mui, plaintiff, v Robert Bosch Power
Tool Corporation, et al., appellants, Saga House
Condominium, et al., respondents.

(Index No. 23578/08)

Quirk and Bakalor, P.C., New York, N.Y. (Loretta A. Redmond of counsel), for
appellants.

Savona, D'Erasmus & Hyer LLC, New York, N.Y. (Joseph F.X. Savona and
Raymond M. D'Erasmus of counsel), for respondents.

In an action to recover damages for personal injuries, the appeal is from an order of
the Supreme Court, Queens County (Lebowitz, J.), dated March 4, 2010, which denied the
appellants' motion pursuant to CPLR 3217(b), in effect, to enforce a stipulation pursuant to which
the plaintiff agreed to voluntarily discontinue the action insofar as asserted against them.

ORDERED that the order is reversed, on the facts and in the exercise of discretion,
with costs, and the appellants' motion pursuant to CPLR 3217(b), in effect, to enforce a stipulation
pursuant to which the plaintiff agreed to voluntarily discontinue the action insofar as asserted against
them is granted; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Queens County, to
convert the cross claims asserted by the defendants Saga House Condominium and Charles Greenthal
Management against the appellants to a third-party action, and to amend the caption accordingly.

January 18, 2011

MUY v ROBERT BOSCH POWER TOOL CORPORATION

Page 1.

“In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted” (*Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961, 961; *see Tucker v Tucker*, 55 NY2d 378, 383). Here, the Supreme Court improvidently exercised its discretion in denying the appellants’ motion pursuant to CPLR 3217(b), in effect, to enforce a stipulation pursuant to which the plaintiff agreed to voluntarily discontinue the action insofar as asserted against them because there was no showing that the defendants Saga House Condominium and Charles Greenthal Management would be prejudiced by such discontinuance, since their cross claims will continue as a third-party action (*see Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d at 961; *Parraguirre v 27th St. Holding, LLC*, 37 AD3d 793, 794; *Citibank v Nagrotsky*, 239 AD2d 456, 457).

SKELOS, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court