

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

D30479
G/kmb

_____AD3d_____

Argued - February 7, 2011

REINALDO E. RIVERA, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2010-01222

DECISION & ORDER

Jasmine Fontilus, etc., appellant, v Herb Pereira, etc.,
et al., respondents.

(Index No. 33125/08)

Lopez Romero & Montelione, P.C., New York, N.Y. (Richard J. Montelione of
counsel), for appellant.

Godosky & Gentile, P.C., New York, N.Y. (Richard Godosky and David Godosky
of counsel), for respondents.

In an action, inter alia, for a judgment declaring that the defendant Dinkes & Schwitzer is obligated to prosecute, on behalf of the plaintiff, an underlying action entitled *Fontilus v St. Festin*, pending in the Supreme Court, Kings County, under Index No. 48693/99, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated December 7, 2009, as denied (a) that branch of her motion which was for an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(a), (b) those branches of her separate motion which were for leave to amend the caption to substitute Dinkes & Schwitzer, P.C., in place of the defendant Dinkes & Schwitzer, and for leave to serve a supplemental summons and an amended complaint adding William Schwitzer as an additional defendant, and (c) that branch of her cross motion which was for an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(a).

ORDERED that the order is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof denying that branch of the plaintiff's motion which was for leave to amend the caption to substitute Dinkes & Schwitzer, P.C., in place of the defendant Dinkes & Schwitzer, and substituting therefor a provision granting that branch of the motion; and (2) by

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deleting the provision thereof denying that branch of the plaintiff's motion which was for leave to serve a supplemental summons and an amended complaint adding William Schwitzer as an additional defendant, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly denied those branches of the plaintiff's motion and cross motion which were for an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(a). Contrary to the plaintiff's contention, an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(a) was not warranted, inasmuch as the conduct of the defendant Dinkes & Schwitzer in the underlying personal injury action was not frivolous within the meaning of 22 NYCRR 130-1.1(c) (*see* 22 NYCRR 130-1.1[c]; *Carrasquillo v City of New York*, 78 AD3d 635, 639; *Joan 2000, Ltd. v Deco Constr. Corp.*, 66 AD3d 841, 842). Nor was there any other basis on which to award an attorney's fee under the circumstances of this case.

The Supreme Court improvidently exercised its discretion in denying those branches of the plaintiff's motion which were to amend the caption (*see Kiaer v Gilligan*, 63 AD3d 1009, 1010; *Holster v Ross*, 45 AD3d 640; *Kingalarm Distribs. v Video Insights Corp.*, 274 AD2d 416, 417), and for leave to serve a supplemental summons and an amended complaint adding William Schwitzer as an additional defendant (*see Kiaer v Gilligan*, 63 AD3d at 1011).

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination.

RIVERA, J.P., BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court