

**Amica Mut. Ins. Co. v Cusano**

2007 NY Slip Op 30184(U)

March 8, 2007

Suffolk County, County Ct

Docket Number: 0023387

Judge: Martin J. Kerins

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**COPY**

Ind No. 23387-2002

SHORT FORM ORDER

County Court - State of New York  
PART III - SUFFOLK COUNTY

**P R E S E N T :**

Hon. MARTIN J. KERINS  
J.C.C.

-----X  
**AMICA MUTUAL INSURANCE COMPANY** :  
**a/s/o JEFFREY MAHER,** :  
: :  
: :  
Plaintiff(s), :  
: :  
- against - :  
: :  
**VANESSA CUSANO,** :  
: :  
Defendant(s). :  
-----X

**Action 1**  
**Index No: 23387-02**  
  
**ALLEN D. WERTER, ESQ.**  
Attorneys for Plaintiff in Action 1  
Attorneys for Defendant (Maher) in  
Action 2, 3  
215 East Main Street, Suite 203  
Huntington, NY 11743  
  
**JONATHAN E. KIRCHNER, ESQ.**  
Serpe, Andree & Kaufman  
Attorneys for Defendant **Cusano**  
149 Main Street, P.O. Box 165  
Huntington, NY 11743

-----X  
**ALLSTATE INSURANCE COMPANY as** :  
**subrogee of DAVID KUGLER,** :  
: :  
: :  
Plaintiff(s) :  
- against - :  
: :  
**VANESSA CUSANO, JEFFREY MAHER and** :  
**AUDREY MOSKOW,** :  
Defendant(s) :  
-----X

**Action 2**  
**Index No: 14284-05**  
  
**D'AMBROSIO & D'AMBROSIO**  
Attorneys for Defendant ( Mosko) in  
Action 2  
Attorneys for Plaintiff in Action 3  
42 Main Street  
Irvington, NY 10533

-----X  
**NATIONWIDE MUTUAL INSURANCE** :  
**COMPANY a/s/o AUDREY MOSKOW,** :  
: :  
: :  
Plaintiff(s) :  
- against - :  
: :  
**VANESSA CUSANO and JEFFREY MAHER,** :  
: :  
Defendant(s) :  
-----X

**Action 3**  
**Index No: 7976-04**  
  
**FELDMAN & FELDMAN**  
Attorneys for Plaintiff in Action 2  
811 West Jericho Turnpike  
Smithtown, NY 11787

***Amica Mutual Insurance Company a/s/o Jeffrey Maher v Vanessa Cusano v Allstate Insurance Company as subrogee of David Kugler v Vanessa Cusano, Jeffrey Maher and Audrey Moskow v Vanessa Cusano and Jeffrey Maher***

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Upon the following papers numbered 1 to 12 read on this motion to amend pleading and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 5-9; Replying Affidavits and supporting papers 10-12; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the portion of the motion by defendant, Vanessa Cusano, in Action No. 3, for leave to amend her answer to include the affirmative defense of the statute of limitations is granted and the second amended complaint is deemed served; and it is further

**ORDERED** that the portion of the motion by defendant, Vanessa Cusano, pursuant to CPLR 32.1 for an order dismissing the summons and complaint against defendant, Vanessa Cusano, in Action No. 3, for not being timely commenced pursuant to CPLR 214(4) within the three year statute of limitations on an action involving property damage is granted.

Leave to amend the pleadings "shall be freely given" absent prejudice or surprise resulting directly from the delay. ( CPLR 3025, subd [b]; *Sindle v New York City Tr. Auth.*, 33 NY2d 293). Here, the respondents cannot claim such prejudice or surprise. CPLR 3025 (b) has been consistently interpreted to authorize pleading amendments absent a showing of "prejudice" or "unfair surprise" ( *Aetna Cas. & Sur. Co. v Sheldon*, 124 AD2d 428, 429); neither of which has been demonstrated here. Plaintiffs offer nothing more than a conclusory assertion that defendants should be estopped on grounds of surprise and laches. There is no showing that they will suffer a loss of some special right or a change in position if the motion is granted.

Plaintiff, Nationwide, asserts that two years and seven months have elapsed between the commencement of the action against Cusano and the making of this motion. In the interim, plaintiff claim that they have undergone time and expense in conducting extensive discovery and in preparing this case for trial. These include a Bill of Particulars and responses to defendant's demands. It has conducted three depositions and produced its insured for a deposition.

Contrary to these claims, the Court does not find plaintiff has demonstrated significant trouble or expense which could have been avoided had defendants asserted the Statute of Limitations defense earlier. Unless coupled with significant prejudice to plaintiff, even inordinate delay as here is not a barrier to amendment. In this last respect, it is noted that, as Cusano asserts, a codefendant did assert the defense in his answer. Clearly, Nationwide can not now claim surprise by the defense. Further, this is certainly not a complex case. None of the discovery procedures alleged by plaintiff can be considered onerous, complex or demanding to construct and they can not be characterized as significant prejudice (*Powe v. Albany*, 130 A.D.2d 823).

*Amica Mutual Insurance Company a/s/o Jeffrey Maher v Vanessa Cusano v Allstate Insurance Company as subrogee of David Kugler v Vanessa Cusano, Jeffrey Maher and Audrey Moskow v Vanessa Cusano and Jeffrey Maher*

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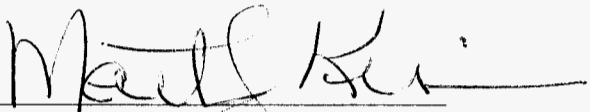
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In opposition to that portion of the motion which seeks a dismissal pursuant to CPLR 3211, plaintiff's sole argument is a reliance upon CPLR 205(a). Clearly, that section does not support plaintiff's position. That section permits an extension of six months within which to commence an action. However, such extension is not given in situations as exist here, i.e., the prior action was terminated for plaintiff's failure to serve the defendant and obtain personal jurisdiction over her.

Accordingly, in light of the foregoing, the defendant's motion to amend her answer and for a dismissal of the complaint is granted.

Dated: March 8, 2007  
RIVERHEAD, NY

  
\_\_\_\_\_  
Martin J. Kerins, J.C.C.

FINAL DISPOSITION \_\_\_\_\_

NON-FINAL DISPOSITION ✓