

<b>Bugos v LC White Plains, LLC</b>
2009 NY Slip Op 31804(U)
August 10, 2009
Supreme Court, New York County
Docket Number: 107382/2003
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 107382/2003

BUGOS, ALVIN

vs

LC WHITE PLAINS LLC.

Sequence Number : 004

AMEND

INDEX NO.

107382/2003

MOTION DATE

6/10/09

MOTION SEQ. NO.

604

MOTION CAL. NO.

11

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

*All attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.**

**FILED**

AUG 12 2009

COUNTY CLERK'S OFFICE  
NEW YORK

*Proposed Commission signed*

Dated: 8/10/09

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
ALVIN BUGOS,

Plaintiff,

against

LC WHITE PLAINS, LLC, CAPPELLI  
ENTERPRISES, INC., FULLER DEVELOPMENT  
COMPANY, GEORGE A. FULLER CO., INC., and  
HRH CONSTRUCTION COMPANY,  
Defendants.

Index Number 107382/2003  
Submission Date June 10, 2009  
Mot. Seq. No. 004  
Cal. No. 11

**DECISION AND ORDER**

-----X  
**For the Plaintiff:**  
Sacks and Sacks, Esqs.  
150 Broadway, 4<sup>th</sup> Floor  
New York NY 10038

**For the Defendants:**  
O'Connor Redd, LLP  
By: Alak Shah, Esq.  
200 Mamaroneck Ave.  
White Plains NY 10601

Papers considered in review of this motion to amend:

**Papers**  
Amended Notice of Motion, Affirmation & Exhibits Annexed

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**PAUL G. FEINMAN, J.:**

This is a personal injury action. By decision and order dated March 2, 2009, entered on March 4, 2009, this court granted defendants' motion to conduct two non-party examinations before trial, but on certain conditions, one of which is that the depositions be accomplished within 30 days of entry of the order. The decision indicated that the commissions were signed, and explicitly noted the need to balance the delay in this litigation with the defendants' right to prepare for trial, and that the matter had been stayed in April 2006 by the previous justice assigned to the litigation, a stay which was only lifted after the court denied summary judgment in November 2008.

Defendants now move to "amend" the decision, in order to extend their time to comply,

based on their failure to realize until April 16, 2009 that the decision had been rendered and entered, that is, *after* the passing of the 30 day period in which to take the depositions.

According to the attorney on the motion, the reason his office failed to schedule and conduct the depositions was due to a “clerical error” that arose because the paralegal assigned to the matter had been hospitalized around the time of the submission. It was only when the attorney himself checked E-law on April 16, 2009, did he learn that the motion was granted, and only when he obtained a copy of the Order did he realize the depositions were to have been conducted by April 4, 2009 (Mot. Shah Aff. ¶¶ 11, 14). He argues that there is no prejudice to plaintiff, as he was previously aware of the non-party depositions, and that it would be of more prejudice to defendants were they to be forced to defend their position at trial without the deposition testimonies of the two witnesses, one of whom was working with plaintiff at the time of the accident, and the other of whom was plaintiff’s direct supervisor and would be likely to know of the safety procedures and equipment (Mot. Shah Aff. ¶¶ 7-8).

According to the affidavit of service, the instant motion was served by mail to plaintiff’s attorney on May 19, 2009. Plaintiff has not opposed the motion.

Defendants rely on CPLR 2001, which provides that absent prejudice of a “substantial right of a party,” the court shall disregard a “mistake, omission, defect, or irregularity.” Here, defendants in essence throw themselves on the mercy of the court, arguing in effect that the depositions were not scheduled because their law office inadequately covered the work load during the absence of a crucial staff member from the office. The reason the court directed that these non-party examinations be done expeditiously was in an effort to bring this long-delayed case to a final resolution either by trial or settlement. It is noted that the parties complied with

complied with one of the other conditions on which the court granted defendants' motion for the commissions, namely that they mediate in good faith on March 6, 2009. However, neither party complied with the court's directive that if mediation failed on that date, then the matter should proceed to trial no later than June 15, 2009. Instead, the parties attempted mediation again on June 3, 2009, and are currently scheduled for mediation on September 15, 2009. As plaintiff has not opposed this motion, and apparently did not seek enforcement of the March 2, 2009 directives, it is appropriate to grant defendants' motion for a final extension of the time to take the out-of-state depositions. Therefore, defendants' motion is granted to the extent that the non-party EBTs must be completed within 25 days of entry of this order or be deemed waived. There will be no further extensions of this deadline. It is

ORDERED that the motion is granted to the extent that defendants are to complete the depositions of William Moscatelli and Brian Walsh, for which the court has signed the open commissions, no later than 25 days of the date of entry of this order; and it is further

ORDERED that the parties are to appear in Mediation I on September 15, 2009 and if no settlement reached on that date, a trial date in Part 40 shall be set by the parties and the mediator.

This constitutes the decision and order of the court.

Dated: August 10, 2009  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
ALVIN BUGOS,

Plaintiff,

Index No.: 107382/03

- against-

OPEN COMMISSION

LC WHITE PLAINS, LLC, CAPPELLI ENTERPRISES  
INC., FULLER DEVELOPMENT COMPANY, GEORGE  
A. FULLER CO., INC., and HRH CONSTRUCTION  
COMPANY,

Defendants.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

TO:

SUPERIOR COURT OF THE STATE OF NEW JERSEY

LAW DIVISION, COUNTY OF SUSSEX

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

KNOW YE, that we, with full faith in your prudence and competence, have appointed you by a Judge of your Court, Commission, and by these presents do authorize you or any of you to examine on, WILLIAM MOSCATELLI, as a non-party witness in an action pending in our Supreme Court, New York County, between ALVIN BUGOS against defendants LC WHITE PLAINS, LLC., CAPPELLI ENTERPRISES, INC., FULLER DEVELOPMENT COMPANY, GEORGE A. FULLER CO., INC., and HRH CONSTRUCTION COMPANY, under oath, upon oral examination to be conducted pursuant to Article 31 of the New York Civil Practice Law and Rules.

We, therefore, request of you that, in furtherance of justice, you will by proper and usual process of your Court cause witness, William Moscatelli, to appear before you or some competent person by you for that purpose to be appointed and authorized by you

at the precise time by you to be fixed, and there to answer under oath, to the several questions and cross-questions put to him by the attorneys for the parties hereto and that you will cause his deposition to be committed to writing and return the same to us.

Pursuant to Section 3102(e) of the New York Civil Practice Law and Rules, "[w]hen under any mandate, writ or commission issued out of any court of records in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in this state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony and actions pending in the state. The Supreme Court or a County Court shall make any appropriate order in aid of taking such a deposition." In accordance with the foregoing statute, we shall be and stand ready, willing, and able to do the same for you as we are asking you to do herein in a similar case when required.

WITNESS, J. HON. PAUL G. FERRMAN, a Justice of the Supreme Court of the State of New York and the seal thereof at the County of New York, this 10 day of ~~February~~ August, 2009.

ENTER:



HON. PAUL G. FERRMAN

precise time by you to be fixed, and there to answer under oath, to the several questions and cross-questions put to him by the attorneys for the parties hereto and that you will cause his deposition to be committed to writing and return the same to us.

Pursuant to Section 3102(e) of the New York Civil Practice Law and Rules, "[w]hen under any mandate, writ or commission issued out of any court of records in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in this state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony and actions pending in the state. The Supreme Court or a County Court shall make any appropriate order in aide of taking such a deposition." In accordance with the foregoing statute, we shall be and stand ready, willing, and able to do the same for you as we are asking you to do herein in a similar case when required.

WITNESS, J. HON. PAUL G. FEINMAN, a Justice of the Supreme Court of the State of New York and the seal thereof at the County of New York, this 10 day of August February, 2009.

ENTER:



J.S.C.

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK