

Ludena v Huamna

2011 NY Slip Op 33749(U)

February 2, 2011

Sup Ct, Queens County

Docket Number: 11444/2010

Judge: Augustus C. Agate

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

	x	
ZENON LUDENA and MAURA LUDENA,		Index Number <u>11444</u> 2010
Plaintiffs,		Motion Date <u>October 12,</u> 2010
- against -		
JULIA R. HUAMNA, et al.,		Motion Cal. Number <u>18 & 19</u>
Defendants.		Motion Seq. No. <u>1 & 2</u>
	x	

The following papers numbered 1 to 23 read on this motion by defendants Shifra Construction Corp. and Rafi Manor for an order dismissing the complaint on the grounds of documentary evidence, failure to state a cause of action and lack of jurisdiction pursuant to CPLR 3211(a)(1)(7) and (8). Defendant Julia Coen a/k/a Julia R. Huaman, cross moves for an order dismissing the complaint on the grounds of failure to state a cause of action and lack of jurisdiction pursuant to CPLR 3211(a)(7) and (8). Defendant David B. Nicholson separately moves for an order dismissing the complaint the grounds of failure to state a cause of action and lack of jurisdiction pursuant to CPLR 3211(a)(7) and (8).

	Papers <u>Numbered</u>
Order to Show Cause - Affidavits - Exhibits .Affirmation (A-C).....	1-4
Notice of Motion-Affidavit-Exhibits.....	5-6
Notice of Cross Motion-Affirmation-Affidavit -Exhibits (A-D).....	7-10
Opposing Affirmation-Exhibits (A-D).....	11-15
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Opposing Affirmation.....	22-23

Upon the foregoing papers these motions and cross motion and consolidated for the purposes of a single decision and are determined as follows:

Zenon Ludena commenced the within action to recover damages arising out of the extension of a party wall on May 6, 2010 against defendants Julia R. Huaman, a/k/a Julia Coen, Rashid Ali, David B. Nicholson and Shifra Construction Corp. Plaintiff thus was required to effectuate service of the summons and complaint no later than September 3, 2010 (see CPLR 304, 306-b). However, it is undisputed that the summons and verified complaint filed on May 6, 2010, was not served on the named defendants. Rather, plaintiffs, retained their present counsel, and a consent to change attorney form was executed on May 28, 2010, and subsequently filed with the court. A supplemental summons and an amended complaint was filed with the Clerk of the Court on June 7, 2010, which names as an additional plaintiff Maura Ludena and as an additional defendant, Rafi Manor. The supplemental summons also names Julia R. Huaman and Julia Coen as separate defendants. The amended complaint alleges a single cause of action to recover damages for encroachment. Plaintiffs also filed a notice of pendency with the Clerk of the Court on June 7, 2010.

An examination of the court's file reveals that affidavits of service were filed on June 18, 2010, which establish that Shifra Construction Corp. was served on June 9, 2010, with a copy of the "Supplemental, etc." summons and complaint, by serving Rafi Manor who is described as its "managing agent" "authorized to accept" service; and that Rafi Manor was personally served with a copy of the "Supplemental, etc." summons and complaint on June 9, 2010, pursuant to CPLR 308(1). Rafi Manor and Shifra Construction Corp. were both served with a copy of the notice of pendency on June 9, 2010.

Affidavits of service filed with the court on July 6, 2010, further establish that Julia R. Huaman was served with a copy of the "Supplemental, etc." summons and complaint on June 16, 2010, pursuant to CPLR 308(4); that Julia Coen was served with a copy of the "Supplemental, etc." summons and complaint on June 16, 2010, pursuant to CPLR 308(4) and that David B. Nicholson was served with the supplemental summons and amended complaint on June 24, 2010, pursuant to CPLR 308(2). Julia R. Huaman, Julia Coen and David B. Nicholson were each served with a copy of the notice of pendency.

Apparently no affidavits of service have been filed with respect to Rashid Ali, a defendant named in the original summons and complaint, and also named in the supplemental summons and complaint.

CPLR 305(a) provides, in pertinent part, that "[w]here, upon order of the court or by stipulation of all parties or as of right pursuant to section 1003, a new party is joined in the action and the joinder is not made on the new party's motion, a supplemental summons

specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon the such party.” This section has been interpreted to require that a supplemental summons be filed and served only where a new defendant is joined. In general, a supplemental summons need not be served on a defendant where the new party is a plaintiff (*see Patrician Plastic Corp. v Bernadel Realty Corp.*, 25 NY2d 599[1970]).

CPLR 1003 provides that “[p]arties may be added at any stage of an action by leave of the court or by stipulation of all parties who have appeared, or once without leave of the court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it”.

The conditions imposed upon adding a new party to a pending action by CPLR 1003 have been held, repeatedly, to be jurisdictional in nature. It is well established that where leave of court is required to join a new party defendant to an action, service, without leave of court, of any supplemental summons together with an amended pleading, is a nullity (*see Perez v Paramount Communications, Inc.*, 92 NY2d 749, [1999]; *Public Admin. of Kings County v McBride*, 15 AD3d 558,[2005]; *Battle v Brookhaven Nursing Home*, 7 AD3d 553,[2004]).

CPLR 3025(a) provides that “[a] party may amend his pleading once without leave of the court within twenty days after its service, or at anytime before the period for responding to it expires, or within twenty days after service of a pleading responding to it.”

The provisions of CPLR cited above require that a plaintiff first serve the summons and complaint before that plaintiff may serve a supplemental summons and an amended complaint, as of right. Here, as counsel for plaintiffs states that the original summons and complaint had not been served, plaintiffs were not entitled to serve either a supplemental summons or an amended complaint, as of right. Therefore, the failure to obtain judicial permission to add Julia R. Huaman and Rafi Manor as defendants constitutes a jurisdictional defect, and renders the service of the amended complaint on these defendants a nullity. The court therefore lacks personal jurisdiction over these defendants.

Furthermore, as the supplemental summons and amended complaint were served on defendants Julia Coen, David B. Nicholson and Shifra Construction Corp., without the court’s permission, and as the original summons and complaint were never served, the court lacks personal jurisdiction over these defendants.

In view of the foregoing, defendants’ Rafi Manor and Shifra Construction Corp.’s motion to dismiss the complaint is granted. Defendant’s Julia Coen a/k/a Julia R. Huaman,

cross motion for an order dismissing the complaint is granted. Defendant David B. Nicholson's motion to dismiss the complaint is granted.

Dated: February 2, 2011

AUGUSTUS C. AGATE, J.S.C.