

Pena v Dimino

2016 NY Slip Op 32680(U)

December 16, 2016

Supreme Court, Bronx County

Docket Number: 20211/13E

Judge: Lizbeth Gonzalez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(E)

-----X
YOEL PENA,

DECISION and ORDER
Index No.: 20211/13E

Plaintiff,

- against -

DEANA MARIE DIMINO,

Defendant.

-----X

DEANA MARIE DIMINO,

Third-Party Plaintiff,

- against -

245 W 28th STREET PROPERTIES, LLC and
EDISON PROPERTIES, LLC.,

Third-Party Defendants

-----X

DEANA MARIE DIMINO,

Second Third-Party Plaintiff

- against -

245 WEST 29 LLC and EDISON NY PARKING, LLC,

Second Third-Party Defendants.

-----X

Recitation pursuant to CPLR §2219(a) of the papers considered in reviewing
the underlying motion:

Notice of Motion and annexed Exhibits and Affidavits.....	1
Notice of Cross -Motion and annexed Exhibits and Affidavits.....	1

Plaintiff Pena commenced an action against defendant Deana Marie Dimino
alleging that she owned and operated a red Volkswagon, the motor vehicle involved in
a hit and run collision on 8/24/10 at 245 West 29th Street in New York County.

Defendant Dimino asserts that she was not involved in any accident and thus moves for summary judgment. Plaintiff Pena cross-moves to amend the complaint to add the correct party to the action and extend the time to serve.

DISCUSSION

The proponent of a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].)

Plaintiff alleges that on 8/24/10 while working at Edison NY Parking on 245 West 29th Street, he was struck by a red Volkswagon allegedly driven by defendant Deana Marie Dimino. In support of her motion, defendant Deana Dimino proffers her deposition testimony and a letter from her attorney to plaintiff's attorney.

During deposition Ms. Dimino testified that she resides in New Jersey. She did not drive to New York on 8/24/10 and has not driven to New York since she left over 16 years ago. Defendant Deana Dimino maintains that she and her husband own three vehicles: a white Toyota Tacoma, a black Cadillac SRX and a Ford Explorer.

Defendant counsel's letter to plaintiff's counsel dated 3/20/15 stated that defendant Deana Marie Dimino was mistakenly named as a party to this action and requested that the action against Ms. Dimino be discontinued; there was no response to the proposed stipulation. Plaintiff's counsel now acknowledges that during Ms. Dimino's deposition on 3/12/15, he became aware that she was the wrong defendant.

Plaintiff's unopposed cross-motion seeks an order granting leave to amend the complaint nunc pro tunc to name Deanna Dimino as a proper party, and to allow for

an extension of time to serve since the Statute of Limitations for this action expired on 8/24/13.

Plaintiff's counsel affirms that a criminal complaint based on the 8/24/10 accident was previously filed with the New York County District Attorney's Office. In an attempt to locate and serve Deanna Dimino, plaintiff hired a private investigator. A facsimile sent to plaintiff's attorney from the investigator stated defendant was arrested for assault, that her case was sealed and plaintiff's attorney would need an unsealing Order to obtain any information on defendant Deanna Dimino.

CPLR 2004 provides that the court may extend the time fixed by any statute, rule or order upon such terms as may be just and for good cause shown, whether the application before or after the expiration of the time fixed. Leave to amend is freely given provided the proposed amendment neither prejudices nor surprises the defendant (*McGhee v Odell*, 96 AD3d 449 [1st Dept 2012] and is not patently devoid of merit. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010].)

CONCLUSION

Defendant Deana Marie Dimino's motion for summary judgment is granted and all cross-claims against her are dismissed. Under these circumstances where plaintiff's counsel admits that he knew that the defendant was not a proper party but failed to sign the stipulation of discontinuance proffered by her lawyer, it was unfair to force the defendant to file a motion for summary judgment in order to be removed from the case. Costs in the amount of \$500 are accordingly assessed against plaintiff.

Leave to extend the time for service is granted provided the movant shows good cause or if it is in the interest of justice (CPLR §306-b). Based on the foregoing,

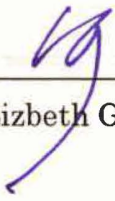
plaintiff's cross-motion is granted. The caption shall be amended to reflect the named defendant Deanna Dimino and plaintiff's time to serve process upon the defendant is extended for thirty (30) days from the date of this Order upon payment of all necessary fees and provided that proof is filed to establish that costs in the amount of \$500 were paid to defendant Deana Marie Dimino within 30 days of the signing of this Order.

Plaintiff shall also serve a copy of this Decision and Order with Notice of Entry within 30 days.

This is the Decision and Order of the Court.

Dated: December 16, 2016

So ordered,



Hon. Lizbeth González, JSC