

<b>Ramirez v Hussain</b>
2019 NY Slip Op 31985(U)
June 18, 2019
Supreme Court, Kings County
Docket Number: 503152/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18<sup>th</sup> day of June, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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CLARA RAMIREZ, CLEMENCIA RAMIREZ and ANABEL GARCIA-RAMIREZ,

Index No.: 503152/2018

*Plaintiffs,*

-against-

**DECISION AND ORDER**

TASSADDUQ HUSSAIN, AMJAD PARVEZ, GOMEZ ELEUTERIO EVANGELISTA, and TOWN LIMO, INC.,

Motion Sequence #2

*Defendants.*

-----X

GOMEZ ELEUTERIO EVANGELISTA, and TOWN LIMO, INC.,

*Third-Party Plaintiffs,*

-against-

TASSADDUQ HUSSAIN,

*Third-Party Defendant.*

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Notice of Petition/Petition (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3, _____
Reply/Sur-Reply .....	4, _____

After oral argument and upon review of the papers in this matter, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on July 11, 2015. Plaintiffs, Clara Ramirez, Clemencia Ramirez and Anabel Garcia Ramirez (hereinafter “the Plaintiffs”) allege in their Complaint that on that date they were all passengers in a vehicle operated by Defendant Gomez Eleuterio Evangelista and owned by Defendant Town Limo, Inc. (hereinafter the “Town Limo Defendants”). The Plaintiffs allege that the Town Limo Defendants’ vehicle

collided with a vehicle operated by Defendant Tassadduqq Hussain and owned by Defendant Amjad Parvez (hereinafter the "Parvez Defendants"). The collision allegedly occurred on Cortelyou Road at or near its intersection with East 9<sup>th</sup> Street, in the County of Kings, City and State of New York.

The Parvez Defendants now move (motion sequence #2) pursuant to CPLR 3211(a)(5) for an Order dismissing the Amended Summons and Complaint as it relates to Defendant Tassadduqq Hussain, based upon the expiration of the statute of limitations. By Order on consent of the parties, dated August 7, 2018, the matter was set for a hearing by a referee, to Hear and Determine whether service of process on Defendant Hussain was valid. On November 19, 2018, Referee Derefim Neckles made a finding that Plaintiff failed to establish that Defendant Hussain was properly served pursuant to CPLR 308(4). On November 28, 2018, the Town Limo Defendants, in their capacity as Third Party Plaintiffs, filed a Third Party Summons and Complaint against Defendant Hussain, as a Third Party Defendant. On December 19, 2018, the Plaintiffs filed an Amended Summons and Amended Complaint which adds a Second Cause of Action against First Party Defendant Hussain, sounding in negligence and arising out of the alleged accident at issue. As a result, the Parvez Defendants contend that the Amended Complaint is untimely, in as much as the statute of limitations for negligence is three years and the alleged accident occurred more than three years prior to the date of the Amended Complaint.

The Plaintiffs oppose the motion and argue that it should be denied. Specifically, the Plaintiffs contend that the Amended Complaint that added Defendant Hussain as a First Party Defendant was not untimely pursuant to CPLR 1009. The Plaintiffs contend that CPLR 1009 allowed the Plaintiffs to amend their complaint without leave of court in order to assert a claim against Defendant Hussain, within twenty days after service of the answer to the Third Party Complaint. The Plaintiffs further argue that while the statute of limitations may have run, CPLR

1009 still allows the Plaintiffs to amend their complaint in this way given that Third Party Defendant Hussain and Defendant Amjad Parvez, are “united in interest” and the claims are related.

CPLR 1009 provides that “[w]ithin twenty days after service of the answer to the third-party complaint upon plaintiff’s attorney, the plaintiff may amend his complaint without leave of court to assert against the third-party defendant any claim plaintiff has against the third-party defendant.” In situations where the statute of limitations has expired, amendment is possible if the plaintiff successfully demonstrates a basis for application of the relation back doctrine pursuant to CPLR 203. *See Headley v. City of New York*, 115 A.D.3d 804, 806, 982 N.Y.S.2d 149, 151 [2<sup>nd</sup> Dept, 2014]. “For the rule allowing relation back to the original date of filing under CPLR 203(c) to apply, a plaintiff is required to prove that: ‘(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well.’” *Sally v. Keyspan Energy Corp.*, 106 A.D.3d 894, 896–97, 966 N.Y.S.2d 133, 136 [2<sup>nd</sup> Dept, 2013], *quoting Austin v. Interfaith Med. Ctr.*, 264 A.D.2d 702, 703, 694 N.Y.S.2d 730, 732 [2<sup>nd</sup> Dept, 1999].

Turning to the merits of the instant motion, the Court finds that the statute of limitations has expired, the Plaintiffs have not shown that they have satisfied the requirements of both CPLR 1009 and CPLR 203, sufficient to allow the Plaintiffs to amend their complaint to include Defendant Hussain. The Court agrees that the Plaintiff’s claim against Defendant Hussain and the claim against the Defendant Parvez arose out of the same conduct, transaction or occurrence, and Defendant Hussain is united in interest with the Defendant Parvez under a vicarious liability theory. However,

the Plaintiffs have not shown that they have satisfied the third element of the relation back doctrine. The third prong of the relation back doctrine involves “ a mistake by the plaintiff as to the identity of the proper parties.” In the instant proceeding, the Plaintiffs were aware of the identity of Defendant Hussain, and his addition pursuant to CPLR 1009 was a product of invalid service not mistake of identity.

As a result, the motion by the Parvez Defendants is denied.


Based on the foregoing, it is hereby ORDERED as follows:

The Parvez Defendants’ motion (motion sequence #2) is granted and the proceeding is dismissed as against Defendant Hussain pursuant to CPLR 3211(a)(5).

This constitutes the Decision and Order of the Court.

ENTER:

  
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**Carl J. Landicino**  
J.S.C.

  
KINGS COUNTY CLERK  
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