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| <b>Escoto v John Doe # 1-5</b>                                                                                                                                                                                                 |
| 2020 NY Slip Op 34206(U)                                                                                                                                                                                                       |
| December 15, 2020                                                                                                                                                                                                              |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 526575/2019                                                                                                                                                                                                     |
| Judge: Peter P. Sweeney                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 526575/2019

Motion Date: 11-23-20

Mot. Seq. No.: 1-2

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FELIX ANTONIO ESCOTO,

Plaintiff,

-against-

**DECISION/ORDER**

JOHN DOE # 1-5 (name fictitious and unknown to  
Plaintiff) and AFFIRMATION ROBERT E. CHARLES  
JR. A/K/A ROBERT CHARLES,

Defendants.

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The following papers, which were e-filed on NYSEF as items Nos. 8-37, were  
read on these motions:

Defendant CHARLES ROBERTS, JR., sued herein incorrectly as ROBERT E.  
CHARLES JR. A/K/A ROBERT CHARLES, moves for an order (a) pursuant to  
CPLR 3212 granting him summary dismissing the complaint on the grounds that the  
Court lacks personal jurisdiction over him and the Statute of Limitations has expired;  
and (b) pursuant to CPLR 3211(a)(7), dismissing the complaint on the grounds that it  
fails to state a cause of action (**Mot. Seq. No. 1**). Plaintiff cross-moves for an order  
pursuant to CPLR §305(c) granting him leave to amend the caption to correctly name  
the defendant (**Mot. Seq. No. 2**).

This action to recover damages for personal injuries arises out of motor vehicle accident  
that occurred on or about December 28, 2016. Plaintiff commenced the action by the filing of a  
summons and complaint on December 6, 2019. In the summons and complaint, the plaintiff  
referred to the defendant as ROBERT E. CHARLES JR. A/K/A ROBERT CHARLES. The  
defendant's correct name is CHARLES ROBERTS, JR. Plaintiff alleged in the complaint that

the vehicle that struck his vehicle and caused him injury, a 2014 motor vehicle bearing North Carolina License Plate number BAX5129, was owned by the defendant.

The plaintiff served the out of state defendant pursuant to VTL § 253 by serving a copy of the summons and complaint on Secretary of State on December 13, 2019 and by mailing another copy to the defendant by Certified Mail-Return Receipt Requested on December 16, 2019. The summons and complaint were mailed to the defendant at the following address: 305 Hayes Drive Saddle Brook, NJ 07663. The defendant does not dispute that this is his address. In fact, he signed the Return Receipt on December 21, 2021.

The defendant interposed an answer to the complaint on January 7, 2020. He appeared as CHARLES ROBERTS, JR., sued herein incorrectly as ROBERT E. CHARLES JR. A/K/A ROBERT CHARLES, and admitted that he owned the 2014 motor vehicle bearing North Carolina License Plate number BAX5129. The defendant raised various affirmative defenses, including lack of personal jurisdiction, improper service of process and that the action barred is time barred.

The Court will first address the cross-motion. “Under CPLR 305(c), an amendment to correct a misnomer will be permitted ‘if the court has acquired jurisdiction over the intended but misnamed defendant ... provided that ... the intended but misnamed defendant was fairly apprised that [he] was the party the action was intended to affect ... [and] would not be prejudiced’ by allowing the amendment” (*Holster v. Ross*, 45 A.D.3d 640, 642, 846 N.Y.S.2d 261, quoting *Simpson v. Kenston Warehousing Corp.*, 154 A.D.2d 526, 527, 546 N.Y.S.2d 148). “Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue” (*Creative Cabinet*

*Corp. of Am. v. Future Visions Computer Store*, 140 A.D.2d 483, 484–485, 528 N.Y.S.2d 596; *see Ober v. Rye Town Hilton*, 159 A.D.2d 16, 20, 557 N.Y.S.2d 937). As the court explained in *Medina v. City of New York*, 167 A.D.2d 268, 269–270, 561 N.Y.S.2d 768:

the court may at any time, in its discretion and upon such terms as may be just, allow any summons to be amended if a substantial right of a party against whom the summons is issued is not prejudiced. Such amendment of a summons is justified where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it. (*Connell v. Hayden*, 83 A.D.2d 30, 36–37, 443 N.Y.S.2d 383; *and see, Creative Cabinet Corp. v. Future Visions Computer Store*, 140 A.D.2d 483, 484–485, 528 N.Y.S.2d 596.)

Here, there is no doubt that correct party defendant has been served with process, but under a misnomer. The misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue since the complaint makes clear that the plaintiff was seeking to sue the owner of the motor vehicle bearing North Carolina License Plate number BAX5129. Clearly, there has been no showing that the defendant would not be prejudiced by allowing the amendment.

In a somewhat similar case, the Court held that plaintiffs' motion to amend caption so as to reflect that true name of defendant was Francesco Monti, as opposed to Monti Francesco, should have been granted since there was evidence that defendant was properly served and he suffered no prejudice as result of misnomer (*Houghtalen v Norstar Bank*, 191 A.D.2d 371, 595 N.Y.S.2d 408).

While a plaintiff may not invoke CPLR 305(c) to proceed against an entirely new defendant, who was not served, after the expiration of the statute of limitations (*see Security Mut. Ins. Co. v. Black & Decker Corp.*, 255 A.D.2d 771, 773, 680 N.Y.S.2d 287), such is not the case

here. Plaintiff's motion is therefore granted and caption will be amended nunc pro tunc. In light of this determination, there is no basis to grant the relief the defendant is now seeking.

For all of the above reasons, it is hereby

**ORDRED** that plaintiff's motion to amend the caption to reflect the defendant's correct name to be CHARLES ROBERTS, JR is **GRANTED**, and the caption will be so amended nunc pro tunc. It is further

**ORDRED** that defendant's motion is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 15, 2020



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020