

**Cuellar v Ramirez**

2009 NY Slip Op 33318(U)

January 28, 2009

Sup Ct, Queens County

Docket Number: 13508/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

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JAVIER ENRIQUE CUELLAR,  
  
Plaintiff,

Index No. 13508/07  
  
Motion  
Date December 9, 2008

-against-

JOSE LUIS RAMIREZ,  
Defendant.

Motion  
Cal. No. 13

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JOSE LUIS RAMIREZ,  
Third-Party Plaintiff,

Motion  
Sequence No. 1

-against-

HILDA E. QUINTO PLLC, HILDA E.  
QUINTO and QUINTO REALTY &  
MANAGEMENT,  
Third-Party Defendants.

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PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that plaintiff's motion for an Order granting plaintiff leave to serve an amended summons and complaint adding Hilda E. Quinto, PLLC, Hilda E. Quitno, and Quinto Realty & Management as defendants and to amend the caption to reflect the addition of such defendants is hereby granted without opposition.

It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]).

The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept 1995]).

The Court has discretion to add Hilda E. Quinto, PLLC, Hilda E. Quinto, and Quinto Realty Management as defendants to the action and to amend the caption to reflect same. CPLR Section 1003: Nonjoinder and misjoinder of parties states in relevant part, that "[p]arties may be added at any stage of the action by leave of court. . ." Plaintiff demonstrated that Hilda E. Quinto, PLLC, Hilda E. Quinto, and Quinto Realty Management should be joined as a defendants in this action, as plaintiff asserts that through discovery, such defendants have been determined to be possibly liable for plaintiff's injuries. As there is no prejudice, as a reasonable excuse for the delay has been offered, and as the instant motion is unopposed, plaintiff's motion for an Order granting plaintiff leave to serve an amended summons and complaint adding Hilda E. Quinto, PLLC, Hilda E. Quinto, and Quinto Realty Management as defendants and to amend the caption to reflect the addition of such defendants is hereby granted without opposition.

Plaintiff is granted leave to add Hilda E. Quinto, PLLC, Hilda E. Quinto, and Quinto Realty Management as party defendants by the filing and service upon the Clerk of the Court and upon all parties a Supplemental Summons and Amended Complaint (see, *Connell v. Hayden*, 83 AD2d 30 [2d Dept 1981]) together with a copy of this order and notice of entry within thirty (30) days from the date of entry of this order.

Defendant/third-party plaintiff's cross motion for an order pursuant to CPLR 3216 dismissing plaintiff's complaint, for failure to appear for an examination before trial; for third-party defendant's failure to provide responses to defendant's discovery demands; or in the alternative, striking this matter from the trial calendar granting leave to defendant to serve further discovery demands, and extending defendant's time to move for summary judgment is hereby granted solely to the following extent:

Defendant/third-party plaintiff asserts that both a Preliminary Conference Order and a Compliance Conference Order directed plaintiff to appear for depositions and that plaintiff has failed to appear for such deposition. Defendant/third-party plaintiff also asserts that plaintiff filed a Note of Issue on August 12, 2008 despite the fact that significant discovery remained outstanding.

Plaintiff maintains that the Court's Compliance Conference Order dated May 13, 2008 required him to file the Note of Issue by September 12, 2008 and if it was not filed by that date, the action would be dismissed. Plaintiff does not dispute that there is an outstanding deposition of plaintiff, but maintains that the deposition is outstanding because defendant has requested adjournments of plaintiff's deposition. Moreover, plaintiff contends that he was instructed by court personnel to file the Note of Issue despite the fact that depositions had not been held.

The Court finds that defendant's motion is granted solely to the extent that, as it is undisputed that all discovery has not yet been completed, the matter is not yet ready for trial (22 NYCRR § 202.21; see, *Drapaniotis v. 36-08 33<sup>rd</sup> Street Corp.*, 288 AD2d 254 [2d Dept 2001]). The Note of Issue and Certificate of Readiness are hereby vacated. The action shall be stricken from the calendar upon presentation of this order to the calendar clerk. Plaintiff may restore the matter to the trial calendar upon completion of all outstanding discovery and the resolution of any discovery issues, along with payment of the appropriate fee.

As plaintiff has provided a reasonable excuse for his failure to appear for a scheduled deposition, plaintiff is compelled to appear for his outstanding EBT on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry. Should plaintiff fail to comply with this Order, defendant may move for sanctions pursuant to CPLR 3126.

As the Note of Issue has been vacated, pursuant to CPLR 3212(a), defendant may move for summary judgment no later than one-hundred twenty (120) days after the filing of a new Note of Issue.

Additionally, defendant/third-party plaintiff contends that third-party defendants failed to respond to a notice of discovery and inspection and various discovery demands served upon it on September 4, 2008, and such allegation is undisputed by third-party defendant, as such third-party defendant is required to respond to all outstanding discovery demands within thirty (30) days from the date of service of a copy of this order with notice of entry. Should third-party defendant fail to comply with this Order, defendant/third-party plaintiff may move for sanctions pursuant to CPLR 3126.

Defendant/third-party plaintiff is directed to serve a copy of this order upon plaintiff and third-party defendant.

Finally, the Court notes that while cross motion and

opposition papers of Hilda E. Quinto PLLC, Hilda E. Quinto, and Quinto Realty & Management were submitted to the Court, no attorney appeared at the calendar call on the return date, and as the Part 22 Rules require an attorney appearance, the cross motion and opposition papers were marked off the calendar.

This constitutes the decision and order of the Court.

Dated: January 28, 2009

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**Howard G. Lane, J.S.C.**