

**Muco v Sadiku**

2012 NY Slip Op 33967(U)

March 8, 2012

Supreme Court, Queens County

Docket Number: 18833/11

Judge: Denis J. Butler

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This opinion is uncorrected and not selected for official publication.

Short Form Order

QUEENS COUNTY CLERK  
FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

2012 MAR 15 A 11:00

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

<sup>u</sup>  
**ORIGINAL**

**OS**

-----x  
ALBERT MUCO and RAJMONDA MUCO,

Plaintiffs,

Index No.: 18833/11

-against-

Motion Date:  
January 31, 2012

TARZAN SADIKU, MIRANDA SADIKU,  
and KRESHNIK SADIKU

Cal. No.: 26  
Seq. No.: 3

Defendants.

2012 MAR 15 A 11:00  
QUEENS COUNTY CLERK  
FILED

-----x  
TARZAN SADIKU, MIRANDA SADIKU  
and KRESHNIK SADIKU ,

Plaintiffs

Third Party  
Index No.: 35042/11

-against-

60<sup>th</sup> COURT MASPETH LLC, EYAL SHACHI, RIDGE  
ABSTRACT CORP., OLD REPUBLIC NATIONAL  
TITLE INSURANCE COMPANY and COLLERAN,  
O'HARA & MILLS, PC.,

Defendants.

-----x  
The following papers numbered 1 to 53 read on this  
application by plaintiff for, inter alia, leave to amend the  
complaint and cross-motion by defendants for summary judgment,  
pursuant to CPLR §3212.

Papers  
Numbered

- Plaintiffs' Order to Show Cause,
- Affirmation, Exhibits ..... 1-12
- Trinity Affirmation in Opposition ..... 13

Plaintiffs' Reply, Exhibits ..... 14-16  
 Defendants' Notice of Cross-Motion,  
 Affirmation, Affidavit, Memorandum of Law,  
 Exhibits ..... 17-39  
 Plaintiffs' Affirmation in Opposition,  
 Affidavit, Exhibit ..... 40-51  
 Defendants' Reply, Memorandum of Law ..... 52-53

Upon the foregoing papers, it is ordered that this application and cross-motion are determined as follows:

The branch of plaintiffs' application seeking to amend the complaint and the caption on the pleadings to assert a direct claim against third-party defendants, 60<sup>th</sup> COURT MASPETH LLC and EYAL SHACHI, is hereby granted, without opposition, pursuant to CPLR §1003, et seq. and §3025.

Movants have demonstrated that the amendment is warranted and no party will be prejudiced by this amendment (see, CPLR §5019[a]; Alaska Seaboard Partners, L.P. v. Low, 294 A.D.2d 318 [2<sup>nd</sup> Dept. 2002]).

The branch of plaintiffs' application seeking to amend the complaint and the caption on the pleadings to join "JUDITH SHACHI, individually and as a member of 60<sup>th</sup> COURT MASPETH LLC", "DANNY ZIVAN, individually and as a member of 60<sup>th</sup> COURT MASPETH LLC" and "TRINITY ABSTRACT, LLC", as additional defendants in the action is hereby granted, pursuant to CPLR §1002(b) and §3025(b).

Movants have demonstrated that the amendment is warranted in that there exists common questions of law or fact (see, CPLR §1002[b]) and that the proposed amendment is not "palpably insufficient or patently devoid of merit" (Lucido v. Mancuso, 49 A.D.3d 220, 222 [2 Dept. 2008]; see, Jablonski v. Jakaitis, 85 A.D.3d 969 [2 Dept. 2011]; Truebright Co., Ltd. v. Lester, 84 A.D.3d 1065 [2 Dept. 2011]). Defendants have failed to demonstrate prejudice of a substantial right by the delay in bringing this motion, necessary to warrant denial hereof, as the magnitude of discovery would have been the same had all plaintiffs been initially named herein (see, Alaska Seaboard Partners, L.P. v. Low, 294 A.D.2d 318 [2<sup>nd</sup> Dept. 2002]).

The amended first-party caption shall be:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
ALBERT MUCO and RAJMONDA MUCO,

Index No.: 18833/11

Plaintiffs,

-against-

TARZAN SADIKU, MIRANDA SADIKU,  
and KRESHNIK SADIKU, 60<sup>th</sup> COURT MASPETH  
LLC, EYAL SHACHI, individually and as  
manager of 60<sup>th</sup> COURT MASPETH LLC,  
JUDITH SHACHI, individually and as  
a member of 60<sup>th</sup> COURT MASPETH LLC,  
DANNY ZIVAN, individually and as a  
member of 60<sup>th</sup> COURT MASPETH LLC and  
TRINITY ABSTRACT, LLC

Defendants.

-----X

The branch of plaintiffs' order to show cause seeking to amend the complaint, as requested in the proposed amended verified complaint (Ex. J), is granted with respect to the First, Second and Fourth Causes of Action. It is well established that leave to amend pleadings shall be freely granted absent a showing of prejudice or surprise to the opposing party (see, CPLR §3205[b] and §305[c]; Cherebin v. Empress Ambulance Service, Inc., 43 A.D.3d 364 [1 Dept. 2007]). Plaintiff's have demonstrated that the branch of the order to show cause seeking to amend the complaint with respect to the First, Second and Fourth Causes of Action is both timely and meritorious (see, CPLR §1009; Rodriguez Paramount Development Associates, LLC., 67 A.D.3d 767 [2 Dept. 2009]) and defendants, in response thereto, have failed to demonstrate either prejudice or surprise sufficient to deny plaintiffs' order to show cause herein.

The branch of plaintiffs' application seeking to amend the complaint is denied with respect to the Third Cause of Action, which is based upon 22 NYCRR §130-1.1(a). A cause of action under 22 NYCRR §130-1.1(a) seeks costs and/or sanctions "resulting from frivolous conduct", and New York State does not recognize a separate cause of action to impose sanctions pursuant to such section (see, Cerciello v. Admiral Ins. Brokerage Corp., 90

A.D.3d 967 [2 Dept. 2011]).

In this action seeking judgment declaring the rights and other legal relations of the parties with respect to two parking spaces located at 60-34 60<sup>th</sup> Court, Maspeth, New York, defendants cross-move for summary judgment and dismissal of the First and Second Causes of Action contained in plaintiffs' complaint, contending that plaintiffs have failed to make out a prima facie claim of entitlement against defendants and that there exists no triable issue of material fact to continue these causes of action against defendants. Defendants contend that plaintiffs have failed to demonstrate that the Driveway Space Restrictive Declaration, dated February 5, 2009 and filed on February 17, 2009 (Ex. A), grants plaintiffs the right to two parking spaces on defendants' property, and, as such, defendants are entitled to summary judgment and the dismissal of the First and Second Causes of Action as a matter of law. Plaintiffs oppose the cross-motion, contending that there exist questions of fact regarding the terms of the subject Driveway Space Restrictive Declaration (Ex. A) and the intentions of the parties thereto, which would make the instant summary judgment motion premature.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (Lopez v. Beltre, 59 A.D.3d 683, 685 [2 Dept. 2009]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted]" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]; see also, Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Andre v. Pomeroy, 35 N.Y.2d 361 [1974]; Stukas v. Streiter, 83 A.D.3d 18 [2 Dept. 2011]; Dykeman v. Heht, 52 A.D.3d 767 [2 Dept. 2008]; Kolivas v. Kirchoff, 14 A.D.3d 493 [2 Dept. 2005]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Scott v. Long Island Power Auth., 294 A.D.2d 348, 348 [2 Dept. 2002]).

The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Gilbert Frank Corp.

v. Federal Ins. Co., 70 N.Y.2d 966 [1988]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320, [1986]; Winegrad v. New York Med. Ctr., 64 N.Y.2d 851 [1985]). Once the proponent has met such burden, the opponent must then produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

With respect to the sole branch of defendants' cross-motion for summary judgment, seeking dismissal of the First and Second Causes of Action contained in plaintiffs' complaint, the evidence should be liberally construed in a light most favorable to plaintiffs (see, Nash v. Port Washington Union Free School Dist., 83 A.D.3d 136 [2 Dept. 2011]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2 Dept. 2009]). Further, the facts alleged by the non-moving party, and the inferences that may be drawn therefrom, must be accepted as true (see, Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573 [2 Dept. 2004]). Based on the evidence submitted, questions exist as to whether the language in the subject Driveway Space Restrictive Declaration (Ex. A), to wit, "... and access to required parking spaces", intends the granting of rights to "parking spaces" on the property, as contended by plaintiffs, or grants only the right to pass over the property for ingress and egress, as contended by defendants. The conflicting contentions regarding the intended meaning of the term proffered by plaintiffs and defendants cannot be resolved without a trial (see, DeJesus v. Alba, 63 A.D.3d 882 [1 Dept. 2009]).

As such, defendants have failed to tender sufficient evidence to show the absence of any material issue of fact and the right to summary judgment as a matter of law (see, Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851 [1985]; Bridges v. Wyandanch Community Development Corp., 66 A.D.3d 938, 940 [2 Dept. 2009]; Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corporation, 64 A.D.3d 85 [2 Dept. 2009]), and their motion for summary judgment is denied.

Accordingly, the branch of plaintiffs' application for leave to amend the caption and pleadings to assert a direct claim against third-party defendants, 60<sup>th</sup> COURT MASPETH LLC and EYAL SHACHI, is hereby granted; the branch of plaintiffs' application seeking to amend the complaint and the caption on the pleadings to join "JUDITH SHACHI, individually and as a member of 60<sup>th</sup> COURT MASPETH LLC", "DANNY ZIVAN, individually and as a member of

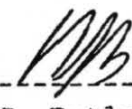
60<sup>th</sup> COURT MASPETH LLC" and "TRINITY ABSTRACT, LLC", as additional defendants in the action is hereby granted; the branch of plaintiffs' application seeking to amend the First, Second and Fourth Causes of Action of the complaint is hereby granted; the branch of plaintiffs' application seeking to amend the Third Cause of Action of the complaint is hereby denied; and defendants' cross-motion for summary judgment, seeking to dismiss the First and Second Causes of Action in plaintiff's complaint, is hereby denied.

It is ordered that movants shall serve a copy of a compliant amended complaint, together with a copy of this Decision and Order with Notice of Entry, within thirty (30) days of entry of this Decision and Order, upon counsel for all current, captioned defendants, the Clerk of Queens County, and the Clerk of the Supreme Court, Queens County, pursuant to CPLR §5019(c).

This Constitutes the Decision and Order of the Court.

Dated: March 8, 2012

QUEENS COUNTY CLERK  
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Denis J. Butler, J.S.C.

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