

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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CHRISTOPHER HAGEDORN,
Plaintiff,

-against-

ROBERT D'ANGELO, JOSEPH CAVARETTA,
MICHAEL BERGANO, and RONALD EALY,
Defendant(s).

MICHELE M. WOODARD,
J.S.C.
TRIAL/IAS Part 21
Index No.: 007030/04
Motion Seq. Nos.: 04, 05 & 06
DECISION & ORDER

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Papers Read on this Motion:

| | |
|---------------------------------------------------------|----|
| Defendant Michael Bergano's Notice of Motion | 04 |
| Defendant Joseph Cavaretta's Notice of Cross-Motion | 05 |
| Defendant Robert D'Angelo's Cross-Motion & Opposition | 06 |
| Defendant Angelo's Affirmation dated September 14, 2006 | xx |
| Defendant Joseph Cavaretta's Reply | xx |

In Motion Sequence #4, defendant MICHAEL BERGANO, hereinafter referred to as "BERGANO", moves by Notice of Motion for an Order granting Summary Judgment.

In Motion Sequence #5, Defendant JOSEPH CAVARETTA, hereinafter referred to as "CAVARETTA", moves for an Order granting leave to file a late Motion for Summary Judgment and upon granting such leave, an Order pursuant to CPLR §3212 granting Summary Judgment dismissing all Cross-Claims asserted against him.

In Motion Sequence #6, defendant ROBERT D'ANGELO, hereinafter referred to as "D'ANGELO", Cross-Moves for an Order granting leave to file an Amended Answer.

This case arises out of a fist fight that occurred at a party in Upper Brookville on May 25, 2003. The parties were Junior and Seniors in High School. The plaintiff and a friend of his suffered injuries as the result of the fight.

Defendant CAVARETTA is claiming that although the Note of Issue was filed in January of 2006, there was still significant outstanding discovery, namely the Examination Before Trial of all the defendants. Defendant CAVARETTA's Examination Before Trial was held on June 26, 2006 which were necessary before a motion could be made. Counsel highlights the fact that the transcript was received on September 6, 2006.

The Court has not received any opposition to CAVARETTA's application for leave to file the Summary Judgment Motion late. As such, CAVARETTA's application to file a late Summary Judgment Motion is **GRANTED**.

In determining whether to grant a Motion to Amend an Answer, the Court should consider the merit of the proposed amendment and whether the plaintiff will be prejudiced by the delay in raising it, *see Norwood v City of New York*, (1st Dept 1997). It is not an abuse of discretion to deny leave to Amend Answer on the eve of trial without any viable explanation proffered for the delay, *see Balport Construction, Inc., v New York Telephone Company*, (2nd Dept 1987).

This matter was certified in January 2006 and has been on the trial calendar since June. A final trial date of October 5, 2006 was given on September 7, 2006 well after the transcripts were received when the defendant D'ANGELO moved to add an action of contribution.

The Court has not received any opposition to defendant D'ANGELO's Motion to Amend. As such Motion Sequence #6 is **GRANTED**.

Defendant BERGANO claims that he is entitled to Summary Judgment based the failure of the record to provide any evidence of a plan or design to assault the plaintiff CHRISTOPHER HAGEDORN, hereinafter referred to as "HAGEDORN".

Defendant CAVARETTA claims that he is entitled to Summary Judgment based on

testimony at the depositions that indicate that D'ANGELO was the defendant who hit HAGEDORN in the fist fight. Upon the completion of the defendant's deposition, the plaintiff discontinued with prejudice claims against CAVARETTA.

The Court has reviewed the entire transcript of the plaintiff HAGEDORN and defendants D'ANGELO and CAVARETTA.

It is clear that CAVARETTA and BERGANO were not the proximate cause of HAGEDORN's injuries. Specifically, in D'ANGELO's Examination page 16 line 5 he said: "Mr. Hagedorn jumped on the back of Joseph Cavaretta and I went to pull him off, and he came up with a fist and when he learned (sic) back, I negligently punched him".

D'ANGELO's testimony goes on to indicate that the negligent punch landed on HAGEDORN's face.

On page 29 line 15 D'ANGELO was asked specifically:

Q. "Did you ever see Michael Bergano strike Christopher Hagedorn?"

A. "No, I'm sorry"; and then on page 30 line 18

Q. "Just to be clear, you never saw Michael Bergano strike Christopher Hagedorn?"

A. "Right"

Page 85 line 3 of HAGEDORN's deposition:

Q. "Do you know the name Michael Bergano?"

A. "I head the name before"

Q. "How have you heard that name?"

A. "Just in relation to the fight, people mentioned it. I was never sure of his specific actions"

Q. "Had anybody ever informed you that he struck you during this incident?"

A. "No"

It is well settled that a party appearing in opposition to a Motion for Summary Judgment must lay bare its proof and present evidentiary facts sufficient to raise a triable issue of fact, *see Morgan v New York Telephone*, 220 AD2d 728 (2nd Dept 1995). D'ANGELO has failed to present any evidence of CAVARETTA or BERGANO's role in HAGEDORN's injuries.

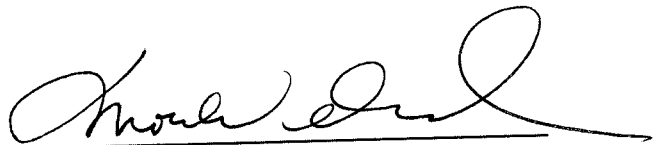
As such, CAVARETTA's Motion Sequence #5 and BERGANO's Motion Sequence #4 for Summary Judgment are **GRANTED**. The Causes of Action alleged in the plaintiff's Complaint and Cross-Claims of D'ANGELO are **DISMISSED** against them. It is hereby

ORDERED, that the remaining parties are directed to appear for trial in Central Jury on October 5, 2006 at 9:30 A.M.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: September 29, 2006
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

OCT 04 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE