

<b>Torres v Cason Cheesecake Corp.</b>
2011 NY Slip Op 31677(U)
June 9, 2011
Supreme Court, Queens County
Docket Number: 23909/2009
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

WALLINGTON TORRES,

Index No.: 23909/2009

Plaintiff,

Motion Date: 06/2/11

- against -

Motion No.: 32

CASCON CHEESECAKE CORP.,

Motion Seq.: 1

Defendant.

- - - - - x

CASCON CHEESECAKE CORP.,

Third Party-Plaintiff,

-against-

IMA ENGINEERING, P.C. and  
VARDARO CONSTRUCTION CORP.,

Third-Party Defendants.

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The following papers numbered 1 to 12 were read on this motion by third-party defendant VARDARO CONSTRUCTION CORP. for an order pursuant to NYCRR § 202.21(e) vacating the plaintiff's note of issue and certificate of readiness and striking this action from the trial calendar and extending VARDARO's time to move for summary judgment:

	<u>Papers Numbered</u>
Vardaro's Order to Show Cause-Affirmation-Exhibits....	1 - 4
IMA Engineering Affirmation in Support.....	5 - 6
Plaintiff's Affirmation in Opposition-Affidavits.....	7 - 10
Reply Affirmation-Exhibits.....	11 - 12

This is an action for damages for personal injuries sustained by plaintiff, WELLINGTON TORRES, on March 17, 2009, when he allegedly slipped and fell over a staircase at the bakery owned by defendant/third-party plaintiff Cascon Cheesecake Corp. while delivering bags of flour. Cascon is located at 7-04 149<sup>th</sup> Street, Whitestone, New York. It is alleged that the stairs were in a dangerous and defective condition as it was missing a handrail on the side of the stairs open to the basement. As a result of the fall the plaintiff allegedly sustained a serious spine injury resulting in two surgeries.

The plaintiff commenced an action for negligence against defendant Cascon by filing a summons and complaint on September 3, 2009. Issue was joined by the service of Cascon's verified answer dated October 19, 2009. A preliminary conference and compliance conference were held on January 27, 2010 and September 27, 2010 respectively. A note of issue was filed by the plaintiff on January 7, 2011.

On January 31, 2011, subsequent to the filing of the note of issue, CASCON filed a third-party complaint naming Ima Engineering P.C. (IMA) and Vardaro Construction Corp. (Vardaro) s/h/a/ Vandaro Construction Corp. as third-party defendants to this action. The gravamen of the third-party complaint is that the stairway in question was renovated in 2005 when plaintiff took occupancy of the premises and that IMA negligently performed

its duties as architect/engineer with respect to the construction work on the stairway and Vardaro is alleged to have been negligent as the contractor on the renovation project. On March 23, 2011, Vardaro served a third-party answer. On April 8, 2011 the plaintiff served an amended complaint with an additional cause of action against Vardaro. On May 3, 2011, plaintiff served a second amended complaint with an additional cause of action against IMA. An answer to the second amended complaint was filed by IMA on June 8, 2011.

Third-party defendant Vardaro initially moved for an order pursuant to CPLR 603 and CPLR 1010 severing the third-party action from the main action on the ground that Vardaro would be prejudiced as discovery has just commenced in the third-party action whereas discovery has been completed in the main action. However, the movant states in its reply affirmation that it now concedes that the requested relief of severance is moot as the plaintiff has recently commenced a direct action against Vardaro and IMA by way of an amended and second amended complaint.

Vardaro does maintain, however, that the Court should vacate the note of issue and extend Vardaro's time to move for summary judgment. Vardaro contends that as it was recently impleaded in this action and has yet to be provided with any discovery that significant and necessary discovery remains outstanding such that the matter is not trial ready. Vardaro claims that it has not yet

had an opportunity to conduct an investigation, has not been afforded an opportunity to conduct depositions or to have plaintiff examined by their own doctors.

Third-party defendant IMA filed an affirmation in support of the motion stating that although they served a demand for a bill of particulars on April 9, 2011, a response has still not been received. Additionally, IMA contends that the note of issue should be stricken as it still requires depositions of the parties, copies of transcripts and proceedings previously had in this proceeding, disclosure of any statements made by any party, photographs of the scene of the accident and examinations of medical expert reports. IMA contends it will be prejudiced if it is required to proceed to trial without adequate time for discovery and to prepare its defense.

The plaintiff submitted an affirmation in opposition to the motion stating that Cascone's defense counsel uncovered information during the discovery process as to Vardaro's involvement as general contractor and IMA's involvement as architect in connection with the renovation. Counsel states that following the commencement of the third-party action the plaintiff amended its underlying complaint to include direct causes of action against both IMA and Vardaro. Plaintiff's Counsel argues that the note of issue should not be stricken as the standard and goals date in the main action is April 15, 2012.

Plaintiff also states that he will be prejudiced by striking the note of issue as the delay in the commencement of the third-party action was not the fault of the plaintiff.

This court finds that there is significant amount of discovery that remains in this matter and as a result of the note of issue should be stricken (see 22 NYCRR 202.21 [e]; Costenza v Skyline Towers 5, 8 AD 3d 524 [2d Dept. 2004]; Lynch v Vollono, 6 AD3d 505 [2d Dept. 2004]; Drapaniotis v. 36-08 33rd St. Corp., 288 AD2d 254 [2d Dept. 2001]; Garofalo v. Mercy Hosp., 271 AD2d 654 [2d Dept. 2000]). As noted by Vardaro's counsel, plaintiff and codfendant have yet to be re-deposed, Vardaro and IMA also need to be deposed. Counsel also notes that the plaintiff, to date, has failed to respond to the third-party defendants' demand for a bill of particulars and discovery and inspection and has failed to provide authorizations for medical records, workers's compensation records, tax and employment records. There also remains outstanding the independent medical examinations and expert inspections of the staircase in question. Transcripts of the prior depositions also need to be acquired.

Therefore, as the third-party action was commenced after the filing of the note of issue in the main action and as the plaintiff served amended complaints adding new parties subsequent to the filing of the note of issue and as it appears that a substantial amount of time will be required to complete discovery

in this matter, it is hereby

ORDERED that the note of issue filed on January 7, 2011 is hereby vacated. Motions for summary judgment shall be made no later than 60 days after the filing of a new note of issue (CPLR 3212(a)).

The parties are directed to appear before referee Florio at the Pre-trial Conference Part at the Queens County Supreme Court, 88-11 Sutphin Boulevard, Jamaica, New York, on June 17, 2011 as previously calendared, to schedule remaining discovery.

Dated: Long Island City, N.Y.  
June 9, 2011

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**ROBERT J. MCDONALD**  
**J.S.C.**