

**McIntosh v Heinz Frozen Food Co., Inc.**

2008 NY Slip Op 32699(U)

October 2, 2008

Supreme Court, Wayne County

Docket Number: 51337

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF WAYNE

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TAMMY McINTOSH and AARON McINTOSH,

Plaintiffs,

-vs-

HEINZ FROZEN FOOD COMPANY, INC.,

Defendants.

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DECISION

Index No. 51337

2007

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The Plaintiffs (hereinafter "McIntosh") have moved pursuant to CPLR §3212 for an order granting partial summary judgment on the issue of liability, under the Fifth Cause of Action (Res ipsa Loquitur) as set forth in the Second Amended Complaint, or alternatively, under the Third Cause of Action (Res ipsa Loquitur) as set forth in the Amended Complaint, or alternatively, under the First Cause of Action (Negligence) in the original Complaint.

The Defendant (hereinafter "Heinz") has opposed the Plaintiffs'

motion and has cross-moved pursuant to CPLR §3126, and on common law grounds, for an Order dismissing the Complaint, based on alleged spoliation of evidence.

The action arises out of the consumption by Plaintiff Tammy McIntosh on May 17, 2001, of a portion of microwaved frozen spinach, manufactured and distributed by Heinz under the brand name Boston Market, which she quickly discovered contained the partial remains of an amphibious creature (such as a frog or lizard). The Plaintiff alleges that she bit down on the creature's remains and swallowed some of the juices, causing her to become upset and physically ill, and resulting in ongoing psychological trauma. She and her husband wrapped the object and the spinach in plastic wrap and placed it in the freezer. The following day Mrs. McIntosh called Heinz and filed a consumer complaint. On May 21, 2001, Heinz advised the Plaintiff that it wished to examine the item and would forward the appropriate mailing containers. The next day, however, the Plaintiff made a telephone call to the New York State Department of Agriculture, and an inspector from the office came to the house a few days later and removed the product and its contents. A written report was then issued by the Department, verifying the presence of amphibious remains.

The product was eventually returned to the Plaintiffs by the department in a styrofoam container with ice/ice packs, which the Plaintiffs placed in their freezer. Subsequently, the Plaintiffs forwarded the product to Heinz on August 8, 2001, but the original packaging of the product was not preserved. Heinz alleges that an analysis was attempted by their experts, but aside from determining that the substance included the partial remains of a small frog, the Defendant's experts were unable to perform a complete examination, due to the deteriorated condition of the product.

Consequently, Heinz maintains that its ability to defend against the Plaintiffs' claims has been severely prejudiced, due to McIntosh's failure to properly maintain the evidence and to produce the product packaging.

Before addressing the merits of the parties' respective motions, the Court must determine which of the three Verified Complaints will be considered as the Plaintiffs' operative pleading. The original Complaint, which was filed on May 7, 2002, set forth two causes of action: negligence as alleged by Tammy McIntosh, and a derivative claim by her husband. A Verified Answer was served by the Defendant on August 28, 2002. The depositions of the Plaintiffs were conducted on December 13, 2005. On December 29, 2005, counsel for the Plaintiffs forwarded a

Summons and Amended Complaint to the Defendant's attorney, which includes a third cause of action for Res ipsa Loquitur. No motion was made by McIntosh, no stipulation was entered and no action was taken by Heinz. Then, on November 21, 2006, the Plaintiffs forwarded a Second Amended Complaint to Heinz, which contains three additional causes of action, namely, strict products liability, breach of implied warranty and breach of express warranty. Subsequent correspondence between counsel in April 2007 indicates the Defendant's opposition to the filing of either amended Complaint and to the making of any motion to amend. No Answer has been served to the Second Amended Complaint.

Under CPLR §3025, a party may amend a pleading once without leave of court, so long as it does so within 20 days after service of a responsive pleading. Otherwise, a party may only amend its pleading by leave of court or by stipulation of all parties. In this instance, both amended complaints were served years after the service of the original Complaint without court leave or stipulation. However, the Plaintiffs argue that the Defendant's failure to reject the pleadings constitutes a waiver of any objection to timeliness.

The court has considered these arguments and finds that the Second

Amended Complaint will be disallowed by the Court and is hereby dismissed. While this pleading was not specifically rejected by Heinz, the fact that it was served four and one-half years after the incident, and that it sets forth additional causes of action which are time-barred and which require proof of different elements than those constituting a cause of action sounding in negligence support the conclusion that dismissal is appropriate.

However, the doctrine of *Res ipsa Loquitur* as set forth in the Amended Complaint is not so much a separate cause of action as it is an evidentiary rule. The doctrine consists of three elements:

- 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
- 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Therefore, if a Plaintiff satisfies the burden of proof on these three elements, the doctrine permits a jury to infer negligence from the mere fact of the occurrence. Since the doctrine relates back to the original claim of negligence, the Court will therefore treat the Amended Complaint as the Plaintiffs' operative pleading.

Turning to the Plaintiffs' motion for partial summary judgment, McIntosh maintains that the presence of a foreign object in food or drink intended for human consumption is recognized as an event which does not ordinarily occur in the absence of negligence. Therefore, the Plaintiff maintains that the very presence of the remains found in the spinach establishes a prima facie case of liability. Nevertheless, the Court finds that the issue of liability must be left for trial. In Morejan v Rais Const. Co., 7 NY3d 203 (2006), the Court of Appeals held that "only in the rarest of *res ipsa loquitur* cases may the Plaintiff win summary judgment or a directed verdict." The Court finds that the elements of Res ipsa Loquitur have not been established as a matter of law, and further, that there are factual issues raised by the Defendant regarding the issue of negligence which preclude the granting of summary judgment.

Finally, the court must consider the Defendant's motion to dismiss the Complaint, based on spoliation of evidence. The details of the storage and transport of the contents of the package to and from the various locations are set forth above.

The Court has broad discretion in determining the appropriate sanction, if any, for spoliation of evidence. Also, it is well-settled that

spoliation sanctions may be appropriate “even if the destruction occurred through negligence rather than willfulness ....” (*Enstrom v Garden Place Hotel*, 27 AD3d 1084 (4<sup>th</sup> Dept, 2006), citing *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41 (2<sup>nd</sup> Dept, 1998)). Here, there is no evidence that the deteriorated condition of the evidence was due to the intentional conduct or bad faith of the Plaintiffs.

“Striking a pleading for negligent spoliation is a drastic sanction that is appropriate only where the missing evidence deprives the moving party of the ability to establish his or her case.” (*Simet v the Coleman Co. Inc.*, 42 AD3d 925 (4<sup>th</sup> Dept, 2007), citing *Enstrom*, supra). This Court is not unmindful of the difficulties encountered by Heinz in defending against the Plaintiffs’ claim under these circumstances. Nevertheless, the Court has determined that the dismissal of the Complaint is too drastic, given the fact that the Plaintiffs took immediate action to preserve the product, turned the product over to an inspector from a disinterested, certified government agency, and ultimately forwarded the product to Heinz upon its return in the original container supplied by the Department of Agriculture. Any negligence which may have occurred may well have taken place while the product was in the control of the disinterested third party (see, e.g. *Miller*

Realty Associates v Amendola, 51 AD3d 987 (2<sup>nd</sup> Dept, 2008); McLaughlin v Chrysler Motors Corporation, 289 AD2d 461 (2<sup>nd</sup> Dept, 2001)). As to the unavailability of the packaging of the product, the pleadings indicate that both the Plaintiffs and the Defendant might have benefitted from expert examination of this item (see, e.g. DeLos Santos v Polanco, 21 AD3d 398 (2<sup>nd</sup> Dept, 2005)). The Defendant will have ample opportunity to explore all these issues with the jury at trial.

Therefore, the Plaintiffs' motion for summary judgment on the issue of liability and the Defendant's motion for dismissal based on claims of spoliation of evidence are both denied. The Defendant is directed to serve and file an Answer to the Amended Complaint within 20 days of the date of this Decision.

This Decision constitutes the Order of the Court.

Dated: October 2, 2008  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice