

Meggyes v Costco Wholesale Membership, Inc.

2008 NY Slip Op 33235(U)

December 2, 2008

Supreme Court, New York County

Docket Number: 102547/07

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

Meggy's
- v -
Costeo

INDEX NO. 102547/07
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~is granted/denied~~ **IS DECIDED**
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM

FILED
DEC 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/10/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
FRANK MEGGYES

Plaintiff,

-against-

COSTCO WHOLESALE MEMBERSHIP, INC. d/b/a
COSTCO WHOLESALE, INC., and COSTCO WHOLESALE
CORPORATION d/b/a COSTCO WHOLESALE, INC.,
MORRIS INDUSTRIAL BUILDERS, LP, and
COSMOPOLITAN CONSTRUCTION & MAINTENANCE CORP.

Defendants.

Index No. 102547/07
Mtn Seq. 003

FILED

DEC 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

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WALTER B. TOLUB, J.:

This is Defendant Cosmopolitan Construction and Maintenance Corp.'s (Cosmopolitan's) motion, pursuant to CPLR §§ 3211(5) and 214(5), for an order dismissing Plaintiff's Complaint as barred by the statute of limitations. Defendant Costco Wholesale Membership, Inc. d/b/a Costco Wholesale, Inc., (Costco Membership) and Costco Wholesale Corporation d/b/a Costco Wholesale Inc. (Costco Wholesale) cross-move for summary judgment dismissing the Complaint against Costco Membership.

Facts

Plaintiff commenced this action claiming that on March 17, 2004 he was injured when he slipped and fell at a Costco parking lot located at 20 Stew Leonard Drive, Yonkers, New York.

Plaintiff initially commenced the lawsuit against Costco Membership and Costco Wholesale on February 23, 2007. Costco

Membership answered Plaintiff's Complaint on March 6, 2007.

Costco Membership then moved for the dismissal of Plaintiff's action against it. This court granted the motion by order dated August 21, 2007, finding that Costco Membership was an improper party to the action.

Following the dismissal, on September 28, 2007, Costco Wholesale filed a third party action against Cosmopolitan and defendant Morris Industrial Builders, LP (Morris). Morris never appeared in the action and Cosmopolitan answered the third-party Complaint on February 27, 2008.

Plaintiff then served an amended verified Complaint on March 18, 2008 naming Cosmopolitan and Morris as direct defendants and keeping Costco Membership in the amended caption.

By this motion, Cosmopolitan seeks an order dismissing it from the Plaintiff's direct action against it as the three year statute of limitations has expired. Costco Membership seeks an order dismissing the Complaint against it based on this Court's August 21, 2007 decision deeming Costco an improper party to the action.

Discussion

Cosmopolitan's Motion to Dismiss Plaintiff's Complaint

Plaintiff alleges in the original Complaint as well as the Amended Complaint, that the incident occurred on March 17, 2004. A lawsuit for personal injuries must be commenced within three

years of the date of loss or injury (CPLR §214[5]).

Plaintiff argues that pursuant to CPLR §1009, Cosmopolitan was an existing party to the case by virtue of the third-party action. Plaintiff further argues that CPLR §1009 allows for a third-party defendant to be named a direct party, so long as Plaintiff makes such an amendment within 20 days of the third-party defendant Answers the third party Complaint.

Here, the statute of limitations remains a bar to Plaintiff's direct claim against Cosmopolitan.

As a general matter, plaintiff's claim against a third-party defendant is interposed on the date of amendment. A "relation back" toll, however, may be available in cases in which the plaintiff's direct claim, even if technically time barred as of the date of amendment, is based on the same transaction or occurrence as the third-party claim. If the claims are thus related, plaintiff's amendment of the complaint to assert a direct claim against the third-party defendant will satisfy the statute of limitations **if the plaintiff's claim would have been timely on the date the third-party claim was interposed** Duffy v. Horton Memorial Hosp, 66 NY2d 473 [1985]).

(Emphasis Added; McKinney's Consolidated Laws of New York (annotated), CPLR, vol. 7B, §1009, *Practice Commentaries* by Vincent Alexander).

Plaintiff has failed to meet the three year statute of limitations because the third-party action was commenced after the three year statute of limitations had run. The three year statute of limitations ended on March 16, 2007. The third-party

action was commenced on September 28, 2007, six months after the statute of limitations run for an action by Plaintiff against Cosmopolitan. As such, there is no tolling of the statute of limitations and there is no relation back. Cosmopolitan's motion to dismiss Plaintiff's direct action against must be and is granted.

It should be noted that Costco's third-party action against Cosmopolitan remains as it was commenced in a timely fashion. A third-party action may be commenced by a defendant at any point following the filing of an answer (CPLR §1007). As such, the fact that Plaintiff's direct action is barred against Cosmopolitan by virtue of the statute of limitations, this has no effect on Costco's third-party action.

Costco's Cross-Motion to Dismiss

It has already been decided by this Court that Costco Membership has no authority to direct, supervise operate or control any of the Costco stores throughout the United States. Costco Membership has no ownership interest in any of the warehouse stores and does not have an ownership leasehold interest in the warehouse store and parking lot at issue in this case. It was because of these facts that on August 21, 2007, this Court dismissed Plaintiff's Complaint against Costco Membership. It follows that Costco Membership is not a direct party to this action and Plaintiff's Amended Complaint against

Costco Membership is dismissed.

Accordingly, it is

ORDERED that Cosmopolitan's motion to dismiss Plaintiff's direct action against it is granted; and it is further

ORDERED that Costco Membership's cross-motion to dismiss Plaintiff's Amended Complaint against it is granted; and it is further

ORDERED that the caption of the remaining action read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
FRANK MEGGYES

Plaintiff,

Index No. 102547/07

-against-

COSTCO WHOLESALE CORPORATION d/b/a
COSTCO WHOLESALE, INC.,
MORRIS INDUSTRIAL BUILDERS, LP,
Defendants.

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Index No. 590852/07

COSTCO WHOLESALE CORPORATION d/b/a
COSTCO WHOLESALE, INC.,

Third-Party Plaintiff,

-against-

MORRIS INDUSTRIAL BUILDERS, LP, and
COSMOPOLITAN CONSTRUCTION & MAINTENANCE
CORP.,

Third-Party Defendants

-----X


and it is further,

ORDERED that the Clerk of the Court enter judgment
accordingly.

Counsel for the remaining parties are directed to appear for
a conference as scheduled on January 16, 2007 at 11:00AM in room
335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order
of the Court.

Dated: 12/2/08



HON. WALTER B. TOLUB, J.S.C.

FILED

DEC 05 2008

**COUNTY CLERK'S OFFICE
NEW YORK**