SUPREME COURT OF THE STATE OF NEW YORK **Index No.:104713/08**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:001**

PATRICK MAIORINO

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

PARK TYSEN ASSOCIATES, L.L.C. *d/b/a* TYSEN PLAZA SHOPPING CENTER; PIZZA HUT, INC. *d/b/a* PIZZA HUT; *and* YASMIN GEORGES

Defendants

The following items were considered in the review of this motion to amend summons and complaint and/or add parties

Papers	Numbered
Order to Show Cause	**1**
Answering Affidavits	**3**
Replying Affidavits	**4**
Supplemental Affirmation	**2**
Exhibits	**Attached to Papers**

Absent a written agreement, a franchisor is not an agent for service for its franchisees nor are they united in interest for the purpose of extending the service of process under *NY CPLR* § 203(c).

Plaintiff Patrick Maiorino moves by order to show cause pursuant to *CPLR* §§ 305(c), 2001, 203(f) and 3025(f) to amend the summons by correcting the name of defendant "Pizza Hut, Inc. d/b/a Pizza Hut" to "ADF Pizza I, LLC d/b/a Pizza Hut" ("Pizza Hut 2"). By the same order to show cause, the plaintiff moves pursuant to *CPLR* § 203(c) to add Pizza-Hut 2 and Pizza Hut of America, Inc. d/b/a Pizza Hut ("Pizza Hut-OA") and Pizza Hut-OA as defendant parties "united in interest" with defendant Pizza Hut, Inc. Lastly, the plaintiff moves pursuant to *CPLR* § 306-b to allow him the time to serve the summons and verified complaint beyond the 120-day period. The plaintiff's motion is denied in its entirety.

Factual and Procedural History

This action arises out of a motor vehicle collision involving the plaintiff and the defendant Yasmin Georges, which occurred on November 27, 2005 in the shopping center parking lot at or around 2712 Hylan Boulevard, Staten Island, New York. The plaintiff alleges that defendant Park Tysen Associates, L.L.C. failed to place and/or properly place traffic control devices and/or markings on the surface of the subject parking area. It is also alleged that Pizza Hut, Inc., and/or Pizza Hut 2, and/or Pizza Hut-OA owned, operated, maintained, managed, or controlled a portion of the subject parking area and permitted the placement of a dumpster that obscured the view of oncoming motorists, including the plaintiff and defendant Yasmin Georges.

Pizza Hut, Inc. and Pizza Hut 2 signed a franchise agreement on August 25, 1999, designating the former as franchisor and the latter as franchisee. Their franchise agreement reads in part,

> At all relevant times, the subject Pizza Hut restaurant has been operated by ADF Pizza I, LLC [Pizza Hut 2] under the Pizza Hut, Inc. Franchise Agreement (the "Franchise Agreement"). Under the Franchise Agreement and related Assignment of Lease, ADF Pizza I, LLC agreed to indemnify Pizza Hut, Inc . . . Defense counsel should be advised that PHI [Pizza Hut, Inc.] has no responsibility for the operation of any franchised restaurants [Pizza Hut 2].[1]

This action was commenced by the filing of the summons and verified complaint on November 25, 2008, two days before the expiration of the three-year personal injury Statute of Limitations.[2] On December 1, 2008, the summons and verified complaint were served on Carol Vogt, agent of Park Tysen Associates, L.L.C. Defendant Yasmin Georges was served on December 2, 2008. On December 4, 2008, summons and verified complaint were served on Paul Bregman, partner of the Bregman Organization, authorized to accept service for Park Tysen Associates, L.L.C. Summons and complaint were served on Pizza Hut, Inc. on December 5,

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[1] Plaintiff's exhibit 10.

[2] CPLR § 214.

2008 at 14841 Dallas Parkway Dallas, TX, 75254. Thereafter, Pizza Hut, Inc. forwarded a copy of the summons and verified complaint, along with a letter dated December 8, 2008 to Pizza Hut 2.

The plaintiff served a summons and verified complaint on Pizza Hut 2's general agent Susan Scott at 350 Passaic Avenue, 2nd Floor, Fairfield, N.J. 07004 on March 23, 2009, Pizza Hut 2's clerk Steve Pastore at 80 State Street. Albany, N.Y. on March 24, 2009, and agent Donna Christie at the Office of the Secretary of State of New York on March 23, 2009. The plaintiff served the summons and verified complaint upon Pizza Hut-OA through agent Donna Christie at the Office of the Secretary of the State of New York on March 23, 2009.

By this order to show cause, the plaintiff intends to include Pizza Hut-OA and Pizza Hut 2 as parties in this action. Because the entities share a similar name and the plaintiff intended to sue the Pizza Hut entity that maintains the subject parking lot, the plaintiff aims to amend its summons to include Pizza Hut-OA and Pizza Hut 2, while keeping Pizza Hut, Inc. as a defendant. Pizza Hut, Inc. was served within the deadline set by the Statute of Limitations. Since Pizza Hut, Inc. forwarded the summons to Pizza Hut 2, the plaintiff contends that Pizza Hut 2 was fairly appraised of the suit. The plaintiff also argues that notice upon the parties was further provided when Pizza Hut-OA and Pizza Hut 2 were served in March 2009.

Alternatively, the plaintiff intends to add Pizza Hut-OA and Pizza Hut 2 by arguing that they are parties united in interest in that they all do business as Pizza Hut and use the same logo, and that Pizza Hut, Inc. and Pizza Hut-OA share the same executive offices at 14841 N. Dallas Parkway, Dallas TX 75254. Therefore, the plaintiff claims that since Pizza Hut, Inc. was timely served, Pizza Hut-OA and Pizza Hut 2 are united in interest and should be added to the action by relating back to the date of the timely filed summons and verified complaint upon Pizza Hut, Inc.

Discussion

According to *CPLR* § 214(6), a negligence action must be commenced within three years of the date of the accident. As the Statute of Limitations in the instant action has expired, the burden shifts to the plaintiff to establish his entitlement to amend the summons or to add the parties through the relation back doctrine.

Amendment to the Summons Pursuant to *CPLR* § 305(c)

CPLR § 305(c) allows the amendment of a summons outside of the Statute of Limitations when there is a misnomer in the description of the party defendant, but not when it adds a new, separate entity. To apply *CPLR* § 305(c), the plaintiff must provide: "(1) evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) that the correct defendant would not be prejudiced by granting the amendment sought."[3] The purpose of *CPLR* § 305(c) is to correct the terminology by which the plaintiffs have incorrectly named the defendant, who was fairly appraised of the action against him, and not as a mechanism by which a new entity is added.[4]

The application of *CPLR* §305(c) is only allowed in misnomers,[5] but not in the addition of distinct entities. The facts of this case significantly differ from *Ober v. Rye Town Hilton*, where the plaintiff erred by naming defendant "Rye Town Hilton" when its proper name was "Hilton Hotels Corporation a/k/a/ the Rye Hilton." The New York Court of Appeals held that the mistake was made merely on the trade name, as the served party had no independent existence from the intended defendant. The instant matter does not simply involve a misnomer,

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[3] *Ober v. Rye Town Hilton*, 159 AD2d 16 [2d Dept 1990].

[4] *Id.*; *Kingalarm Distributors v. Video Insights Corp.*, 274 AD2d 416 [2d Dept 2000].

[5] *CPLR* §305 (c); *Gajdos v. Haughton El.*, 131 AD2d 428 [2d Dept 1987]; *Matter of Gladding v. Board of Educ. of Kings Park Cent. School Dist.,* 136 AD2d 636 [2d Dept 1988].

but the addition of separate entities with independent existence of each other. The case at bar also differs from *Stuyvesant v. Weil* where the Court of Appeals ruled that the trial court had acquired jurisdiction over a defendant who was called Mary J. Stockton, where the summons and complaint named her as Emma J. Stockton.[6] In determining whether the intended party received a fair appraisal of the action, the Court noted that the defendant received the summons and complaint but was just misnamed. In contrast to *Stuyvesant*, this Court finds that the summons and complaint were served upon a completely different entity. On the other hand, the instant action is more parallel to *Ingenito v. Grumman Corp.*, where the intended defendant was Grumman Aerospace Corp., but the summons and complaint named defendant "Grumman Corporation."[7] The Appellate Division, Second Department denied the plaintiff's motion pursuant to *CPLR* § 305(c) because the summons named a distinct entity. Accordingly, this court cannot allow the application of *CPLR* § 305(c) in the instant case because it involves the addition of parties and not the correction of defendant's name.

It is undisputed that Pizza Hut, Inc., Pizza Hut-OA, and Pizza Hut 2 are separate entities. An examination of the franchise agreement reveals that Pizza Hut, Inc. and Pizza Hut 2 were separate entities with only a business relationship, limited to their roles as franchisor and franchisee.[8] The franchise agreement clearly states that the franchisee was solely liable for its wrongdoing and would have to indemnify the franchisor; as such, Pizza Hut, Inc. bears no responsibility over Pizza Hut 2. Pizza Hut, Inc.'s lack of responsibility over Pizza Hut 2 is also confirmed in the letter enclosed in the plaintiff's moving papers. The Appellate Division, Third Department in *Potamianos v. Convenient Food Mart,* established that franchisors and franchisees are separate entities and confusing one from another does not constitute a misnomer for the purposes of *CPLR* § 305(c).[9] In *Potamianos,* the plaintiff moved to amend the summons to include

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[6] *Stuyvesant v. Weil*, 167 NY 421 [1901].

[7] *Ingenito v. Grumman Corp.*, 192 AD2d 509 [2d Dept 1993].

[8] Plaintiff's exhibit 10.

[9] *Potamianos v. Convenient Food Mart, Inc.*, 197 AD2d 734 [3d Dept 1993].

the name of the franchisee, when she had only served the franchisor. The Third Department denied the plaintiff's motion to amend and observed that "until such time as she realized her error with regard to defendant's legal responsibility in this matter, plaintiff always intended to sue defendant."[10] The facts of *Potamianos* mirror the facts of the instant case since the plaintiff intends to add the franchisee when it had originally sued the franchisor, who does not share any responsibility with the franchisee. Under the guidance of *Potamianos* and in accordance with Pizza Hut, Inc.'s franchise agreement, this court denies the plaintiff's motion to add Pizza Hut-OA in pursuance to *CPLR* §305(c).

The plaintiff further argues that Pizza Hut 2 should be amended in accordance with *CPLR* § 305(c) because it received Pizza Hut, Inc.'s forward of the summons and was later served a summons and verified complaint on March 23, 2009. Under these circumstances, the plaintiff insists, Pizza Hut-OA and Pizza Hut 2 knew or should have known that the action would have been brought to them as well. The Appellate Division, Second Department in *Shapiro v. Schnoninger* rejected a similar argument by holding that the required notice for proper service can only be performed through service of original pleadings.[11] Therefore, forwarding the summons and complaint by Pizza Hut, Inc. to Pizza Hut 2 is not sufficient notice for purposes of acquiring jurisdiction, absent an agreement where the franchisor was serving as an agent for service for its franchisee.

Adding Parties through the Relation Back Doctrine

The plaintiff alternatively aims to apply the relation back doctrine by adding Pizza Hut-OA and Pizza Hut 2 because they are parties united in interest with defendant Pizza Hut, Inc. *CPLR* § 203(b) allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a co-defendant when the Statute of Limitations has

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[10] *Id.*

[11] *Shapiro v. Schoninger*, 122 AD2d 38 [2d Dept 1986].

expired. The plaintiff must establish that:

> (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is *united in interest* with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well.[12]

The rationale behind the concept of unity of interest is that "parties are united in interest when their interests in the subject matter is such that they will stand or fall together with respect to the plaintiff's claim."[13] "Timely service upon one of two such defendants gives sufficient notice to enable him to investigate all the defenses which are available to both defendants within the period of limitations. From this rule has evolved that where a defendant 'may' have a defense which is not available to the other, they cannot be said to be united in interest."[14] In determining whether parties are united in interest, courts must look at: "(1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them."[15]

In a negligence action, parties are held to be united in interest when one is vicariously

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[12] *Shapiro v. Good Samaritan Regional Hospital Medical Center*, 42 AD3d 443 [2d Dept 2007; *Xavier v. RY Mgt. Co., Inc.*, 25 AD3d 677 [2d Dept 2007] [emphasis added].

[13] *Xavier v. RY Mgt. Co., Inc.*, 45 AD3d 677, *supra*; *Hilliard v. Roc-Newark Assoc.*, 287 AD2d 691 [2d Dept 2001].

[14] *Connell v. Hayden*, 83 AD2d 30 [2d Dept 1981].

[15] *Xavier v. RY Mgt. Co., Inc.*, 45 AD3d 677, *supra*; *Hilliard v. Roc-Newark Assoc.*, 287 AD2d 691 [2d Dept 2001].

liable for the acts of the other[16] and the defenses available to the defendants are identical.[17] A party is vicariously liable for the other if it exerts authority or control over the alleged wrongdoer.[18] "The mere existence of a parent-subsidiary corporate relationship is insufficient to establish a unity of interest between the two corporations."[19] "In order for vicarious liability to exist, '[t]he parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations.'"[20]

The plaintiff proffers a printout from the New York Secretary of State website indicating that Pizza Hut-OA's address at 14841 Dallas Parkway, Dallas, TX, 75254, which is the same address where the summons and complaint were served upon Pizza Hut, Inc. The Appellate Division, Second Department in *Xavier v. RY Management Company, Inc.* held, however, that the sharing of office space, or even employees, is not dispositive in the application of the relation back doctrine.[21] As such, the alleged sharing of the business address between Pizza Hut, Inc. and Pizza Hut-OA does not translate into the application of the relation back doctrine.

The relation back doctrine requires that the parties share the same jural relationship. The Appellate Division, Second Department in *Connell v. Hayden* analyzed the legislative history of *CPLR* § 203(b) and concluded that a jural relationship was akin to the status of being "joint contractors."[22] The *Connell* Court also confirmed that a unity of interest is a question of law and

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[16] *Santiamagro v. County of Orange*, 226 AD2d 359 [2d Dept 1996]; *Gatto v. Smith-Eisenberg*, 280 AD2d 640 [2d Dept 2001].

[17] *Connell v. Hayden*, 83 AD2d 30, *supra*.

[18] *Hilliard v. Roc-Newark Assoc.*, 287 AD2d 691, *supra*.

[19] *Feszczyszyn v. General Motors Corp.*, 248 AD2d 939 [4th Dept 1998].

[20] *Id.* [citing 14 NY Jur 2, Business Relationships, § 41, at 119].

[21] *Xavier v. RY Mgt. Co., Inc.*, 45 AD3d 677, *supra*.

[22] *Connell v. Hayden*, 83 AD2d 30, *supra*. The predecessor to *CPLR* § 203 (b) is section 99 of the Code of Procedure of 1848 which stated in relevant part that: "An action is commenced

not of fact;[23] in other words, the law determines whether a particular relationship is also a jural relationship or that of "joint contractors." Given the relation back doctrine's legislative history, it cannot be held that Pizza Hut, Inc. is a joint contractor with Pizza Hut-OA and Pizza Hut 2. Pizza Hut, Inc. is a franchisor, holding its unique defenses that are not to be shared with the other entities. As the unity of interest is a question of law and not of fact and case law establishes that a franchisor and franchisee are separate entities,[24] this court cannot apply the relation back doctrine to either of the intended defendants.

The franchise agreement and the letter from Pizza Hut, Inc. to Pizza Hut 2 indicate that the former is not vicariously liable for the latter, and the latter would have to indemnify Pizza Hut, Inc. in the event of a claim. Although the plaintiff argues that the indemnification clause means that Pizza Hut, Inc. and Pizza Hut 2 are protected by the same insurance carrier, the plaintiff fails to provide any factual evidence or case law that gives rise to this assumption. Moreover, in *Hilliard v. Roc-Newark Association*, the Appellate Division, Second Department ruled that an indemnification provision regarding any claims arising out of the operation of a business does not establish that the parties are united in interest.[25] Hence, application of the relation back doctrine is also improper in the instant matter because indemnification does not constitute a unity of interests.

No Extension of Time to Serve a Summons and Complaint

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as to each defendant when the summons is served on him, *or on a co-defendant who is a joint contractor, or otherwise united in interest*, which him" [emphasis added]. The *Connell* Court noted that the second annual report of the Advisory Committee on Practice and Procedure which developed the CPLR recommended that the term "join contractor" be dropped as an unnecessary example of a situation in which co-defendants are united in interest.

[23] *Id.*

[24] *Potamianos v. Convenient Food Mart, Inc.*, 197 AD2d 734, *supra.*

[25] *Xavier v. RY Mgt. Co., Inc.*, 45 AD3d 677, *supra*.

Since neither the amendment to the summons and complaint pursuant to *CPLR* § 305(c) and the relation back doctrine in accordance with *CPLR* § 203(b) can be granted to the plaintiff, the plaintiff's request to extend the limitation to serve summons and complaint pursuant to *CPLR* § 206-b is also denied.

Conclusion

Lastly, the plaintiff's reply papers point out that the Malapero Law Firm, who drafted the opposition to the plaintiff's motion, does not represent Pizza Hut 2 nor Pizza Hut-OA. Indeed, the plaintiff buttresses the fact that these parties are separate entities, rendering both *CPLR* § 305(c) and *CPLR* § 203(b) inapplicable because the plaintiff's mistake in service did not involve a mere misnomer, and because the parties are not united in interest.

Accordingly, it is hereby :

ORDERED, that the plaintiff's motion to amend summons pursuant to *CPLR* §§ 305(c), 2001, 203(f) and 3025(f) is denied; and it is further

ORDERED, that the plaintiff's motion to add Pizza-Hut 2 as party defendant united in interest with defendant Pizza Hut, Inc. is denied; and it is further

ORDERED, that the plaintiff's motion to add Pizza Hut-OA as party defendants united in interest with defendant Pizza Hut, Inc. is denied; and it is further

ORDERED, that the plaintiff's motion for an extension to serve the summons and verified complaint upon Pizza Hut 2 and Pizza Hut-OA pursuant to *CPLR* § 306-b is denied; and it is further

ORDERED, the original parties in this action shall return to DCM Part 3 for a

Compliance Conference on September 10, 2009.

ENTER,

DATED: July 10, 2009