SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

X

PATRICIA REIMANN and HERBERT REIMANN,

Plaintiffs,

-against-

T.G.I.FRIDAYS, INC. CARLSON RESTAURANTS WORLDWIDE, INC. and CARLSON COMPANIES, INC.,

Defendants.

X

Index No. 013623/08
Motion Sequence...01
Motion Date...01/05/11
XXX

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Affirmation in Reply.....x

Upon the foregoing papers, the Defendants', T.G.I.Fridays, Inc. ("TGIF"), Carlson Restaurants Worldwide, Inc. and Carlson Companies, Inc., move seeking an Order, pursuant to CPLR § 3212, granting them summary judgment dismissal of the Plaintiffs' complaint as asserted against them is determined as hereinafter provided.

This action stems from the Plaintiff, Patricia Reimann's claims that she suffered "food poisoning" as a result of consuming food provided to her while dining at the

Defendant, TGIF, located in Massapequa, New York on March 3, 2007. The Plaintiff claims that the food she ingested, namely a Cobb Salad consisting of chicken strips and bleu cheese dressing, was tainted with Staphylococcus Aureus and/or other pathogens. Her husband, the Plaintiff, Herbert Reimann, seeks damages for the loss of services of his wife, Patricia Reimann.

As best as can be determined from the papers submitted herein, the Defendants are separate and distinct entities and neither the Defendant, Carlson Restaurants Worldwide, Inc., nor the Defendant, Carlson Companies, Inc. have any relationship with the subject restaurant. The Defendant, TGIF is a subsidiary of the Defendant, Carlson Restaurants Worldwide, Inc., which is, in turn, a subsidiary of the Defendant, Carlson Companies, Inc. (*Motion*, Exhibit L [Schnepp Affidavit], ¶ 3). Moreover, they are separate and distinct corporations and neither Carlson Restaurants Worldwide, Inc., nor Carlson Companies, Inc. have any connection, whatsoever, to the restaurant at which the Plaintiff consumed the food in question.

In their Bill of Particulars, the Plaintiffs claim, *inter alia*, that the TGIF defendants were negligent "in tolerating and permitting employees, who were sick, ill or infected to handle bleu cheese dressing, salad greens and raw and/or cooked/grilled chicken served to plaintiff, thereby contaminating the subject food, preparation areas, plates, knives or forks provided to and used by, plaintiff" and, *inter alia*, "in failing to have proper and safe practices, procedures and guidelines to inspect and insure that employees who come in contact with food and food stuff served to customers...had proper hygiene...[and] in failing

to comply with food safety handling and service established by Nassau County Department of Health; New York State Sanitary Code; and IDA Food Code" (*Bill of Particulars*, ¶ 16).

In their complaint, the Plaintiffs assert four causes of action: (1) Negligence; (2) Breach of Implied Warranty of Fitness; (3) Strict Products Liability; and (4) the Plaintiff, Herbert Reimann's loss of services claim.

Upon the instant motion, the Defendants seek summary judgment dismissal of the Plaintiffs' complaint in its entirety.

Initially, it is noted that inasmuch as it remains undisputed that neither Defendant, Carlson Restaurants Worldwide, Inc., nor Defendant, Carlson Companies, Inc. have any relationship with the subject restaurant, the Defendants' motion for summary judgment dismissal of the Plaintiffs' claims as against them is **GRANTED** (*Meshel v. Resorts International of New York, Inc.*, 160 A.D.2d 211 [1st Dept. 1990] *citing to Alexander & Alexander of New York v. Fritzen*, 114 A.D.2d 814, 815 [1st Dept. 1985] *aff'd* 68 N.Y.2d 968 [1986]).

The Defendant, TGIF, asserts two bases for its entitlement to summary judgment. First, that the Plaintiffs are unable to demonstrate that the food the Plaintiff consumed while at TGIF was contaminated; and, second, that the Plaintiffs are unable to demonstrate that consuming said food was the proximate cause of her alleged illness.

A negligence cause of action against a restauranteur is predicated upon its duty to exercise care and prudence respecting the fitness of the food it furnishes for consumption (*Singer v. Zabelin*, 24 N.Y.S.2d 962 [City Ct. 1941] *rev'd on other grounds*, 34 N.Y.S.2d

236 [App. Term. 1941]). In view of the danger to the public when an article of food is not carefully prepared, this means the maximum degree of care which a reasonably prudent person must use when engaged in a business exacting meticulous care (*Piazza v. Fischer Banking Co.*, 197 Misc. 418 [City Ct. 1950] *jdgmt aff'd* 200 Misc. 834 [App. Term 1951]). A defendant will be held liable if a plaintiff can show that it is reasonably certain that the product, when put to normal use, would be dangerous if it were defective. A product is defective if the defendant fails to use reasonable care in designing, making, inspecting and testing a product (PJI 2:120). In practice, this turns into an inquiry of whether or not a restaurant owner, and his or her suppliers, used ordinary care to remove from the food, as served, such harmful substance as the consumer would not ordinarily anticipate (*Vitiello v. Captain Bill's Restaurant*, 191 A.D.2d 429 [2d Dept. 1993]).

Even in those situations where "negligence and injury are both properly found, the negligent party may only be held liable where the alleged negligence is found to be the proximate cause of the injury" (*Williams v. State of New York*, 308 N.Y. 548 [1955]; *Farinaro v. State of New York*, 132 A.D.2d 642 [2d Dept. 1987]). Thus, plaintiffs in food poisoning cases are also required to not only show that the food in question was contaminated but, additionally, that the illness from which the plaintiffs had suffered was causally related to the food consumed by them (*Williams v. White Castle Systems, Inc.*, 4 A.D.3d 161, 162 [1st Dept. 2004]).

The burden of proving that the food was defective and that his or her injury resulted from its consumption rests upon the plaintiff (*Valenti v. Great Atlantic & Pacific*

Tea Co., 207 A.D.2d 340 [2d Dept. 1994]).

With respect to a cause of action sounding in strict products liability, under New York law, a product defect may be actionable if the product is not reasonably safe. Liability is determined by a negligence-like risk/benefit inquiry that looks at the likelihood that the product will cause injury if not properly made, and the reasonableness of the actions (or inactions) taken by the seller/supplier/manufacturer's in ensuring that the product was made safe (*Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 256-59 [1995]).

In contrast, the standard under an implied warranty theory is whether the product was fit for the ordinary purposes for which such goods are used. That inquiry focuses on the reasonable expectations of the consumer for the product when used in the customary, usual and reasonably foreseeable manner, without regard to the feasibility of alternative designs or the manufacturer's or seller's reasonableness in marketing it in that unsafe condition (*Id*).

With this overview in mind, this Court will first look at the Plaintiff's negligence cause of action.

At her Examination Before Trial, the Plaintiff testified that she did not notice anything unusual about the appearance or smell of the food she ordered; nor did she notice anything peculiar about the utensils or bowl she had been provided with the food. She stated that although she thought the bleu cheese dressing tasted "a little bit more bitter than usual," she "thought at the time that it was native to the bleu cheese dressing, that that was the taste that you were supposed to have." She went ahead and ate her entire meal, without complaint

to either her husband, who was dining with her, or any employee of TGIF. Since she ate her entire meal, none of the food was ever tested for contamination. Moreover, when questioned whether tests had been taken of her stool samples, the Plaintiff stated that "nothing came of it" and that her doctor told her "it doesn't always show...it doesn't always manifest itself..."

In support of their instant motion, the Defendants submit the microbiology report of the Plaintiff's stool sample taken the next day on March 4, 2007 which was found to be "negative for Salmonella Shigella and campylobacter." The Defendants also rely upon the sworn affidavit of Virginia Rector, the General Manager at the subject TGIF, who confirms that TGIF has no records of any food related complaints for the subject restaurant on or about the date of the Plaintiff's visit to same, other than received from Plaintiff, sometime after the date of her visit. In support of their motion, the Defendants also submit the report of the Nassau County Department of Health prepared after an inspection of the subject restaurant on April 23, 2007 which clearly states "[n]o reported related complaints[;] [n]o violations noted that could have contributed to illness at the time of my inspection."

Perhaps most critically, the Defendants submit and rely upon the report of the Plaintiff's own internist, Dr. Theodore M. Perlman, MD who states:

> Patricia Reimann was admitted to New Island Hospital on 03/03/07 complaining of nausea and vomiting, abdominal pain and diarrhea followed by a syncopal episode. The incident occurred one to two hours after eating a grilled chicken and salad with Blue cheese dressing at [TGIF]. Within 24 hours of hospitalization her gastrointestinal symptoms resolved. Stool studies were sent within those initial hours and were negative for Salmonella, Shigella and Campylobacter. Patient was treated with antibiotics and her symptoms resolved. To note, patient had

noticed bright red blood per rectum which could be explained by hemorrhoids.

Patient's hospitalization was prolonged due to the pneumonia she developed. It appeared to be a result of aspiration during her syncopal episode. Patient was discharged on 03/11/07 in good health.

Based on her symptoms she certainly had gastroenteritis. However it is unlikely to have been caused by Enterohemorrhagic E. Coli. The reason is that initiation of symptoms occurred almost immediately after ingestion. In addition the duration of her gastrointestinal symptoms lasted at most 48 hours.

A possible culprit could have been Staphyloccous Aureus, which could explain the rapid onset and rapid resolution of her symptoms. Diagnosis of food poisoning secondary to S. Aureus is generally based on symptoms rather than [sic] stool studies. Another possible etiology could have been viral.

It is unlikely that Patricia Reimann will develop any long term sequelae from her unfortunate episode. ***

In addition, the Defendants also submit and rely upon the expert affidavit of Dr. Harold A. Schechter, M.D., a board certified internist, who states, in pertinent part, as follows:

10. None of the records reviewed by me show that the food plaintiff consumed at [TGIF] on the date in question, caused plaintiff's illness. In this regard, bacterial food poisoning caused by contaminated food that occurs within one to six hours of ingestion would be from Staphylococcus aureus or from bacillus cereus. Bacillus cereus can be ruled out as a cause of plaintiff's illness as this is caused by fried rice, something plaintiff did not consume while at [TGIF]. Food poisoning due to Staphylococcus aureus would be from a preformed toxin present in the food. However, Staphylococcus food

poisoning usually causes a common source outbreak of illness in several people and there is absolutely no objective documentation of anyone else becoming ill from consuming food at [TGIF] on the date in question. Indeed, there is no mention in the Nassau County Department of Health records regarding a common source outbreak in the restaurant. Furthermore, Staphylococcus food poisoning usually resolves within 8 to 10 hours and although a report from plaintiff's gastroenterologist states that the duration of symptoms was at most 48 hours, plaintiff stated in her deposition that her symptoms took several days to resolve.

11. The lack of documentation of a common source outbreak of food poisoning at [TGIF] and the duration of plaintiff's illness mitigates against the diagnosis of Staphylococcus food poisoning. Her illness would be more appropriately attributed to a bacterial or viral agent that was already incubating in her at the time she was eating at the restaurant and, therefore, her illness within an hour after leaving the restaurant was just a coincidence and would not be causally related to the food that she ate at [TGIF]. Indeed, plaintiff's gastroenterologist stated that plaintiff's diagnosis of food poisoning could be due to Staphylococcus aureus or it could be as a result of a virus.

12. Further, plaintiff's subsequent development of celiac disease, which is due to an autoimmune process, is certainly not related to any alleged Staphylococcal poisoning that occurred in the restaurant. In fact, Dr. Perlman, in his letter dated January 25, 2008, stated it was unlikely that plaintiff would develop any long term sequelae from the episode in question.

13. Based upon the foregoing, upon my clinical experience and my review of medical literature, including Harrison's Principals of Internal Medicine, 16th edition, 2005, it is my medical opinion, with a reasonable degree of medical certainty that the food plaintiff consumed at [TGIF] on March 3, 2007, was not the cause of her illness.

In light of the foregoing, this Court finds that the Defendant, TGIF, has made its prima facie showing of entitlement to judgment as a matter of law. Specifically, the Defendant has established that there is no evidence in the case at bar that the food consumed by the Plaintiff while at the subject TGIF, was in any way tainted, or that her illness resulted from the food provided to her by TGIF as opposed to any other source such as a virus. Further, the affidavit of Dr. Schechter reveals that the food the Plaintiff consumed at TGIF on the date in question was not the cause of her illness. Therefore, in light of the Defendant's demonstration that the Plaintiff completely failed to establish that the food she consumed at TGIF was in fact contaminated, and in light of Dr. Schechter's expert opinion that the food the Plaintiff consumed at TGIF would not have been the cause of the Plaintiff's illness and that the admission of the Plaintiff's own internist, Dr. Perlman, that there could have been an alternative cause of the Plaintiff's illness, i.e., an unrelated virus, this Court finds that the Defendant, TGIF has made its prima facie showing of entitlement to judgment as a matter of law as to each asserted cause of action including strict products liability and breach of implied warranty of fitness.

Specifically, in order for the Plaintiffs to succeed on their causes of action for common law negligence, breach of implied warranty and/or strict products liability, it is axiomatic that the Plaintiffs must demonstrate that the Defendant, TGIF provided the Plaintiff with tainted food and that the tainted food was a proximate cause of the Plaintiff's alleged illness.

Inasmuch as the Defendant's proof also establishes that there is no evidence

that the food the Plaintiff consumed on the date of her alleged incident was improperly made or was otherwise unsafe, this Court finds that the Defendant, TGIF, has also established its prima facie entitlement to judgment as a matter of law under a strict products liability theory (*Denny v. Ford Motor Co.*, supra at 256-59). Similarly, the Defendants have also established, through the submission of the aforementioned proof, particularly the Plaintiff's own testimony that her Cobb salad and bleu cheese dressing met her reasonable expectations, that there is no evidence that the Plaintiff's food was not fit for consumption under an implied warranty theory (*Id*).

In light of the Defendants' showing of entitlement to judgment as a matter of law, the burden shifts to the Plaintiffs, as the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

In opposition, the Plaintiffs rely upon the sworn deposition testimony of Francis Nubla, Jr., who testified on behalf of TGIF; the Plaintiffs also submit the Ecosure-T.G.I.Fridays' food safety evaluation manual, dated October 2006; a web print out from the Center for Disease Control (CDC) Department of Health & Human Services Disease listing re: Staphylococcal food poisoning; the receipt of purchase of food by the Plaintiff at TGIF on March 3, 2007 and the Massapequa Fire Department record report of food poisoning dated March 3, 2007.

Notably, in opposing the motion for summary judgment, the Plaintiffs fail to submit their own affidavits.

The crux of the Plaintiffs' opposition is that as testified to by Francis Nubla, at one time a manager at the subject TGIF location, that the chicken used in a Cobb salad that was served to the Plaintiff was prepared utilizing a seriously flawed method that deviated from TGIF's own established practices and standards which provides an explanation for the Plaintiff's food poisoning. Specifically, the Plaintiffs point out that Nubla testified, in order to prevent bacteria/viruses from contaminating the chicken, the chicken for the Cobb salad was not to be cooked to order; rather, it was first to be grilled, put into a cooler, diced and stored in a cooler for at least six hours before the Cobb salad with chicken could be prepared (in less than three minutes). Essentially, the chicken was required to be served cold. The Plaintiffs submit, however, that the Health Department records utilized by the Defendants confirm that the subject TGIF's restaurant manager, Mr. Yen, confirmed to the investigating sanitarian that the chicken was cooked to order, having been stored in a raw state and that raw chicken was cut up and then grilled – a violation of TGIF's own safety standards. According to Nubla, this is a flaw that subjects the chicken to contamination by bacteria.

With respect to the affidavit of Dr. Schechter, the Paintiffs submit that he never reviewed the supporting proof submitted by the Plaintiff in opposition to the Defendants' motion. Further, the Plaintiffs maintain that even still, Dr. Schechter opined that he did not disagree with the Plaintiff's physician who stated that a possible culprit for the Plaintiff's illness could have been "staphylococcus aureus."

Inasmuch as the Plaintiffs fail to submit their own affidavits and limit their opposition to arguments advanced in the affirmation of their attorney, who is clearly without

personal knowledge of the facts, the Plaintiffs have failed to successfully resist this motion (CPLR 3212 [b]; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 229, n 4 [1978]).

Furthermore, this Court cannot overlook the fact that the Plaintiffs fail entirely to submit any evidence dispelling their own internist's opinion that the culprit for the Plaintiff's illness could have been an unrelated virus. The Plaintiffs have also failed to advance any admissible evidence to suggest that her illness was caused by Staphylococcus Aureus and not a virus. A motion for summary judgment may not be defeated by arguments and contentions based upon surmise, conjecture and suspicion (*Shaw v. Time-Life Records*, 38 N.Y.2d 201 [1975]). Therefore, in the absence of any evidence demonstrating that the Plaintiff's illness was, in fact, caused by the food she consumed at TGIF, as opposed to another cause, this Court finds that the Plaintiffs have failed to prove a prima facie case herein (*Williams v. White Castle Systems, Inc.*, supra; *Valenti v. Great Atlantic and Pacific Tea Company*, supra).

Finally, inasmuch as the Plaintiffs' fail to proffer an expert affidavit supporting their contention that by cooking chicken to order and immediately placing it on a salad it could in any contribute to food contamination, Nubla's testimony that this was the cause of the contamination of the chicken, is meritless and unsupported.

Therefore, in the absence of any evidence establishing the Plaintiffs' prima facie case in this action based upon common law negligence, breach of implied warranty or strict products liability, the Defendants' motion for summary judgment is **GRANTED**.

In accordance with the foregoing, it is,

ORDERED, that the Defendant's motion, which seeks an order granting summary judgment dismissing the Plaintiffs' complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
March 24, 2011

Hon. Randy Sue Marber, J.S.C.
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