

<b>Cioffi v S.M. Foods, Inc.</b>
2013 NY Slip Op 32582(U)
May 20, 2013
Sup Ct, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC, ATLANTA FOODS INTERNATIONAL, RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS, SHEILA MARIE IMPORTS, DOUG JAY, RYDER TRUCK RENTAL, INC., PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.

-----X  
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

-----X  
LEFKOWITZ, J.

**DECISION & ORDER**

Index No.:55391/2011  
Motion Date: Apr. 15, 2013  
Seq No. 14

The following papers were read on this motion by defendants Atlanta Foods International, Russell McCall's Inc., and Doug Jay (the "Atlanta Defendants") for an order (1) striking plaintiffs' second set of interrogatories to all defendants; (2) striking plaintiffs' third notice to produce; (3) striking plaintiffs' fourth notice to produce; (4) striking plaintiffs' fifth notice to produce; and (5) amending the caption to delete Sheila Marie Imports as a defendant and identify defendant Russell McCall's Inc. as Russell McCall's Inc. d/b/a Atlanta Foods International:

Order to Show Cause-Affirmation in Support- Exhibits  
Affirmations in Opposition - Exhibits  
Correspondence to the Court<sup>1</sup>

Upon the foregoing papers and the proceedings held on April 15, 2013, this motion is decided as follows:

In this personal injury action, plaintiffs allege that on or about May 22, 2009, plaintiff Frederick Cioffi, a police officer for the Village of Tuckahoe, sustained serious personal injuries when he was struck by a tractor trailer while performing a routine vehicle stop. Plaintiffs allege that Mr. Cioffi was injured due to the negligence of defendants in the ownership, leasing, operation, control, management, maintenance and repair of the tractor trailer involved in the accident.<sup>2</sup>

This action involves complex matters related to the ownership of the tractor trailer that struck the injured plaintiff, Mr. Cioffi. Plaintiffs allege that at the time of the accident, defendant Daniel E. Burke (“Burke”), who was the driver of the tractor trailer, was on the payroll of GFI Boston LLC (“GFI Boston”), but believed his employer was “Sheila Marie.”<sup>3</sup> Furthermore, plaintiffs allege that defendant SM Foods leased the trailer, and that defendant GFI Boston rented the tractor portion of the tractor trailer from defendant Ryder Truck Rental, Inc. (“Ryder”).

On or about September 27, 2012, this court directed defendants to respond to certain discovery demands served by plaintiffs on or before October 17, 2012. Pursuant to that same order, this court also directed defendants to respond to certain interrogatories contained within plaintiffs’ first set of interrogatories on or before October 17, 2012.

On or about October 17, 2012, the Atlanta Defendants responded to plaintiffs’ discovery demands and plaintiffs’ first set of interrogatories. On that same date, defendants SM Foods,

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<sup>1</sup> This motion was adjourned from February 25, 2013 in order to give certain defendants an opportunity to file an order to show cause seeking the same relief being sought by the Atlanta Defendants. Those defendants submitted a letter to this court dated March 5, 2013 indicating that they did not intend to file a protective order for the same relief. Therefore, this court will only address the arguments made in the papers filed by the Atlanta Defendants.

<sup>2</sup>On or about August 7, 2009, plaintiffs filed the initial complaint in this action under a different index number. According to plaintiffs, during the course of discovery, they became aware of additional parties that should be named as defendants. Thus, on or about September 13, 2011, plaintiffs filed a new summons and complaint, bearing the current operative index number.

<sup>3</sup> In addition, plaintiffs assert that Sheila Marie is a trade name and key identifier for the business of defendant SM Foods, Inc., and that at the time of the accident, defendant Russell McCall’s Inc. had infused that company with capital and was paying all its bills.

Inc., GFI Boston LLC, PLM Trailer Leasing and Daniel Burke (the “GFI Defendants”) responded to plaintiffs’ discovery demands and plaintiffs’ first set of interrogatories.

On or about November 23, 2012, plaintiffs served a third notice to produce on defendants, which consisted of 28 different document requests not including sub-parts. On or about December 18, 2012, plaintiffs served a fourth notice to produce to defendant Sheila Marie Imports and served the notice on counsel for the Atlanta Defendants. On or about that same date, plaintiffs served a second set of interrogatories on defendants. On or about December 19, 2012, plaintiffs served a fifth notice to produce on all defendants, which consisted of 26 document requests not including sub-parts.

On this motion, the Atlanta Defendants argue that plaintiffs’ third, fourth and fifth set of discovery demands, as well as the second set of interrogatories, are overly broad, ambiguous, not designed to provide relevant discovery, and duplicative of prior discovery demands. With respect to the third and fourth set of discovery demands, the Atlanta Defendants aver that they are duplicative of one another except that the fourth set is addressed to Sheila Marie Imports and includes two additional requests. In addition, the Atlanta Defendants assert that the requests are redundant in that they seek documents with respect to non-entities including Sheila Marie, Sheila Marie Imports and/or Sheila Marie Foods. With respect to the fifth notice to produce, the Atlanta Defendants argue that the requests are unduly burdensome and seek documents that are not relevant. The Atlanta Defendants also aver that plaintiffs’ second set of interrogatories is duplicative of the first set of interrogatories and therefore should be stricken. The Atlanta Defendants go through an itemized list of interrogatories from the second set and compare them to the first set to demonstrate the similarities.

With respect to the branch of the Atlanta Defendants’ motion seeking to amend the caption, the Atlanta Defendants argue that deposition testimony and documentary evidence in this case has established that Sheila Marie Imports, currently named as a defendant, is not a business entity but is, instead, the business name under which the co-defendant GFI Boston conducted business beginning on October 1, 2007. In addition, the Atlanta Defendants aver that Russell McCall’s Inc. does not do business, and never has done business, under the name Sheila Marie Foods. The Atlanta Defendants argue that plaintiffs’ counsel is aware of these issues but continues to attempt to prosecute the action against these entities, which indicates an intent to harass defendants and their clients.

In opposition to this motion, plaintiffs argue that their discovery demands on the Atlanta Defendants and Sheila Marie Imports are reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs aver that the discovery demands in the third, fourth and fifth set of demands are tailored to identify records that are needed to prove plaintiffs’ claims, including but not limited to the claim for piercing the corporate veil, and that an explanation for why these documents are needed is in the affidavit of Thomas Fiorenza, CPA, which is submitted in opposition to the instant motion.

With respect to the branch of the motion seeking to amend the caption, plaintiffs aver that there are several documents that indicate that Sheila Marie Imports and Russell McCall’s d/b/a

Sheila Marie Imports should be named as defendants. Plaintiffs state that defendant Atlanta Foods maintained a website in which it made numerous references to Sheila Marie Imports as recently as 2011. Plaintiffs also attach to their opposition papers a number of documents which they claim establish that Sheila Marie Imports is an entity. Plaintiffs also aver that financial records disclosed by Russell McCall's indicate that Russell McCall's was required by the IRS in 2008 to consolidate tax accounting because it was in full control of the company and had effectively merged the Sheila Marie Imports/GFI Boston LLC into the parent company Russell McCall's. Plaintiff further argue that removing any party from the caption at this point would be premature.

Plaintiffs also argue that the second set of interrogatories is not duplicative of the first set. With respect to certain interrogatories, plaintiffs aver that the distinction between the two sets is that in the second set, plaintiffs clarified that they were referring to Sheila Marie Imports, as opposed to merely Sheila Marie. In addition, plaintiffs argue that the reason they served the second set of interrogatories was to ensure that any party in possession of responsive information would respond to the interrogatories.

At oral argument, counsel for plaintiffs argued that despite the fact that hundreds of documents have been produced during discovery in this matter, that a number of additional types of documents were still missing.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). However, "a party does not have the right to uncontrolled and unfettered disclosure." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 873 NYS2d 145 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]). CPLR 3103(a) provides the Court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Here, defendants have established that plaintiffs' second set of interrogatories is duplicative of the first set of interrogatories and should be stricken. However, with respect to plaintiffs' third, fourth and fifth notices to produce, defendants have failed to establish that these demands are overbroad, duplicative or seek irrelevant documents. Given the nature of the claims at issue in this litigation and the relationship between the defendants, plaintiffs have established the need for the additional notices to produce. Similarly, at this point, it would be premature to amend the caption in the way defendants seek, especially given the nature of the claims asserted against defendants in this action. Defendants shall serve responses to the third, fourth and fifth notices to produce on or before June 5, 2013.

In view of the foregoing, it is

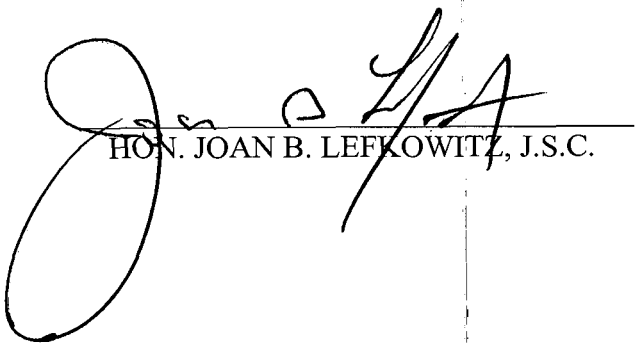
ORDERED that the branch of defendants' motion seeking to strike plaintiffs' second set of interrogatories to all defendants is granted; and it is further

ORDERED that the branch of defendants' motion to strike plaintiffs' third, fourth and fifth notices to produce is denied. Defendants shall respond to the third, fourth and fifth notices to produce on or before June 5, 2013; and it is further

ORDERED that the branch of defendants' motion to amend the caption to delete Sheila Marie Imports as a defendant and identify defendant Russell McCall's Inc. as Russell McCall's Inc. d/b/a Atlanta Foods International is denied; and it is further

ORDERED that the parties shall appear for a Compliance Conference in Courtroom 800 at 9:30 a.m. on June 7, 2013.

Dated: White Plains, New York  
May 20, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk