

**Ramos v Brown**

2014 NY Slip Op 32663(U)

September 2, 2014

Supreme Court, Bronx County

Docket Number: 309164/2009

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X  
RAYNALDO RAMOS, as administrator of the estate of  
YSEMNY RAMOS, deceased, and RAYNALDO  
RAMOS, individually,  
  
Plaintiffs,

- against -

KESTON BROWN, GRISTEDE'S FOODS, INC., RED  
APPLE GROUP INC., RED APPLE LEASING, INC.,  
GRISTEDE'S NY, LLC and GRISTEDE'S FOODS NY,  
INC.,  
  
Defendants.

-----X  
KESTON BROWN,  
  
Third-Party Plaintiff,

- against -

AFRICAN AMERICAN AUTO REPAIR INC.,  
  
Third-Party Defendant.

-----X  
-----X  
TASSIA KATSIAMBANIS,  
  
Plaintiff,

- against -

KESTON BROWN, GRISTEDES FOODS, INC. and  
RED APPLE GROUP INC.,  
  
Defendants.

-----X  
KESTON BROWN,  
  
Third-Party Plaintiff,

- against -

AFRICAN AMERICAN AUTO REPAIR INC.,  
  
Third-Party Defendant.

-----X

PRESENT: Hon. Lucindo Suarez

DECISION AND ORDER

Action #1

Index No. 309164/2009

Third-Party Index No.  
83763/2011

Action #2

Index No. 303079/2009

Third-Party Index No.  
83740/2011

Upon the notice of motion dated February 12, 2014 of defendants Gristede's Foods, Inc.,

Red Apple Group Inc., Red Apple Leasing Inc., Gristede's NY, LLC and Gristede's Foods NY, Inc. and the affirmation, affidavits (5) and exhibits submitted in support thereof; the notice of cross-motion dated March 10, 2014 of plaintiff in Action #1 and the affirmation and exhibits submitted in support thereof; the exhibits served by plaintiff in Action #1 on March 13, 2014; the notice of cross-motion dated March 18, 2014 of plaintiff in Action #2 and the affirmation and exhibit submitted in support thereof; the supplemental affirmation dated March 20, 2014 of plaintiff in Action #1 and the exhibits submitted therewith; the affirmation in opposition and reply dated April 22, 2014 of defendants Gristede's Foods, Inc., Red Apple Group Inc., Red Apple Leasing Inc., Gristede's NY, LLC and Gristede's Foods NY, Inc. and the exhibit submitted therewith; the affirmation in reply dated April 30, 2014 of plaintiff in Action #1 and the exhibits submitted therewith; the affirmation in reply dated May 1, 2014 of plaintiff in Action #2; and due deliberation; the court finds:

These actions stem from a 2009 motor vehicle accident in which a van driven by defendant Keston Brown ("Brown") struck plaintiff Raynaldo Ramos's ("Ramos") decedent and plaintiff Tassia Katsiambanis ("Katsiambanis"). The complaints allege that defendants employed Brown and were negligent, careless and reckless in their ownership, operation, management, maintenance, supervision, use and control of the vehicle. Third-party defendant African American Auto Repair Inc. ("AAAR") serviced the vehicle.

Defendants Gristede's Foods, Inc. ("Gristede's Foods"), Red Apple Group Inc. ("Red Apple Group"), Red Apple Leasing Inc. ("Red Apple Leasing"), Gristede's NY, LLC ("Gristede's NY") and Gristede's Foods NY, Inc. ("Gristede's Foods NY") (collectively, "the Gristede's defendants") move for summary judgment dismissing both complaints and all cross-claims on the grounds that 1) plaintiffs have not alleged any statutory violation that would render defendants vicariously liable for Brown's conduct; 2) defendant Red Apple Leasing, the owner of the van, is not liable by virtue of

49 U.S.C. § 30106, commonly referred to as the “Graves Amendment;” 3) they did not own, operate, maintain, manage, supervise, repair or control the van; and 4) they did not employ Brown.

### **MOTION FOR SUMMARY JUDGMENT**

#### **Failure to Allege a Statutory Violation**

The Gristede’s defendants argue that plaintiffs have not alleged or identified violations of statutes such as Vehicle and Traffic Law §128 or § 388 that would render them vicariously liable for the accident. Vehicle and Traffic Law § 388(1) renders vehicle owners liable for injuries resulting from the negligent permissive use of their vehicles; Vehicle and Traffic Law §128 defines “owner.” However, Vehicle and Traffic Law § 388 is not a statute that creates liability by virtue of its being “violated.” It is a “statutory command,” *see Metropolitan Group Prop. & Cas. Ins. Co. v. Wellington*, 42 Misc.3d 270, 280, 975 N.Y.S.2d 617, 625 (1st Dist Nassau County 2013), imputing vicarious liability that requires only ownership and permissive use. The complaint alleges that defendants owned the van, that they were negligent in such ownership and that the permissive user was negligent. The basis of liability is explicitly stated and encompassed by the statute. *See Nunez v. Jenkins*, 8 A.D.3d 151, 779 N.Y.S.2d 55 (1st Dep’t 2004).

Furthermore, Vehicle and Traffic Law §128 and § 388 relate solely to the relationship between an owner and operator of a motor vehicle. The Gristede’s defendants could also be found liable on a *respondeat superior* theory if Brown was their employee acting within the scope of his employment at the time of the accident. *See e.g. Horney v. Tisyl Taxi Corp.*, 93 A.D.2d 291, 461 N.Y.S.2d 799 (1st Dep’t 1983). Thus, the mere failure to explicitly state that defendants “violated” Vehicle and Traffic Law § 388 does not entitle the Gristede’s defendants to summary judgment.

#### **Graves Amendment**

Red Apple Leasing argues that as the registered owner of the van, it is not liable by virtue of

the Graves Amendment. Pursuant to the Graves Amendment, applicable to this action because commenced after August 10, 2005, an “owner (or an affiliate of the owner) . . . engaged in the trade or business of renting or leasing motor vehicles,” is not vicariously liable under Vehicle and Traffic Law § 388 for the negligence of the defendant vehicle operator. See *Hall v. Elrac, Inc.*, 52 A.D.3d 262, 859 N.Y.S.2d 641 (1st Dep’t 2008).

The Gristede’s defendants submit the affidavit of Mark Kassner (“Kassner”), Chief Financial Officer and Vice President of Red Apple Leasing and its successor, Red Apple Lease Corporation, who averred that Red Apple Leasing was in the business of leasing vehicles and that, because it leased the van to non-party Red Apple Supermarkets, Inc. (“Red Apple Supermarkets”), Red Apple Leasing did not have possession or control of the van. Kassner averred that Red Apple Leasing and its successor, Red Apple Lease Corporation were in the business of vehicle leasing and that Red Apple Leasing leased every vehicle it owned, including the subject van. Although movant did not annex a lease for the particular vehicle in question, Kassner authenticated a 1991 roster of vehicles registered to Red Apple Leasing and a 1994 billing schedule sent by Red Apple Leasing to Red Apple Supermarkets, both of which listed the subject van. However, in the absence of a lease and/or proof that the van had been continuously leased since such time, records from 1991 and 1994 are simply too remote to be probative of the lessor and lessee of the vehicle in 2009.

**Ownership of the Van**

Gristede’s Foods, Red Apple Group, Gristede’s NY and Gristede’s Foods NY argue that they did not own, operate, maintain, manage, supervise, repair or control the van. They submit the 1990 title and the 2008 registration to the vehicle in the name of Red Apple Leasing. They further submit the affidavit of Renee Flores (“Flores”), Executive Vice President of Human Resources, Asset Management and Administration for Gristede’s Foods, Gristede’s NY and Gristede’s Foods

NY, who averred, based upon a familiarity with their business and records, that those defendants did not own, lease, possess, or have responsibility for operating, managing, maintaining, supervising, repairing or controlling the van.

Defendants further submit the affidavit of Robert A. Zorn ("Zorn"), Executive Vice President of Red Apple Group, who averred that Red Apple Group is a real estate company that does not own or lease vehicles, including the subject van, and that it did not possess or have responsibility for operating, managing, maintaining, supervising, repairing or controlling the van. Defendants also rely on Kassner's assertion that, because it leased the van to non-party Red Apple Supermarkets, Red Apple Leasing did not have possession or control of the van.

Charles Criscuolo ("Criscuolo"), the Senior Executive Vice President of non-party Namdor, Inc. ("Namdor"), successor to lessee Red Apple Supermarkets, averred that Red Apple Supermarkets had only "nominal" control over the van because its policy was to have the drivers who used vehicles daily to control, maintain, manage and keep the vehicles. Defendants further rely on the deposition testimony of Brown's foreman (and uncle), Michael Francis ("Francis"), that Francis was responsible for maintenance of the subject vehicle and that upon learning that a vehicle required servicing, he would have the vehicle serviced by AAAR.

In response to this *prima facie* showing, Ramos points to instances in attorney affirmations submitted on behalf of the Gristede's defendants during the course of motion practice in which the Gristede's defendants purportedly conceded various points contested here, such as ownership of the van. The first such statement appeared in paragraph six of the October 17, 2012 affirmation submitted in support of a motion to strike the third-party defendant's answer for failure to provide discovery, where in an introductory paragraph counsel referred to "a Gristede's van," without defining to whom the word "Gristede's" was intended to refer. While careless drafting on

defendants' part, the affirmation of an attorney does not constitute admissible evidence. *See Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

The second such statement appeared in paragraph ten of the April 14, 2011 affirmation submitted in opposition to plaintiff's motion to amend the complaint to add a claim for punitive damages: "punitive damages in this case are patently improper as to Gristede's as the owner of the van." By defendants' definition, however, "Gristede's" merely referred collectively to all the Gristede's defendants and was not a statement or admission as to the owner of the van. In context, the argument referred to vehicle ownership in the abstract where a plaintiff attempts to assert a claim for punitive damages against a party whose liability is vicarious pursuant to Vehicle and Traffic Law § 388.

The next such statement appeared in paragraph eight of the same April 14, 2011 affirmation: "testimony makes clear that Gristede's authorized repair of the vehicle whenever its exclusive driver requested it." However, as above, by definition "Gristede's" referred collectively to all the Gristede's defendants, and, from a reading of the entire sentence and argument as a whole, "its" referred to the van itself and the argument therefore referred to "the exclusive driver of the van," not "the exclusive driver of Gristede's."

The final such statement is found in the Gristede's defendants' answer to Katsiambanis' complaint: "Gristede's paid to have certain maintenance, repair and inspection performed." However, plaintiff's recitation is incomplete and misleading. The phrase in full context, reading the answer as a whole and taking into account how the Gristede's defendants referred to themselves, denies plaintiff's allegations that Gristede's Foods, Inc. and Red Apple Group Inc. maintained, managed and controlled the van, and "[Gristede's Foods, Inc.] and [Red Apple Group Inc.] each admit that [Gristede's Foods, Inc.] paid to have certain maintenance, repair and inspection

performed on the aforementioned motor vehicle.”

Plaintiff argues that additional proof that Red Apple Leasing leased the vehicle to Red Apple Supermarkets is lacking, as there is no lease attached and no documentation identifying the lessee. Plaintiff also argues that neither Red Apple Leasing nor Red Apple Supermarkets existed at the time of the accident; this, however, fails to raise a question as to whether they existed at the time of the lease, which need not have occurred at the time of the accident.

Ramos points out that despite the Gristede’s defendants’ protestations, the subject van bore the word “Gristede’s” together with the Gristede’s defendants’ common business address, and argues that “Gristede’s” was an owner of the van. Plaintiff does not specify to which entity he refers. However, he relies on the Vehicle and Traffic Law § 128 definition of owner to claim that “Gristede’s” is an owner because entitled to exclusive use under a lease for a period in excess of thirty days, given Brown’s testimony that he used the van in his work for four months, records that Gristede’s Foods, Inc. paid for repairs over the course of multiple years and testimony that Red Apple Supermarkets merged into “Gristede’s” in 1997. It is thus presumed that plaintiff refers to a “Gristede’s Foods” entity, and plaintiff’s opposition raises a question of fact with respect to those defendants. *See Caraballo v. Rivas-Barzola*, 92 A.D.3d 532, 939 N.Y.S.2d 21 (1st Dep’t 2012); *Grant v. Alexandria Toyota*, 224 A.D.2d 187, 637 N.Y.S.2d 932 (1st Dep’t 1996).

Testimony and vehicle maintenance records submitted by defendants indicating that AAAR’s client was “Red Apple” are not probative in the absence of evidence of AAAR’s awareness of the Gristede’s defendants’ corporate structure. Plaintiff accordingly failed to raise an issue of fact as to Red Apple Group’s ownership or other involvement with the subject van.

**Employment of Brown**

The Gristede’s defendants next argue that they are not liable for the control, supervision,

hiring or retention of Brown because they did not employ him and were unaware that Brown would attempt to operate a motor vehicle while under the influence of alcohol. They submit the affidavit of Deborah Clusan ("Clusan"), the Director of Payroll for non-party Namdor, who averred that her review of Namdor's payroll records, including W-2s and check registers, showed that Namdor employed Brown from January 17, 2008 to March 27, 2009 and has employed Francis from 1990 to the present. Flores averred that, based on a review of the employment records of Gristede's Foods, Gristede's NY and Gristede's Foods NY and Clusan's affidavit, those defendants did not employ Brown. Zorn averred that, based on a review of Red Apple Group's employment records, it did not employ Brown. Kassner averred similarly. The affidavits are conclusory, and conclusory affidavits do not satisfy a movant's burden on a summary judgment motion. *See JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 828 N.E.2d 604, 795 N.Y.S.2d 502 (2005).

Even were the affidavits sufficient to establish defendants' *prima facie* entitlement to summary judgment, other evidence submitted raised issues of fact as to Brown's employment. Defendants' evidence included Brown's testimony that he was employed by "Gristede's;" testimony of Brown's immediate supervision that he was employed by "Red Apple;" an affidavit that Criscuolo, Brown's immediate supervisor, was variously employed by Red Apple Supermarkets, RAS Operating Corp. and Namdor; Brown's and Francis's testimony that their work exclusively benefitted Gristede's supermarkets; Brown's testimony that he was provided with a vehicle by his employer; and the vehicle servicer's testimony that he repaired the van for "Red Apple."

While an employee's testimony regarding who he believed to be his employer may not be dispositive in the absence of evidence that he was aware of the corporate structure, *see Clifford v. Plaza Hous. Dev. Fund Co., Inc.*, 105 A.D.3d 609, 965 N.Y.S.2d 87 (1st Dep't 2013), defendants' reliance on Namdor payroll records must be viewed in light of the fact that the records identify

Namdor as an “agent” without specifying the principal for whom it acted, creating a question as to whether and for whom Namdor served merely as a payroll and/or benefits administrator at the time of the accident, *see e.g. Amill v. Lawrence Ruben Co., Inc.*, 100 A.D.3d 458, 954 N.Y.S.2d 27 (1st Dep’t 2012), particularly given the testimony of the corporate owner, John Catsimatidis (“Catsimatidis”), that regardless of who actually operated the supermarkets, paychecks could be generated by Namdor.

Of significance is the testimony of Flores, someone in a position to be well-versed in defendants’ corporate structure, who referred to her employer interchangeably as “Namdor” and “Gristede’s.” While relation or affiliation between corporations does not necessarily mean they are both to be considered an employer, *see Ortiz v. Rose Netherlander Assoc., Inc.*, 90 A.D.3d 454, 933 N.Y.S.2d 684 (1st Dep’t 2011), on this record it is unclear who controlled Brown or the means used to produced the results required by his work, *see Bautista v. David Frankel Realty, Inc.*, 54 A.D.3d 549, 863 N.Y.S.2d 638 (1st Dep’t 2008).

Inasmuch as the Gristede’s defendants did not establish a lack of employment relationship, they cannot be granted summary judgment on claims of negligent hiring, retention or supervision, even given Francis’s uncontroverted testimony that he never had a problem with anyone drinking on the job. *See Babikian v. Nikki Midtown, LLC*, 60 A.D.3d 470, 875 N.Y.S.2d 20 (1st Dep’t 2009).

**CROSS-MOTIONS TO ADD PARTY DEFENDANTS**

Ramos cross-moves to add Namdor, Red Apple Supermarkets, RAS Operating Corp., Catsimatidis and Red Apple Group as party defendants. Adopting Ramos’s arguments, Katsiambanis cross-moves similarly.

A meritorious amendment, even if sought after the filing of the note of issue, may be permitted in the absence of a claim of prejudice or surprise. *See Lettieri v. Allen*, 59 A.D.3d 202,

873 N.Y.S.2d 39 (1st Dep't 2009); *Byrne v. Fordham University*, 118 A.D.2d 525, 500 N.Y.S.2d 253 (1st Dep't 1986). Despite the laxity of CPLR 3025(b), the court must examine the merit of a proposed amendment in the interest of the conservation of judicial resources, see *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 675 N.Y.S.2d 5 (1st Dep't 1998), and the amendment may be denied in the absence of a demonstration of merit, see *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 (1st Dep't 2009), *appeal dismissed*, 12 N.Y.3d 880, 910 N.E.2d 1003, 883 N.Y.S.2d 174 (2009); *American Theatre for the Performing Arts, Inc. v. Consolidated Credit Corp.*, 45 A.D.3d 506, 846 N.Y.S.2d 60 (1st Dep't 2007). Unless the "alleged insufficiency or lack of merit is clear and free from doubt," the proposed amendment should be permitted. *Miller v. Staples the Off. Superstore E., Inc.*, 52 A.D.3d 309, 313, 860 N.Y.S.2d 51, 55 (1st Dep't 2008).

As the statute of limitations has passed, rendering the proposed claims otherwise untimely, plaintiffs must rely on the relation-back doctrine. See *Mondello v. New York Blood Ctr.*, 80 N.Y.2d 219, 604 N.E.2d 81, 590 N.Y.S.2d 19 (1992). To invoke the relation-back doctrine, the proponent must demonstrate that

- (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well.

*Mondello*, 80 N.Y.2d at 226, 604 N.E.2d at 85, 590 N.Y.S.2d at 23. *Buran v. Coupal*, 87 N.Y.2d 173, 661 N.E.2d 978, 638 N.Y.S.2d 405 (1995) dispensed with the requirement that the mistake be "excusable."

“If the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other then they are ‘otherwise united in interest.’” *Prudential Ins. Co. v. Stone*, 270 N.Y. 154, 159, 200 N.E. 679, 680 (1936). “[U]nity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other.” *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255, 255, 804 N.Y.S.2d 305, 306 (1st Dep’t 2005), *citing Mercer v. 203 E. 72nd St. Corp.*, 300 A.D.2d 105, 751 N.Y.S.2d 457 (1st Dep’t 2002). Mere relatedness or commonality of ownership, however, is insufficient to demonstrate unity of interest. *See Mercer, supra*.

**RAS Operating Corp. and Red Apple Supermarkets, Inc.**

Plaintiffs seek to add RAS Operating Corp. and Red Apple Supermarkets on the basis of Criscuolo’s affidavit stating that Red Apple Supermarkets, the lessee of the van, eventually merged into RAS Operating Corp., which ultimately merged into Namdor. Plaintiffs rely on Catsimatidis’s testimony from 2001 wherein he stated that the grocery stores were operated “as one entity.” However, Catsimatidis also testified that the stores owned by Red Apple Supermarkets came under the control of Gristede’s Foods sometime after the entities merged into Gristede’s Foods in 1997.

Indeed, pursuant to the online database of the New York State Department of State Division of Corporations, of which the court takes judicial notice, *see Matter of LaSonde v. Seabrook*, 89 A.D.3d 132 n8, 933 N.Y.S.2d 195 (1st Dep’t 2011), Red Apple Supermarkets merged out of existence in 1997 and RAS Operating Corp. merged out of existence in 2000, years before the subject accident, and there is no proof that either entity continued to have any involvement in relevant operations, ownership or employment afterward. Plaintiff has acknowledged that Red Apple Supermarkets did not exist at the time of the accident. While successor corporations may be liable for the torts of their predecessors under certain circumstances, *see Schumacher v. Richards*

*Shear Co.*, 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983), a predecessor cannot assume liabilities that had yet to arise, *see Ward v. Cross County Multiplex Cinemas, Inc.*, 62 A.D.3d 466, 878 N.Y.S.2d 334 (1st Dep't 2009). Thus, regardless of whether RAS Operating Corp. or Red Apple Supermarkets were united in interest with a named defendant, claims against them would have no merit.

### Catsimatidis

The rule “that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners,” *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140, 623 N.E.2d 1157, 1160, 603 N.Y.S.2d 807, 810 (1993), is applicable even to a corporation having a single shareholder, *Worthy v. N.Y. City Hous. Auth.*, 21 A.D.3d 284, 287, 799 N.Y.S.2d 518, 521 (1st Dep't 2005) (Tom, J., concurring). Plaintiffs therefore bear the heavy burden of demonstrating that the corporate veil should be pierced to subject Catsimatidis to personal liability. *See Matias v. Mondo Props. LLC*, 43 A.D.3d 367, 841 N.Y.S.2d 279 (1st Dep't 2007); *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 797 N.Y.S.2d 1 (1st Dep't 2005).

Courts will disregard the corporate form and pierce the corporate veil “whenever necessary ‘to prevent fraud or to achieve equity.’” *Back v. Nuro Trans. Corp.*, 62 A.D.2d 942, 942, 404 N.Y.S.2d 7, 8 (1st Dep't 1978). However, “[t]he burden is on the complainant to establish by a preponderance of evidence all the elements necessary.” *Lowendahl v. Baltimore & O. R. Co.*, 247 A.D. 144, 154, 287 N.Y.S. 62, 72 (1st Dep't 1936), *affirmed*, 272 N.Y. 360, 6 N.E.2d 56 (1936), *reh denied*, 273 N.Y. 584, 7 N.E.2d 704 (1937). Abuse is not inferred “where a corporation was formed for legal purposes or is engaged in legitimate business.” *TNS Holdings Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339-40, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891, 893 (1998).

Nothing submitted suggests that Catsimatidis has undertaken any act in his personal,

individual capacity. Even if Catsimatidis did exercise dominion and control over any of the various cited entities, plaintiffs have failed to claim, let alone demonstrate, that his conduct “was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences,” *Joseph Kali Corp. v. A. Goldner, Inc.*, 49 A.D.3d 397, 398, 859 N.Y.S.2d 1, 2 (1st Dep’t 2008), that has resulted in any identifiable harm to the plaintiffs or to the existing or contemplated defendants, *see First Capital Asset Mgmt. v. N.A. Partners, L.P.*, 300 A.D.2d 112, 755 N.Y.S.2d 63 (1st Dep’t 2002). There is accordingly no unity of interest for relation-back purposes. The fact that Catsimatidis may have been deemed an “employer” for Labor Law purposes is not instructive as to whether he is an employer for traditional tort liability. The scope of liability imposed in the Labor Law context has been called “unusual.” *See Jeffrey D. Pollack, Outside Counsel, NYLJ*, April 5, 2001 at 21, col. 4.

### **Red Apple Group**

To the extent that plaintiffs seek to amend the caption and pleadings to reflect the true name of Red Apple Group, Inc. as Red Apple Group, the cross-motions were unopposed. However, to the extent plaintiffs seek to add Red Apple Group as a defendant in the event the action against Red Apple Group, Inc. is dismissed, the proof submitted by plaintiffs does not establish that the claims against any named defendant relate back to Red Apple Group, which plaintiffs characterize as an owner together with Catsimatidis. The various testimony relied upon by plaintiffs demonstrates only that, at least in 2001, Red Apple Group was a shareholder of Gristede’s Foods or that, at least in 2005, it was a parent company of Gristede’s Foods. Neither is a sufficient relationship for relation-back purposes. *See Matias, supra* (shareholder); *Ward, supra* (parent company).

To the extent that Zorn testified in 2009 that he, as well as Kassner and the legal staff, performed work for various entities owned by Catsimatidis, the sharing of resources such as employees and facilities is not dispositive. *See Xavier v. RY Mgt. Co., Inc.*, 45 A.D.3d 677, 846

N.Y.S.2d 227 (2d Dep't 2007); *Zehnick v. Meadowbrook II Assocs.*, 20 A.D.3d 793, 799 N.Y.S.2d 604 (3d Dep't 2005), *appeal denied*, 5 N.Y.3d 873, 842 N.E.2d 22, 808 N.Y.S.2d 136 (2005).

There is no showing that Red Apple Group has the same jural relationship with any of the named defendants, *see Verizon N.Y., Inc v. City of New York*, 2011 NY Slip Op 31341(U) (Sup Ct N.Y. County May 20, 2011), or that the relationship between Red Apple Group and any of the named defendants is such that they are vicariously liable for each other's acts, *see Regina, supra*, or that the defenses available to Red Apple Group would be identical to those of the named defendants, *see Connell v. Hayden*, 83 A.D.2d 30, 443 N.Y.S.2d 383 (2d Dep't 1981).

Given the lack of evidence with respect to the liability of Red Apple Group, the court searches the record and grants it summary judgment. *See* CPLR 3212(b).

#### Namdor

Plaintiffs seek to add Namdor because, as urged by defendants, it is Brown's employer, and would therefore be liable under *respondeat superior*. Namdor is clearly the successor of the lessee of the van, as per Criscuolo's affidavit. Furthermore, Namdor appears to have had an amorphous role with respect to the Gristede's entities. In 2001, Catsimatidis testified that he did not know whether Namdor operated the supermarkets, and that either it or Red Apple Management issued the paychecks. Furthermore, Flores referred to her employer interchangeably as "Namdor" and "Gristede's" in her 2009 testimony. Nothing about Clusan's testimony was inconsistent. She testified in 2005 and averred in the course of present motion practice that she was employed by Namdor. The fact that any witness may have understood the operations of other companies does not necessarily mean that all companies are united in interest for relation-back purposes. More compelling are Criscuolo's statements regarding his employment.

In 2005, Criscuolo testified that he was a Senior Executive Vice President at "Gristede's" in

charge of all aspects of operating a supermarket chain, and that since 1992 he had always worked for "Gristede's." He testified that Gristede's Foods operated forty-five supermarkets. In his affidavit submitted in support of the present motion, he averred that he had been Senior Executive Vice President of non-party Red Apple Supermarkets, which consisted of grocery stores, since April 1992 and was now Senior Executive Vice President of its successor, Namdor. Thus it appears that Namdor is not merely the successor to the van's lessee but also the successor to the supermarket operating entity.

Given that Catsimatidis testified that many of the operating companies merged into Gristede's Foods, the entity Brown claims to be his employer, it is unclear which entity Namdor has succeeded and it therefore cannot be said that plaintiffs' relation-back argument has no merit with respect to Namdor. The fact that an employer may have available to it the defense that the employee was not acting within the scope of his employment at the time of the accident does not pose a bar to finding unity of interest for relation-back purposes. *See Connell, supra; see also Bruns v. Catskill*, 169 A.D.2d 963, 564 N.Y.S.2d 857 (3d Dep't 1991); *Preferred Electric & Wire Corp. v. Duracraft Products, Inc.*, 166 A.D.2d 425, 560 N.Y.S.2d 489 (2d Dep't 1990).

Accordingly, it is

ORDERED, that the motion of defendants Gristede's Foods, Inc., Red Apple Group Inc., Red Apple Leasing Inc., Gristede's NY, LLC and Gristede's Foods NY, Inc. for summary judgment is granted to the extent of granting the motion as to defendant Red Apple Group Inc.; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Red Apple Group Inc. dismissing the complaint of plaintiff in Action #1 Raynaldo Ramos insofar as asserted against it; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Red Apple Group Inc. dismissing the complaint of plaintiff in Action #2 Tassia Katsiambanis insofar as asserted against it; and it is further

ORDERED, that the cross-motion of plaintiff in Action #1 Raynaldo Ramos to amend the complaint to add party defendants is granted to extent of granting the cross-motion to add Namdor, Inc. as a party defendant; and it is further

ORDERED, that the cross-motion of plaintiff in Action #2 Tassia Katsiambanis to amend the complaint to add party defendants is granted to extent of granting the cross-motion to add Namdor, Inc. as a party defendant; and it is further

ORDERED, that the captions of the actions shall be amended to reflect the foregoing and all papers to be served and filed herein shall bear the following captions:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X  
RAYNALDO RAMOS, as administrator of the estate of  
YSEMNY RAMOS, deceased, and RAYNALDO RAMOS,  
individually,

Plaintiffs,

Action #1

Index No. 309164/2009

- against -

KESTON BROWN, GRISTEDE'S FOODS, INC., RED  
APPLE GROUP INC., RED APPLE LEASING, INC.,  
GRISTEDE'S NY, LLC, GRISTEDE'S FOODS NY, INC.  
and NAMDOR, INC.,

Defendants.

-----X  
KESTON BROWN,

Third-Party Plaintiff,

Third-Party Index No.

83763/2011

- against -

AFRICAN AMERICAN AUTO REPAIR INC.,

Third-Party Defendant.

-----X

[Caption continued on next page.]

-----X  
TASSIA KATSIAMBANIS,

Plaintiff,

Action #2

- against -

Index No. 303079/2009

KESTON BROWN, GRISTEDES FOODS, INC., RED  
APPLE GROUP INC. and NAMDOR, INC.,

Defendants.

-----X  
KESTON BROWN,

Third-Party Plaintiff,

Third-Party Index No.

83740/2011

- against -

AFRICAN AMERICAN AUTO REPAIR INC.,

Third-Party Defendant.

-----X

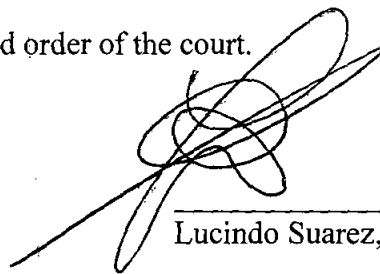
and it is further

ORDERED, that within thirty (30) days after the date of this decision and order, plaintiff in Action #1 Raynaldo Ramos shall serve and file an amended summons and amended complaint in a form consistent with the foregoing; and it is further

ORDERED, that within thirty (30) days after the date of this decision and order, plaintiff in Action #2 Tassia Katsiambanis shall serve and file an amended summons and amended complaint in a form consistent with the foregoing.

This constitutes the decision and order of the court.

Dated: September 2, 2014



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Lucindo Suarez, J.S.C.