

**Jackson v Ocean State Job Lot of NY2011 LLC**

2014 NY Slip Op 33468(U)

March 19, 2014

Supreme Court, Albany County

Docket Number: 818-12

Judge: Roger D. McDonough

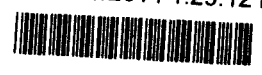
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

Albany County Clerk  
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JEFFREY JACKSON,

Plaintiff,

-against-

**DECISION AND ORDER**  
Index No.: 818-12  
RJI No.: 01-12-106121



OCEAN STATE JOB LOT OF NY2011  
LLC, CHAD SNYDER and JOHN DOE,

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

LAW OFFICE OF JESSICA M. GORMAN  
Attorneys for Plaintiff  
(Jessica M. Gorman, Esq., of Counsel)  
90 State Street, Suite 700  
Albany, NY 12207

HANNIGAN LAW FIRM PLLC  
Attorneys for Defendants Ocean State Job  
Lot of NY2011 LLC and Chad Snyder  
(Timothy C. Hannigan, Esq., of Counsel)  
1881 Western Avenue, Suite 140  
Albany, NY 12203

**Roger D. McDonough, J.:**

Plaintiff seeks an Order granting him leave to amend the amended complaint so as to name the "John Doe" defendant. Defendants Ocean State Job Lot of NY2011 LLC ("Ocean State") and Chad Snyder<sup>1</sup> oppose the motion.

**Background**

Plaintiff filed his amended complaint on or about January 18, 2013. Therein he set forth two causes of action. The first sounds in assault and battery and was brought against Ocean State, Chad Snyder and "John Doe". The second sounds in negligent hiring and is brought solely against Ocean State. Said cause of action relates to Ocean State's hiring of Chad Snyder and "John Doe". The causes of action emanated from plaintiff's purported shoplifting activity at

<sup>1</sup> There is no record of plaintiff serving the instant motion on Josh McFee, the individual believed to be "John Doe".



Ocean State's retail store located in Albany. Said activity occurred on November 1, 2011. The proposed second amended complaint would substitute an individual named Josh McFee for "John Doe".

Plaintiff's original summons and complaint was filed on or about March 30, 2012. He survived defendant's motion to dismiss the complaint by successfully cross-moving for an extension of time to serve the defendants. At the time, plaintiff was self-represented. Plaintiff's counsel served a notice of appearance in December of 2012 and the amended complaint followed soon thereafter. Counsel for plaintiff avers that she requested John Doe's identify from defendants' former counsel on January 15, 2013. There was no response.

Plaintiff made formal discovery requests in March of 2013. Defendants' failure to timely respond to the discovery requests necessitated motion practice from plaintiff.<sup>2</sup> The discovery demands were served on September 16, 2013. Plaintiff indicates that said responses allowed plaintiff to identify Josh McFee as "John Doe". This motion was brought approximately two months after plaintiff's receipt of defendants' discovery responses.

### Discussion

Plaintiff indicates that he is moving pursuant to CPLR § 203(c) & (f) and the "relation-back doctrine". Said statutory subsections relate to when a claim in an amended pleading is deemed interposed for purposes of calculating the appropriate limitations period. As to the "relation-back doctrine", plaintiff maintains that: (1) the claims arise out of the same transaction and occurrence; (2) Josh McFee is united in interest with Ocean State and Chad Snyder; and (3) that McFee knew or should have known that, but for a mistake by plaintiff as to McFee's identity, the action would have been brought against him as well.<sup>3</sup>

Ocean State and Snyder argue that plaintiff failed to undertake timely efforts to identify

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<sup>2</sup> Defendants' discovery response delays were attributed to their substitution of counsel.

<sup>3</sup> Plaintiff relies upon McFee's statement as well as the statements of Snyder and an Ocean State manager to support their relation-back argument. However, none of these statements were provided to the Court. The sole exhibit provided to the Court was plaintiff's proposed second amended complaint.

the correct party prior to the expiration of the relevant limitations period. Accordingly, they argue that the instant motion should be denied. In support, they rely upon the relevant case law as well as CPLR § 1024. CPLR § 1024 relates to actions brought against unknown parties. Snyder and Ocean State also maintain that there is no evidence in the record to establish that McFee knew or should have known that an action would be commenced against him individually or that he knew or should have known that an action would be commenced against Ocean State and Snyder. Finally, Snyder and Ocean State contend that CPLR §§ 203 and 1024 would not bar application of the one-year statute of limitations to plaintiff's cause of action for assault and battery.

In reply, plaintiff distinguishes Snyder and Ocean State's case law by pointing out that McFee's identity was not readily available via Freedom of Information Law ("FOIL") or other record requests. Additionally, plaintiff argues that McFee should have been on notice of this action because he is united in interest with defendants Snyder and Ocean State. Finally, plaintiff maintains that he did not deliberately fail to previously identify McFee.

The Court finds that plaintiff's motion must be denied. The record is wholly bereft of any evidence that McFee had any form of notice of the instant lawsuit prior to expiration of the applicable limitations period. Quite frankly, there is also no evidence before the Court that McFee presently has any knowledge of the instant lawsuit or the instant attempt to substitute him for "John Doe". Since notice within the applicable limitations period is considered the "linchpin" of the relation back doctrine, McFee's lack of notice is fatal to plaintiff's instant motion (*see, Bruran v Coupal*, 87 NY2d 173, 180 [1995]). Additionally, plaintiff failed to set forth any efforts he made to identify McFee prior to the expiration of the one year statute of limitations period applicable to assault/battery torts (*see, Hall v Rao*, 26 AD3d 694, 695 [3<sup>rd</sup> Dept. 2006]). Based upon all of the foregoing, the Court must deny plaintiff's request for leave to amend in this matter.

Based upon the foregoing, it is hereby

**ORDERED** that plaintiff's motion is denied in its entirety.

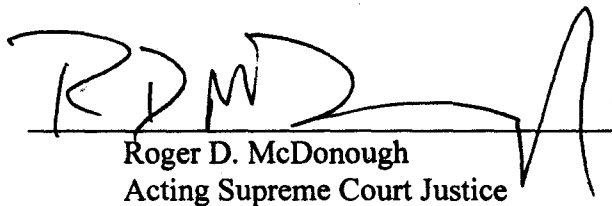
This shall constitute the Decision and Order of the Court. The original decision and order is being returned to counsel for the defendants who is directed to enter this Decision and Order without notice and to serve plaintiff's counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order and the papers considered to the County Clerk. The signing of the decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

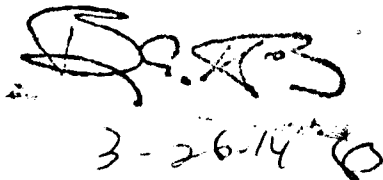
**ENTER.**

Dated: Albany, New York  
March 19, 2014

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Roger D. McDonough  
Acting Supreme Court Justice

  
3-26-14

Papers Considered:

- 1) Plaintiff's Notice of Motion for Leave to Amend Complaint, dated November 19, 2013;
- 2) Affirmation of Jessica M. Gorman, Esq., dated November 19, 2013, with annexed exhibit;
- 3) Affirmation of Timothy C. Hannigan, Esq., dated December 4, 2013;
- 4) Affirmation of Jessica M. Gorman, Esq., dated December 11, 2013.