

Cioffi v SM Foods, Inc.

2016 NY Slip Op 33069(U)

June 8, 2016

Supreme Court, 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
RUSSELL McCALL'S INC. d/b/a/ ATLANTA FOODS
INTERNATIONAL,

Second Third-Party Plaintiff,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Second Third-Party Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

**Index No. 55391/2011
Return Date: May 27, 2016
Seq. No. 51**

The following papers were read on this cross motion (sequence number 5) by plaintiffs for an order vacating the note of issue and permitting discovery to be conducted of the various parties in this case relating to the second third-party claims and defenses asserted in the recently filed second third-party action.

Notice of Cross Motion dated May 25, 2016; Affirmation in Support
Affirmation in Opposition; Exhibits
Letter dated May 31, 2016 by counsel for the Third-Party and Second Third-Party
Defendants

Upon the foregoing papers this cross motion (sequence number 51) is determined as follows:

As a preliminary matter this court notes that on September 21, 2015 a note of issue was filed in this matter. On April 12, 2016 Russell McCall's Inc. d/b/a Atlanta Foods International (hereinafter to be referred to as McCall's) filed a second third-party complaint against the Village of Tuckahoe and Vincent Pinto (who were already third-party defendants in this action and will hereinafter be referred to jointly as the "Village"). On April 22, 2016 the Village moved before this court's IAS Part (Hon. Mary H. Smith, J.S.C.) for an order dismissing the second third-party complaint. In their response to the dismissal motion, plaintiffs stated that the filing of the second third-party action following certification of this case created new special circumstances requiring additional discovery in this case. Plaintiffs requested discovery on an expedited basis. Plaintiffs then cross-moved (by the present motion sequence number 51) for an order vacating the note of issue to permit further discovery. Determination of motion sequence number 50 is pending before the IAS part. The present cross motion was referred to the compliance part for determination.

Parties' Contentions:

Plaintiffs assert that McCall's has asserted claims against the Village that are undefined, not well articulated and will require further discovery. Plaintiffs note that they have prepared demands for bills of particulars, to McCall's and the Village as well as notices for discovery and inspection. They assert that additional party depositions may be required. Plaintiffs assert that all necessary discovery should be able to be completed in 60 to 90 days. Plaintiffs assert that all claims in this case should be handled together, without severance since the main action and the third-party actions have common questions of law and fact.

McCall's opposes this cross motion on the ground that it is untimely pursuant to CPLR 2214. McCall's further asserts that the motion should be denied on substantive grounds. It asserts that its claims in the second third-party complaint have no bearing or relevance regarding plaintiffs' claims against defendants and notes that plaintiffs are precluded from bringing any claims against the Village pursuant to the Workers' Compensation Law. McCall's asserts that the claims set forth in the second third-party complaint do not require additional discovery and it does not foresee any reason to conduct further depositions of the Village which has been deposed

already, twice. McCall's notes that this is the second time plaintiffs have moved for an order vacating the note of issue. Their first motion was denied by this court by decision and order dated December 2, 2015.

Analysis:

CPLR 2214 provides in relevant part that a notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits and any notice of cross motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least 16 days before such time so demands. In this matter, the motion was served on April 22, 2016 and the return date therein was set as May 27, 2016. The motion also provided that opposing papers be served within seven days of the return date. Accordingly, pursuant to the rule governing the time for service of motion and cross motion papers, plaintiffs' cross motion served on May 25, 2016 was untimely.

The cross motion should also be denied on the basis of plaintiffs' failure to properly raise this issue at a pre-motion conference. The cross motion seeking an order vacating the note of issue on the grounds that further discovery is needed in light of the service of a second third-party complaint in this matter is a discovery motion. The Westchester Supreme Court Differentiated Case Management Protocol, Part Rules, specifically provides that no discovery or discovery compliance motion may be interposed until a pre-motion conference has been requested and held in the compliance part. The protocol specifically provides that the parties are expected to attend such conferences and are expected to attempt in good faith to resolve all discovery disputes. Although the Westchester Supreme Court Differentiated Case Management Protocol, Part Rules, further states that nothing stated therein prevents or limits counsel from making any motion deemed appropriate to best represent a party's interest in order to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences are held to permit the court an opportunity to resolve issues before motion practice ensues. When motion practice is deemed necessary, a Briefing Schedule is established by the court-attorney-referee. The court notes that nothing in this record suggests that the issue of vacating the note of issue in light of the service of a second third-party complaint in this matter was addressed at any pre-motion conference.

Lastly, the motion should be denied on substantive grounds. The note of issue states that discovery proceedings now known to be necessary were completed. "The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (*Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by the Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings" (see *Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956 [2d Dept 2015]). Section 202.21 (e) provides that if more than 20 days

has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

Based on the foregoing, this court finds that plaintiffs have failed to show good cause warranting an order vacating the note of issue. The court notes that plaintiffs previously moved for an order vacating the note of issue. That motion was denied by decision and order dated December 2, 2015. Although the instant cross motion to vacate arises from the recent service of a second third-party complaint, McCall's has stated that it does not require any additional discovery from any of the parties with respect to the claims asserted in the second third-party complaint. The court notes that the claims in the second third-party complaint arise from the same facts set forth in the original complaint served almost five years ago against, among other parties, McCall's. Moreover, the second third-party defendants were brought into this action several years ago as named third-party defendants and have participated in discovery.

All other arguments raised and evidence submitted by the parties to this cross motion have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that the cross motion is denied in its entirety; and it is further,

ORDERED that the parties are directed to appear in the Settlement Conference Part on July 12, 2016 at 9:15 a.m.; and it is further,

ORDERED that plaintiffs are directed to serve all parties in this matter with a copy of this order with notice of entry within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 8, 2016



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

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