SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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A.M., infant by her f/n/g VINCENT MAZZOTA,

and VINCENT MAZZOTA individually

Plaintiffs,

-against-

MME LLC, COCA-COLA REFRESHMENTS USA, INC. and AP MARKETING GROUP, LLC,

Defendants.
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DECISION AND ORDER

Index Number

159950/2017

MME LLC,

Third-party Plaintiff,

-against-

AP MARKETING GROUP, LLC

Third-party Defendant.
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FRANK P. NERVO, J.S.C.

Defendant AP Marketing Group ("AP Marketing") seeks to dismiss plaintiff's claims against it on the basis of improper service, pursuant to CPLR § 3211(a)(8), and as time barred, pursuant to CPLR § 3211(a)(5). Plaintiff opposes that portion of the motion seeking to dismiss the claim as time barred.

The Court first addresses that portion of the motion raising jurisdictional claims, as it must. CPLR § 3211(a)(8) provides a party may move to dismiss the claims against it for want of jurisdiction. The party seeking to assert personal jurisdiction bears the burden of establishing that jurisdiction was properly obtained (*see College v. Brady*, 84

AD3d 1322 [2d Dept 2011]). A plaintiff opposing a motion to dismiss pursuant to CPLR § 3211(a)(8) on the ground that discovery is required on the issue of personal jurisdiction, need only provide "a sufficient start" to show jurisdiction has been obtained and that plaintiff's position is not frivolous, not a prima facie showing of jurisdiction (*Peterson v. Spartan Indus.*, 33 NY2d 463, 467 [1974]; *American BankNote Corp. v. Daniele*, 45 AD3d 338 [1st Dept 2007]; *see also Shore Pharm. Providers Inc. v. Oakwood Care Ctr. Inc.*, 65 AD3d 623 [2d Dept 2009]).

New York Limited Liability Code § 304 (LLCL § 304) requires service of process against a foreign limited liability company (LLC) be upon the New York Secretary of State and also either personally delivered outside of New York to the foreign LLC or sent by registered mail with return receipt. Once complete, an affidavit of service must be filed with the Clerk of the Court within 30 days after return receipt is received. (*id.*; *Global Liberty Ins. Co. v. Surgery Center of Oradell*, LLC, 153 AD3d 606 [2d Dept 2017]) The Appellate Divisions have found strict compliance with LLCL § 304 is required (*Chan v. Onyx Capital, LLC*, 156 AD3d 1361 [4th Dept 2017] *lv. to app. denied* 31 NY3d 903 [2018]; *Global Liberty Ins. Co. v. Surgery Center of Oradell*, LLC, 153 AD3d at 607).

As an initial matter, an in-person conference on this motion was scheduled for April 3, 2020 (NSYCEF Doc. No. 77). Due to COVID-19's impact on in-person conferences and the resulting restricted Court operations, the conference was not held. The Court issued a notice on April 16, 2020 directing the parties to seek a virtual

conference; the parties did not schedule a virtual conference. A conference is not required for the Court to issue the instant Decision and Order.

Here, AP Marketing contends it is a foreign limited liability corporation subject to the service requirements of LLCL § 304. It further contends plaintiff's affidavit of service avers that service was completed in compliance with the Business Corporation Law § 306 and CPLR § 3215(g)(4)(i)[1], not the Limited Liability Code. As the party seeking to assert jurisdiction over defendant AP Marketing Group, plaintiff bears the burden of establishing proper service and subjecting AP Marketing Group to this Court's personal jurisdiction. Plaintiffs have not addressed jurisdiction. Silence as to jurisdiction does not provide "a sufficient start" to show jurisdiction has been obtained and that plaintiff's position is not frivolous. Furthermore, plaintiff's own affidavit of service evinces that service did not comply with LLCL § 306. Consequently, a Traverse or other hearing related to service and jurisdiction is not required, nor is further discovery on the issue. Strict compliance with the LLCL is essential (*supra*), and plaintiff's have not complied with its requirements. Consequently, the Court does not have jurisdiction over AP Marketing, and the action must be dismissed against it.

In light of the dismissal as to AP Marketing for want of personal jurisdiction, AP Marketing's cross-motion seeking dismissal of Vincent Mazzota's derivative claim as time barred is moot.

[1] CPLR § 3215(g)(4)(i) provides for service on defaults, an issue not relevant in this matter.

As an alternative holding, were this Court to reach the merits of this claim, the Court finds Vincent Mazzota's derivative claim as time barred and the relation back doctrine inapplicable.

An action for loss of services of a minor child is to be construed as a personal injury action (*Constantinides v. Manhattan Transit Co.*, 264 AD 147 [1st Dept 1942]). Therefore, such an action must be brought within three years of the alleged accident (*id.*; CPLR § 214(5); *see also* P*itrelli v. Cohen*, 257 AD 845 [2d Dept 1939]). The tolling of statute of limitations for infants, extending their time to bring an action until after reaching the age of majority, does not extend to the derivative claims (*Quinones v. NYRAC*, 277 A.D.2d 110, 111 [1st Dept 2000]).

Here, plaintiff-daughter's accident allegedly occurred on May 22, 2015, thus plaintiff-father must have brought his derivative action within three years. Plaintiffs filed their amended complaint on December 6, 2019, outside the statute of limitations period. Plaintiff-father concedes that his loss of services claim would be time barred, but for the relation back doctrine (Affirmation in Opposition at ¶ 8). Defendants agree; however, the parties disagree as to whether the relation back doctrine applies. Therefore, the Court must determine whether the doctrine is applicable, and plaintiff-father's claim for loss of services can only survive if the relation back doctrine is applicable.

The relation back doctrine, codified in CPLR § 203, "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted

against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (*Buran v. Coupal*, 87 NY2d 173 [1995]). The doctrine's purpose is to allow a plaintiff to add either a new claim or a new party after the applicable Statue of Limitations has run (*id*. at 178). Where a plaintiff seeks to add a new party, and relate back to the earlier pleading, three factors must be met: (1) both claims must arise from the same conduct, or transaction, or occurrence; (2) there must be unity of interest between the new party and the original defendant; and (3) the new party knew or should have known that the action would have been brought against it but for plaintiff's excusable mistake as to the identity of the parties (*Mondello v. New York Blood Ctr.*, 80 NY2d 219 [1992]; *see also Buran v. Coupal*, 87 NY2d at 178). Interests are united generally "only where one party is vicariously liable for the acts of the other" (*Teer v. Queens-Long Island Medical Group, P.C.*, 303 AD2d 488 [2d Dept 2003] citing *Mondello v. New York Blood Ctr.*, 80 NY2d 219 [1992]), that is to say the two parties "stand or fall together and that judgment against one will similarly affect the other" (*Prudential Ins. Co. v. Stone*, 270 NY 154 [1936]).

Here, all three factors are not met. It cannot be said that AP Marketing and MME are united in interest. They are distinct entities who, by nature of a contractual agreement, contributed different services in providing the inflatable climbing "Coca Cola Bottle" that plaintiff-daughter was allegedly injured upon (*see e.g. Mondello v. New York Blood Ctr.*, 80 NY2d 219 [blood center and hospital not united in interest]). Likewise, the evidence adduced through discovery does not establish that AP Marketing knew or should have known plaintiff intended to sue it in addition to the other defendants (*see e.g*. NYSCEF Doc. 36 – Edward Becker Deposition). Although the

claims plaintiff-father seeks to add against AP Marketing are the same as those asserted against the other defendants, all three factors must be met to apply the relation back doctrine. Consequently, plaintiffs have failed to meet their burden establishing an entitlement to assert plaintiff-father's derivative claim against AP Marketing outside of the statute of limitation under the relation back doctrine.

Accordingly, it is

ORDERED that AP Marketing's motion is granted; and it is further

ORDERED that the action is dismissed as against AP Marketing for want of proper personal jurisdiction; and it is further

ORDERED that AP Marketing's motion seeking dismissal of Vincent Mazzota's derivative claim as time barred is moot; and it is further

ORDERED that as an alternative holding, notwithstanding mootness, Vincent Mazzota's derivative claim is time barred.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May 29, 2020

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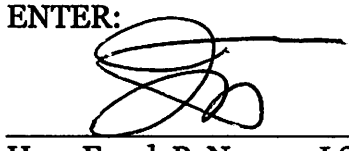

Hon. Frank P. Nervo, J.S.C.