

Murray-Goode v Mohr-Mac of Shirley, Inc.
2020 NY Slip Op 35142(U)
October 23, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 605537/18
Judge: Vincent J. Martorana
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SHORT FORM ORDER

INDEX NO: 605537/18

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

LEANNE MURRAY-GOODE and
TYRONE GOODE,

Plaintiffs,

- against-

MOHR-MAC OF SHIRLEY, INC. and
MCDONALD'S USA, LLC.

Defendants.

ORIG. RETURN DATE: 3/5/20; 5/28/20

ADJOURNED DATE: 8/20/20

MOTION SEQ. NO.: 003 - MD
004 - MGPLTF'S/PET'S ATTY:

PURCELL & INGRAO, P.C.

204 Willis Avenue
Mineola, NY 11501DEFT'S/RESP'S ATTY:

LAWRENCE, WORDEN, RAINIS & BARD, P.C.

225 Broad Hollow Road, Suite 105E
Melville, NY 11747

Upon the following papers read on this motion for summary judgment; and this cross motion to amend pleadings; Notice of Motion and supporting papers by defendant dated February 4, 2020 ; Notice of Cross-Motion and supporting papers by plaintiff dated May 21, 2020 ; Affirmation/affidavit in opposition and supporting papers by plaintiff dated May 21, 2020; by defendant dated July 23, 2020 ; Affirmation/affidavit in reply and supporting papers by defendant dated July 23, 2020, by plaintiff dated August 14, 2020 ; Other ; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that Defendant McDonald's USA LLC's summary judgment motion is denied as premature, the portion of Plaintiffs' cross-motion seeking leave to renew its opposition to non-party (former Defendant) McDonald's Corporation's summary judgment motion is denied and the portion of Plaintiffs' motion seeking leave to amend its complaint to add a party is granted.

Plaintiff Leanne Murray-Goode seeks to recover damages for mental and emotional trauma and economic losses allegedly sustained as a result of consuming a Southwest Chicken Salad that contained parts of a mouse, vole or other similar animal. Her husband, Tyrone Goode, asserts a derivative claim. Defendants are the restaurant franchisee, Mohr-Mac of Shirley, Inc. ("Mohr-Mac"), and the franchisor, McDonald's USA, LLC (McDonald's USA"). Plaintiffs had previously sued McDonald's Corporation. McDonald's Corporation moved for summary judgment which was granted by order dated March 25, 2019, on the basis that McDonald's Corporation was not a party to the franchise agreement and there was no basis to assert that it would have control over the restaurant's daily operations such that vicarious liability could be imputed. Additionally, no basis was presented for the assertion that McDonald's Corporation was the supplier of the contaminated ingredients. Plaintiff cross-moved to amend its complaint to add McDonald's USA, LLC as a party and that motion was granted. Issue has been joined. McDonald's USA, LLC now seeks summary judgment on the basis that it did not own, operate or control the daily operations of the restaurant which sold the salad and that it did not manufacture, process, prepare, supply or sell the Southwest Chicken Salad. Plaintiff cross-moves seeking leave to amend its complaint to add the alleged supplier

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of the lettuce, The Martin-Brower Company LLC, as a party to the action and further seeking leave to renew its opposition to McDonald's Corporation's summary judgment motion which was granted on March 25, 2019.

In support of its motion, Defendant McDonald's USA, LLC, provides an affidavit of William Mohrmann, the Chief Executive Officer of Mohr-Mac of Shirley, Inc. Mr. Mohrmann attests that McDonald's USA, LLC did not own, operate, or maintain the restaurant or control the day to day activities there, that it did not hire or employ any of the workers at the restaurant and that it did not sell, produce or provide the Southwest Salad at issue or any of the ingredients contained in the salad. As such, it is asserted that Defendant McDonald's USA did not exercise sufficient control over the daily operations of the franchisee to give rise to a legal duty to Plaintiffs. No affidavit of anyone with personal knowledge of McDonald's operations was offered.

Plaintiffs' arguments in opposition to McDonald's USA's motion are somewhat intertwined with their allegations against non-party McDonald's Corporation in support of their motion to renew. Plaintiffs counter that the shipping invoices for the lettuce indicate that the lettuce was addressed to and delivered by The Martin-Brower Company LLC to "McDonald's" at the Mohr-Mac address which blurs the lines between the entities. It is undisputed that the restaurant operated by Mohr-Mac was a franchise and operated under the name "McDonald's." Plaintiff also argues that a notation in a 2015 Suffolk County Department of Health Report indicates that an unnamed person reported that the source of the 2015 lettuce was McDonald's Corporation and that McDonald's Corporation previously issued a press release when contaminated lettuce was found to have been used in Midwestern U.S. restaurants. Neither of these allegations are sufficient to impute liability as against non-party McDonald's Corporation. Plaintiff also avers that there is an internal lease agreement between McDonald's USA and McDonald's Corporation. The Court could not locate this in the record. However, if this refers to ownership of a building and lease of premises, it is difficult to see how this would impute vicarious or direct liability as against non-party McDonald's Corporation for a contaminated salad. Plaintiff also asserts that the 2018 Form 10-K filed with the Securities and Exchange Commission states that McDonald's Corporation franchises and operates McDonald's restaurants in the global restaurant industry. It is unclear why this would nullify or cast doubt on the validity of the franchise agreement between Defendant McDonald's USA and Defendant Mohr-Mac. As Plaintiff also asserts that Defendant's motion is premature because Defendants' depositions and discovery responses are outstanding, the Court declines to opine on the strength of Plaintiff's arguments as against McDonald's USA at this juncture.

Plaintiff argues that the lettuce supplied by The Martin-Brower Company LLC likely contained the animal parts upon delivery and Plaintiff seeks to add them as a party on this basis. Plaintiff alternately argues that the lettuce may have been contaminated at the restaurant. Some of the issues Plaintiff wishes to explore in discovery include: what franchisee training entails; how growers, suppliers and distributors are selected and how and when franchisee restaurants are inspected, if at all. Plaintiff seeks to establish liability based upon agency theory, vicarious liability and direct negligence in failing to properly and carefully select and inspect its suppliers and its franchisee Mohr-Mac and because McDonald's USA and McDonald's Corporation allegedly controlled the food products sold at the franchisee restaurants and was involved in setting food handling standards along with manufacturing or distribution of contaminated lettuce. The franchise agreement between Mohr-Mac and McDonald's USA provides that franchisee and managers shall attend Hamburger University, the international training center for the McDonald's system (para. 6). The agreement also states that franchisee acknowledges the importance of "uniformity of food specifications, preparation methods, quality and appearance" and provides that "McDonald's shall have the right to inspect the Restaurant at all reasonable times to ensure that Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System" (para. 12). The

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agreement also states at paragraph 16 that the Franchisee shall have no authority, express or implied, to act as an agent of McDonald's or any of its affiliates and that Franchisee is an independent contractor responsible for all claims of illness or injury resulting from the operation of the restaurant.

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Stonehill Capital Mgmt., LLC v. Bank of the West.*, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016])(quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). Additionally, summary judgment may be denied under circumstances where discovery is incomplete, pursuant to CPLR §3212(f), if the discovery sought is not predicated upon speculative hope that evidence supporting a theory may be uncovered (*Greenberg v McLaughlin*, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]; *Zarzona v. City of New York*, 208 AD2d 920, 920, 617 NYS2d 534, 535 2d Dept 1994]; *Price v. Cty. of Suffolk*, 303 AD2d 571, 572, 756 NYS2d 758, 759 [2d Dept 2003]).

Here, Plaintiffs have not had the opportunity to obtain any information relevant to the prosecution of their claims. Plaintiff has the right to discovery on these and other related issues prior to the Court's determination of whether or not summary judgment is appropriate (CPLR §3212(f); *Valdivia v. Consol. Resistance Co. of Am.*, 54 AD3d 753, 755, 863 NYS2d 720 [2d Dept 2008]; *Harvey v. Nealis*, 61 AD3d 935, 936, 877 NYS2d 459, 460 [2d Dept. 2009]; *Churaman v. C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485, 486–87, 35 NYS3d 716, 718 [2d Dept. 2016]; *Magee v. Cty. of Suffolk*, 14 AD3d 664, 664–65, 789 NYS2d 289 [2d Dept 2005]; *Gruenfeld v. City of New Rochelle*, 72 AD3d 1025, 1026, 900 NYS2d 144 [2d Dept. 2010]). As such, Defendant McDonald's USA's motion is denied as premature with leave to renew upon substantial completion of discovery.

Plaintiff cross-moves seeking renewal of its opposition to McDonald's Corporation's summary judgment motion and further seeks leave to amend its complaint to add a The Martin-Brower Company LLC as a party.

A motion for leave to renew must be based on new or additional facts “not offered on the prior motion that would change the prior determination,” and “shall contain a reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [2], [3]; see *Yebo v Cuadra*, 98 AD3d 504, 949 NYS2d 451 [2d Dept], *lv dismissed* 20 NY3d 905, 956 NYS2d 477 [2012], *rearg denied* 21 NY3d 979, 970 NYS2d 747 [2013]; *Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 934 NYS2d 467 [2d Dept 2011]; *Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565, 892 NYS2d 194 [2d Dept 2010]). Renewal must be denied when the moving party fails to present a reasonable justification for not submitting the additional evidence on the previous motion (see *Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 989 NYS2d 302 [2d Dept 2014]; *Aha Sales, Inc. v Creative Bath Prods., Inc.*,

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110 AD3d 1020, 973 NYS2d 793 [2d Dept 2013]; *Yebo v Cuadra*, 98 AD3d 504, 949 NYS2d 451; *Eskenazi v Mackoul*, 92 AD3d 828, 939 NYS2d 484 [2d Dept 2012]), as it is “not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” or who failed to assert a legal theory due to a mistaken belief that what was submitted was sufficient (*Matter of Beiny*, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; see *Jovanovic v Jovanovic*, 96 AD3d 1019, 947 NYS2d 554 [2d Dept 2012]; *Zito v Jastremski*, 84 AD3d 1069, 925 NYS2d 91 [2d Dept], *lv dismissed in part, denied in part*, 17 NY2d 885, 933 NYS2d 641 [2011]; *Hlenski v City of New York*, 51 AD3d 974, 858 NYS2d 789 [2d Dept 2008]). Plaintiff has failed to present a reasonable justification for not submitting the new evidence at the time of the original motion and has failed to submit evidence that would change the prior determination. As such, the portion of Plaintiff's cross-motion which seeks leave to renew is denied.

Leave to amend pleadings should be freely given absent surprise or prejudice (CPLR §3025[b]; *McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]; *Rosicki, Rosicki & Assocs., P.C. v Cochems*, 59 AD3d 512, 514, 873 NYS2d 184 [2d Dept. 2009]). A court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (*Rosicki, supra*; *Bank of Smithtown v. 219 Sagg Main, LLC*, 107 AD3d 654, 655, 968 NYS2d 95, 97 [2d Dept. 2013]). Here, Plaintiff has stated sufficient basis for amendment of the pleadings to add The Martin-Brower Company LLC as a party. There is no indication that such amendment would cause undue surprise, prejudice or delay. The issue of statute of limitations has been raised with respect to the claims against the new party. Plaintiff argues that, although more than three years have passed since Plaintiff's cause of action accrued, Plaintiff's cause of action is timely due to the relation-back doctrine. The Court need not explore this. Plaintiff's cause of action accrued on March 9, 2017. Executive Order 202.8 issued by Governor Andrew Cuomo on March 7, 2020 tolled statutes of limitations due to the Covid-19 health emergency. Successive Executive Orders extended the tolling. Most recently, Executive Order 202.67 issued by Governor Cuomo on September 18, 2020 extended such tolling to November 3, 2020. As such, Plaintiff's Proposed Second Amended Complaint, which shall be deemed filed as of the date of entry of the within order, is timely filed.

Although Plaintiff's Second Amended Complaint is deemed timely filed, Plaintiff is nonetheless directed to re-file it for administrative clarity so that the Second Amended Complaint appears as a separate docket entry. Such filing shall be completed within twenty (20) days of the date of entry of the within order. Plaintiff shall also serve a copy of the within order with CPLR§8019(c) notice upon the Suffolk County Clerk within twenty (20) days of the date of entry of the within order. A compliance conference has been scheduled for November 19, 2020. The parties are directed to request a compliance conference stipulation from chambers in advance of the conference, enter into a discovery schedule and efile the fully executed stipulation with request to "so order" on or before November 19, 2020.

Upon receipt of a copy of the within order with CPLR§8019(c) notice, the Suffolk County Clerk is hereby directed to amend the caption of the within action as follows:

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LEANNE MURRAY-GOODE and
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Plaintiffs,

- against -

MOHR-MAC OF SHIRLEY, INC.,
MCDONALD'S USA, LLC. and
THE MARTIN-BROWER COMPANY LLC,

Defendants.

Based upon the foregoing, Defendant McDonald's USA LLC's summary judgment motion is denied as premature with leave to renew upon the substantial completion of discovery, the portion of Plaintiffs' cross-motion seeking leave to renew its opposition to non-party (former Defendant) McDonald's Corporation's summary judgment motion is denied and the portion of Plaintiffs' motion seeking leave to amend its complaint to add The Martin-Brower Company LLC as a party is granted.

Dated: Riverhead, New York

October 23, 2020



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION