

Murray-Goode v Mohr-Mac of Shirley, Inc.

2025 NY Slip Op 35356(U)

February 4, 2025

Supreme Court, Suffolk County

Docket Number: Index No. 605537/2018

Judge: James F. Quinn

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INDEX No. 605537/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES F. QUINN
Acting Justice of the Supreme Court

MOT. DATE 03/06/2024 (#006);
06/10/2024 (#007)
ADJ. DATE 10/01/2024

Mot. Seq. #006-MG; #007-MD

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LEANNE MURRAY-GOODE and TYRONE
GOODE

Plaintiffs,

- against -

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

Defendants.

DECISION AND ORDER

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Upon the E-File document list numbered 127-151, 205-232, 236-241 and 244-254 and read on motion by Defendant McDonald's USA, LLC ("McDonald's") for an order pursuant to CPLR §3212 granting Defendant McDonald's summary judgment and dismissal of the complaint and by Plaintiffs for an order pursuant to CPLR §3212 granting Plaintiffs summary judgment on liability and pursuant to CPLR §3025(b) seeking leave to file a third amended complaint; it is hereby

ORDERED, the application by Defendant McDonald's USA, LLC for an order pursuant to CPLR §3212, granting Defendants summary judgment and dismissal of the complaint is **granted**; and it is further

ORDERED, the application by Plaintiffs for an order pursuant to CPLR §3212 granting Plaintiffs summary judgment on liability is **denied**; and it is further

ORDERED, the application by Plaintiffs pursuant to CPLR §3025(b) seeking leave to file a third amended complaint is **denied**.

This action seeks damages for personal injuries allegedly sustained by Plaintiff Leanne Murray-Goode (“Murray-Goode”) on March 9, 2017 at approximately 7:34pm when she bit into a rodent in the Southwest Chicken Salad she was eating that was purchased by Plaintiff Tyrone Goode (“Goode”) at the McDonald’s located at 971 Montauk Highway, Shirley, New York of which the Defendant Mohr-Mac of Shirely, Inc. was the owner-operator/franchisee. This action was commenced by the filing of a summons and complaint on March 23, 2018, a supplemental summons and amended complaint on April 17, 2019 and a second supplemental summons and second amended complaint on October 29, 2020. Issue was joined lastly on November 30, 2020 by the filing of an answer by Defendants Mohr-Mac of Shirley, Inc. and McDonald’s USA, LLC and by the filing of an answer and cross-claims by Defendant The Martin-Brower Company LLC (“Martin-Brower”) on January 4, 2021. The cross-claims were discontinued by stipulation dated January 22, 2021.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to so summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR §3212(b); *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*Alvarez*, *supra*, 68 NY2d at 324-325, 508 NYS2d 923). Courts have the authority to search the record on a motion for summary judgment and make determination in accordance with the admissible evidence presented (see *Marciano v Ran Oil Co. East, LLC*, 63 AD3d 1118, 882 NYS2d 452 [2d Dept 2009]; *Amore Partners, Inc. v Mephisto, Inc.*, 222 AD2d 473, 635 NYS2d 57 [2d Dept 1995]).

The court notes a Protective Order, dated November 3, 2021, was issued by the Court (Condon, J.) in this action and by this Court in an additional Order dated April 16, 2024. Defendant McDonald’s argues, *inter alia*, that since the relationship between McDonald’s and Mohr-Mac is that of franchisor-franchisee McDonald’s cannot be held vicariously liable. Further, McDonald’s argues that they do not exercise or maintain control over the daily operations of the franchisee. In support of their argument McDonald’s submits, *inter alia*, the franchise agreement between it and Mohr-Mac, deposition transcripts and an affidavit of William Mohrmann, the Chief Executive Officer of Mohr-Mac of Shirley, Inc..

It is well-established that the mere existence of a franchise agreement “is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee” (*Martinez v. Higher Powered Pizza, Inc.*, 43 AD3d 670, 841 NYS2d 526 [1st Dept. 2007]); *see also Khanimov v. McDonald’s Corp.*, 121 AD3d 1050, 995 NYS2d 202 [2d Dept. 2014]; *Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 AD3d 809, 862 NYS2d 513 [2d Dept. 2008]) (“absent proof of a principal/agency relationship or proof that the franchisor exercised a high degree of control over its franchisee, there is no basis for holding a franchisor responsible for its franchisee’s misconduct); *Andreula v. Steinway Baraqafod Corp.*, 243 AD2d 596, 668 NYS2d 891 [2d Dept. 1997]).

Defendant McDonald's established their prima facie entitlement to summary judgment dismissing the complaint against them. McDonald's demonstrated, prima facie, that they lacked the requisite control over the subject location franchisee (*see, Caceres v Toyota Motor N. Am., Inc.*, 216 AD3d 732, 190 NYS3d 85 [2d Dept 2023]). Although the affidavit of William Mohrman in support of their motion was notarized outside of New York State and not accompanied by a certificate of conformity as required by CPLR §2309(c), this is not a fatal defect (*Caceres v Toyota Motor N. Am., Inc., supra*).

In opposition, Plaintiff failed to raise a triable issue of fact (*see Athenas v Simon Prop. Group, LP*, 185 AD3d 884, 128 NYS3d 284; *Byrd v Walmart*, 128 AD3d 629, 8 NYS3d 428; *Alami v 215 E. 68th St., L.P.*, 88 AD3d 924, 931 NYS2d 647; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, Defendant McDonald's USA, LLC's application for summary judgment is granted.

In support of its application for summary judgment Plaintiffs submit, *inter alia*, deposition transcripts and affidavits of the Plaintiffs. A review of same demonstrates that there are issues of fact as to how, where, when, at what point in the process and under whose control, Mohr-Mac's, Martin-Brower's or Plaintiff's, the alleged rodent got into Murray-Goode's salad. Accordingly, Plaintiffs application for summary judgment is denied.

In view of the foregoing, it is unnecessary to consider whether the papers submitted by Defendants Mohr-Mac and Martin-Brower in opposition to the motion were sufficient to raise a triable issue of fact (*see Blau v Benodin*, 190 AD3d 922, 140 NYS3d 576 [2d Dept 2021]; *Giangrasso v Callahan*, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]).

Accordingly, Plaintiffs' application for summary judgment is denied.

Lastly, Plaintiff seeks leave to file a Third Amended Complaint adding a claim for punitive damages. "[P]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives" (*Gravitt v Newman*, 114 AD2d 1000, 1002 [1985]; *see Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307 [1998]; *Spinosa v Weinstein*, 168 AD2d 32, 42-43 [1991])" (*Thomas v Farrago*, 154 AD3d 896, 62 NYS3d 478 [2d Dept 2017]). Here, the Plaintiffs' allegations sound in mere negligence and do not rise to the level of moral culpability necessary to support a claim for punitive damages (*Thomas v Farrago, supra*); *see also Woehrle v Buono*, 232 AD3d 820, 221 NYS3d 215).

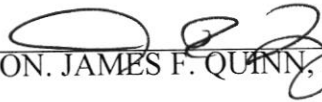
Accordingly, Plaintiffs' application for leave to file a third supplemental summons and third amended complaint is denied.

Accordingly, it is hereby

ORDERED, Plaintiffs' complaint as against Defendant McDonald's USA, LLC is dismissed.

The foregoing constitutes the *Decision and Order* of this Court.

Dated: February 4, 2025
Riverhead, New York


HON. JAMES F. QUINN, A.J.S.C.

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION