

Celts Celebrate v Meadowgreens Rest., Inc.
2012 NY Slip Op 30355(U)
January 19, 2012
Supreme Court, Columbia County
Docket Number: 3543-07
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF COLUMBIA

CELTS CELEBRATE, ANNE MACPHERSON,
and JOHN MACPHERSON,

Plaintiffs,

-against-

MEADOWGREENS RESTAURANT, INC.,
and CARMEN NERO INDIVIDUALLY.,

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ1: 10-09-0201 Index No. 3543-07

Appearances: Benedict Bradford McCaffree, Esq., Ph.D.
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(Peter L. Burgess, Esq., of counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

On September 20, 2006 and October 17, 2006 the plaintiffs and defendants allegedly entered into contracts under which the plaintiffs would hold a Celtic-theme festival in the Spring of 2007 at defendants' restaurant and golf course, located on Route 9H, Town of Ghent, Columbia County. The festival was held on May 5-6, 2007. The conditions at the festival site, and the performance of the agreements by the defendants, were not to plaintiffs' satisfaction. In addition, the defendant Carmen Nero allegedly had plaintiff John

MacPherson arrested for issuing a bad check. On December 27, 2007 the plaintiffs commenced the instant action for money damages alleging causes of action for breach of contract, fraud, malicious prosecution, abuse of process, tortious interference with contractual relations, tortious interference with prospective contractual relations and negligence. Defendants' answer includes three counterclaims for amounts allegedly due and owing to them from the plaintiffs.

Plaintiffs have made a motion for leave to add a limited liability company, CN Production Management Enterprises, LLC ("CN Production Management") as a defendant. Plaintiffs indicate that defendant Carmen Nero is a principal of CN Production Management. They indicate that Meadowgreens, Inc. owned and operated the Meadowgreens restaurant, including the real property on which it was located, at the time they entered into their agreements with the defendants. They indicate that Meadowgreens, Inc. transferred ownership of the real property to CN Production Management during the pendency of their agreements (specifically, on November 3, 2006) for the sum of one million four hundred thirty thousand dollars; and that Meadowgreens, Inc. dissolved shortly thereafter (in August 2007). They maintain that CN Production Management, as successor-owner of the restaurant property, should be held liable for their damages.

As an explanation as to why they did not move earlier to join CN Production Management as a defendant, the plaintiffs maintain that the defendants actively concealed all of the foregoing facts from them. Plaintiffs' counsel indicates that the very first notice which the plaintiffs received with regard to the transfer of ownership of the restaurant property was when they learned in September 2011 that the Town of Ghent issued a cease

and desist order to CN Production Management to stop unlawful vehicle races at the Meadowgreens premises. In further support of plaintiffs' claim of concealment, counsel indicates:

“Mr. Nero frequently has concealed the existence of [CN Production Management] in publications simply by declaring [that] he is the owner. Today I reviewed forty-seven active websites that list Carmen Nero as owner of the Business. For example, GolfNow.com states: ‘The course rating is 80.0 with a slope rating of 108. The course contact is Carmen J. Nero, Owner.’ A recent article in the Hudson Register Star opens: ‘Carmen Nero, owner and operator of Meadowgreens Resort in Ghent, isn’t happy about losing TMT Metalfest 2010.’ The May 5th, 2010 article is attached hereto as Attachment D.”

According to public records furnished by both plaintiffs and defendants, Meadowgreens, Inc. was incorporated on February 17, 1995, and dissolved on August 24, 2007. Meadowgreens Restaurant, Inc. was incorporated on July 20, 2006. CN Production Management was formed on May 10, 2006.

Contrary to the claims of the plaintiffs, there is no evidence in admissible form to demonstrate that the defendants actively concealed either the existence of CN Production Management or the transfer of the Meadowgreens property. Notably, almost all of the information upon which the plaintiffs currently rely has been a matter of public record since 2006. As demonstrated by the plaintiffs themselves, much of the information has been freely available on the internet. Plaintiffs make reference to various documents or publications where Carmen Nero was referred to by the writer as the “owner” of the Meadowgreens restaurant, to support their contention that he actively concealed the true owner of the premises. In the Court’s view, any such published information with regard to the ownership of the Meadowgreens restaurant property, as obtained, construed and/or reported by the

media or others (and which information, incidentally, was not directed specifically at the plaintiffs), can hardly be the basis of a finding of concealment. With respect to claims that there was a concealment through failure of the defendants to comply with plaintiffs' discovery demands, plaintiffs do not identify the specific discovery demands, relevant to ownership of the real property, with which defendants failed to comply, nor indicate when they were served.

As defendants point out, plaintiffs' written agreements were with an entity named Meadowgreens. However it is unclear from the instant record which Meadowgreens corporation was the contracting party.¹ The plaintiffs argue that CN Production Management may be held liable for the torts of its predecessor, Meadowgreens, Inc. The general rule is that "a corporation which acquires the assets of another is not liable for the torts of its predecessor" (Schumacher v Richards Shear Co., Inc., 59 NY2d 239, 244 [1983], cited with approval, Semenetz v Sherling & Walden, 7 NY3d 194 [2006]). There are four exceptions to the foregoing rule:

"A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." (id., at 245).

In this instance, as plaintiffs acknowledge, it appears that there are actually two successor entities to Meadowgreens, Inc., CN Production Management, as owner of the

¹The parties' two agreements, entitled "Deal Points", variously recite that the contract is between plaintiff Celts Celebrate, Inc. and (1) Meadow Greens Golf Course, (2) Meadow Greens Golf, (3) Meadow Greens Resort, (4) Meadow Greens Golf Resort, and (5) Meadow Greens. No mention is made of any other entity, including CN Production Management.

Meadowgreens real property, and the defendant Meadowgreens Restaurant, Inc., which operated the restaurant business.² In the Court's view, insufficient facts are adduced here for the Court to determine which, if any of the foregoing exceptions set forth in the Schumacher case (supra) might be applicable. In this respect, plaintiffs have not shown how CN Production Management, a company having no contractual relationship with plaintiffs, could be held liable for their damages.

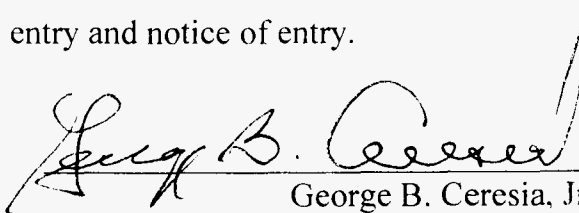
Most importantly, the instant action is now over four years old, with a trial scheduled to commence on February 28, 2012. At this very late stage of the action, the Court is of the view that a party moving to join a new party to the action should provide compelling evidence to support the relief it requests. This, in the Court's view, has not been done.

Under all of the circumstances, the Court finds that the motion must be denied.

SO ORDERED!

This shall constitute the decision and order the Court. The original decision/order is returned to the attorney for the defendants. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does 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.

Dated: January 19, 2012
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

²See paragraph 13 of the affirmation of Benedict Bradford McCaffree, Esq., Ph.D. dated November 4, 2011.

Papers Considered:

1. Notice of Motion dated September 30, 2011. Supporting Papers and Exhibits
2. Affirmation in Opposition of Peter L. Burgess, Esq., dated October 28, 2011 and Exhibits
3. Affidavit of Carmen Nero, sworn to October 27, 2011 and Exhibits
4. Affirmation of Benedict Bradford McCaffree, Esq., dated November 4, 2011 and Exhibits
5. Affidavit of Anne MacPherson, sworn to November 4, 2011