Cioffi v SM Foods, Inc.
2012 NY Slip Op 33237(U)
November 20, 2012
Sup Ct, Westchester County
Docket Number: 55391/2011
Judge: Mary H. Smith

DECISION AND ORDER

FILED & ENTERED
11/20/12

To commence the statutory period of 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
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

----------X

FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

MOTION DATE: 11/16/12
INDEX NO.: 55391/11

-against-

SM 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 BOSON, LLC PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

----------X

The following papers numbered 1 to 11 were read on this motion by plaintiffs for an Order pursuant to CPLR 2221 granting reargument and renewal, etc., and on this cross-motion by defendants Russell McCall's Inc. and Jay for an Order pursuant to CPLR 603 directing a separate non-jury trial of plaintiff's injury

claims prior to trial of plaintiff's equitable claims against defendants.

Papers Numbered

Notice of Motion - Affirmation (Rice) - Exhs. (A-H) 1-3
Notice of Cross-Motion - Affirmation (Quinlan) - Exhs. (A-M) 4-6
Amended Answering Affirmation (Shaprio)- Exhs. (A-B) 7-8
Answering Affirmation (Grant) - Exhs. (Collectively) 9-10
Replying Affirmation (Rice) 11

Upon the foregoing papers, it is Ordered that this motion and cross-motion are disposed of as follows:

The essential facts in this pedestrian knock-down action previously have been set forth in this Court's August 13, 2012, Decision and Order finding that defendant Ryder is entitled to the protection of the Graves Amendment, and thereupon having granted defendant Ryder's then motion for dismissal; the facts shall not be re-stated herein.

Presently, plaintiff is moving for reargument and renewal of said Decision and Order, arguing that this Court improperly had engaged in issue determination rather than properly issue finding, that it had erred in accepting moving defendant Ryder's proof "at face value," that the Court erroneously had found the expired lease agreement sufficient notwithstanding that the expired lease never was authenticated, that the Court had failed to consider that defendant Ryder's failure to have retrieved the vehicle upon the expiration of the rental agreement period raises a question

regarding Ryder's own negligence, that there is no proof that Ryder had the required insurance in place on the subject involved vehicle, and that there exists new evidence supporting the finding that Ryder had violated Federal statutes and Regulations, including specifically the Federal Motor Carrier Safety Act, governing the use and operation of vehicles engaged in interstate commerce which are intended to insure financial responsibility and safety standards and thus it should not be entitled to the protection of the Graves Amendment.

In support of his arguments, plaintiff submits an affidavit from retired police officer Christopher Calabrese. Mr. Calabrese therein states that he had conducted a thorough investigation of the records relating to Ryder's leasing of the subject offending vehicle and he concludes, based thereon, that Ryder has engaged in a pattern of criminal wrongdoing and intentional violations of Federal and State regulations relating to public safety, including its failure to have had the subject vehicle identified as one that was being operated by defendant GFI Boston under its Department of Transportation number.

In support of his motion for renewal, plaintiff relies upon documents recently obtained through his FOIL requests showing that Ryder has been cited numerous times by the New York State Department of Transportation for failing to have its vehicle

properly placarded with the name and federal DOT number of the interstate carrier, i.e., defendant GFI Boston LLC. In light of this evidence, plaintiff argues that, given the absence of a valid lease between Ryder and GFI Boston LLC, Ryder had become the de facto carrier which is responsible for providing financial security for the subject vehicle and thus Ryder is removed from the protection of the Graves Amendment.

Finally with respect to this aspect of plaintiff's motion, plaintiff argues that defendant Ryder had "fail[ed] to conduct a road test on Daniel Burke," contrary to the rental agreement's provision that Ryder must safety check and driver from GFI Boston LLC or Sheile Marie, and missing from the expired rental agreement is [renter] Mr. Sicaro's date of birth, license number or any proof that Mr. Sicaro was road tested by Ryder. Plaintiff fails to specify whether this argument is in favor of reargument or renewal.

Defendant Ryder opposes the motion in all respects, arguing that the Court correctly had dismissed the action against it because it is in the business of renting or leasing motor vehicles, there is no proof of wrongdoing or negligence on Ryder's part, that plaintiff has failed to offer a reasonable excuse for plaintiff's not offering the evidence he now offers, there is no private right of action by an individual for alleged violations of Federal and State law, that any violations were not the proximate cause of

plaintiff's injuries and that plaintiff's expert is not qualified to offer his opinion as to defendant Ryder's negligence.

Plaintiff's motion for reargument and renewal pursuant to CPLR 2221 is granted in the exercise of this Court's discretion and upon the record more fully developed at bar.

Upon the granting of reargument and renewal, the Court hereby reverses its earlier determination granting defendant Ryder's motion dismissing the claims against them based upon the Graves Amendment and all previously interposed claims against defendant Ryder are herein restated.

The Court finds, affording plaintiff every benefit of every possible inference, that defendant Ryder has failed to sustain its burden as movant demonstrating as a matter of law that it is entitled to the protection of the Graves Amendment, that the supporting affidavits from Nathan Reed and Richard Canty do not authenticate the subject rental/lease agreement, see Merine v. Darden, 26 Misc.3d 1205(A) (N.Y. City. Civ. Ct. 2009), and, noting that the Graves Amendment confers liability immunity only if there is no criminal activity or negligence on the part of the owner, see 49 U.S.C. §30106 (a), the Court finds that there appears to be issues of facts as to whether Ryder had engaged in criminal wrongdoing, which wrongdoing preempts its entitlement to Graves Amendment protection, whether Ryder, by permitting defendant GF

Boston LLC to improperly and illegally use Ryder's DOT registration number, de facto became a motor carrier and not merely a lessor, and as such is not afforded protection under the Graves Amendment, and whether Ryder independently had been negligent in failing properly to have "safety checked" defendant Burke by way of a road test, but see Coppage v. U-Haul Intern, 2011 WL 519227 (S.D.N.Y. 2011); Sigaran v. Elrac, Inc., 22 Misc.3d 1101(A) (Sup. Ct. Bx. Co. 2008), and/or to have retrieved the subject vehicle upon the expiration of the rental period, see Luma v. Elrac, Inc., 19 Misc.3d 1138(A), and thus whether it is not entitled to the protection of the Graves Amendment. Notwithstanding defendant Ryder's argument to the contrary, the Court finds that the issue of proximate cause is a jury question. See Nowlin v. City of New York, 81 N.Y.2d 81, 89 (1993); Moore v. Gottlieb, 46 A.D.3d 775 (2nd Dept. 2007); Calhoun v. Allen, 951 N.Y.S.2d 641 (ALL. Co. 2011).

Addressing next plaintiff's motion for an Order granting amendment of his complaint pursuant to CPLR 3025, subdivision (b), to plead allegations of violations of Federal and State law, joint venture, criminal conduct, alter ego status and entitlement to pierce the corporate veil, and thereby increasing from three to seven the number of pleaded causes of action[1], it is well-settled

[1]The Court notes that plaintiff's proposed "Amended Complaint," annexed as Exhibit H to his moving papers, properly should be denominated "Second Amended Complaint," the first

that leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly results from the delay in seeking the amendment. See CPLR 3025, subd. (b); McCasky, Davies, & Assoc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 (1983); Moyse v. Wagner, 66 A.D.3d 976 (2nd Dept. 2009); Bolanowski v. Trustees of Columbia University in City of New York, 21 A.D.3d 340 (2nd Dept. 2005); Santori v. Met Life, 11 A.D.3d 597 (2nd Dept. 2004). "The legal sufficiency or merits of a proposed amendment to a proposed pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." Sample v. Levada, 8 A.D.3d 465, 467-468 (2nd Dept. 2004); see, also Shovak v. Lon Island Commercial Bank, 50 A.D.3d 1118, 1120 (2nd Dept. 2008); Benyo v. Sikorjak, 50 A.D.3d 1074 (2nd Dept. 2008). Moreover, where an additional theory of liability is based upon the same facts alleged in the original complaint and the defendant had familiarity with the facts underlying these causes of action from the outset of the litigation, permission to serve an amended compliant ought be granted. See Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439 (2nd Dept. 2005); Barraza v. Sambade, 212 A.D.2d 655 (2nd Dept. 1995); Bobrowsky v. Lexus, 215 A.D.2d 424 (2nd

---

amended complaint being dated October 25, 2010.

Dept. 1995).

Applying the foregoing principles of law to the record at bar, plaintiff's motion for an Order permitting amendment of his complaint is granted.

Within ten (10) days after the date hereof, plaintiff shall file and serve the second amended complaint in the form annexed as Exhibit H; defendants shall have the statutory time in which to answer.

Addressing next defendants Russell McCall's Inc. d/b/a Atlanta Foods International's and Jay's cross-motion seeking an Order declaring that this action shall be tried without a jury because the claims against them are equitable in nature, and as such are not subject to jury trials, is denied as premature. CPLR 4102 states that a demand for a jury trial shall be contained in the filed and served note of issue, which filing and service not only has not occurred here, but given the extensive discovery which remains, is a long way off from occurring.

Nevertheless, it appears that plaintiff's argument that it is entitled to demand a jury trial upon those claims in which he seeks to pierce the corporate veil or impose alter ego and/or successor corporate liability upon defendants Russell McCall's Inc. and its employee Jay, and thereupon impose monetary damages, has merit; Courts have recognized that, while piercing the corporate veil is,

as defendants argue, an equitable remedy, whether to find such relief appropriate necessarily rests upon factual inquiries and determinations and thus such inquiry "generally is submitted to the jury." See Wm. Passalacqua Builders, Inc. v. Resnick developers South, Inc., 933 F.2d 931, 135-137 (2nd Cir. 1991); American Protein Corp. v. AB Volvo, 844 F2d 56, 59 (2nd Cir. 1988); David v. Glemby, Co., Inc., 717 F. Supp. 162, 166 (S.D.N.Y. 1989); but see First Keystone Consultants, Inc. v. DDR Const. Services, 22 Misc.3d 1102(A) (Sup. Ct. Qu. Co. 2008).

The parties shall appear in the Compliance Conference Part, Room 800, at 9:30 a.m., on December 19, 2012.

Dated: November 20, 2012
White Plains, New York

MARY H. SMITH
J.S.C.

Wilson, Bave, Conboy, Cozza & Couzens
Attys. For Deft. Ryder
Two William Street
White, Plains, New York 10601

Grant & Longworth, LLP
Attys. For Pltfs.
377 Ashford Avenue
Dobbs Ferry, New York 10522

Baxter, Smith & Shaprio
Attys. For Defts./3rd P. Pltfs. S.M. Foods; GFI Boston; PLM Trailer; Burke
200 Mamaroneck Avenue
White Plains, New York 10601

White, Quinlan & Staley, LLP
Attys. For Atlanta Foods; Russell McCall's; Sheila Marie; Jay
377 Oak Street, Suite 301
P.O. Box 9304
Garden City, New York 11530

Maynard, O'Connor, Smith & Catalinotto, LLP
Attys. For 3rd P. Defts.
6 Tower Place
Albany, New York 12203