Yoo v A.C.N.C. Corp.
2015 NY Slip Op 31639(U)
August 28, 2015
Supreme Court, New York County
Docket Number: 150120/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

ELLIE YOO,

Index No. 150120/2014

Plaintiff,

DECISION/ORDER

-against-

A.C.N.C. CORPORATION DBA
MCDONALD'S RESTAURANT #14971
MCDONALD'S CORP., JOHN DOES 1 THROUGH 10

---x

CAROL R EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant McDonald's Corporation, s/h/a McDonald's Corp. (McDonald's) moves for an Order, pursuant to CPLR §3212, granting summary judgment dismissing the Amended Complaint of plaintiff Ellie Yoo (plaintiff).

McDonald's Contentions

In her First Amended Complaint, plaintiff alleges she ate a portion of a quarter pounder hamburger that she purchased at a McDonald's restaurant located at 401 Park Avenue South, New York, New York, on April 8, 2013. She claims there was a push pin in her quarter pounder and that she bit into it and was injured. McDonald's as franchisor and and McDonald's Restaurants of New York, Inc. as franchisee entered into a franchise agreement for the operation of a McDonald's restaurant at the subject location. Defendant McDonald's assigned its rights and status to McDonald's USA, LLC before the subject incident. McDonald's Restaurants of New York, Inc. assigned its rights as franchisee to defendant A.C.N.C. CORP. (ACNC) on February 20, 1995. The Franchise Agreement governs the operation of a McDonald's restaurant at the subject location. The Franchise Agreement permits the franchisee to use the McDonald's

system at the subject location. It expressly provides that

> "Franchisee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business, including...all claims or demands based on damage or destruction of property or based on injury, illness or death of any person or persons, directly or indirectly, resulting from the operation of the Restaurant.

Allen Norman, the owner of ACNC in his affidavit states that defendant McDonald's did not sell any product at his restaurant. Indeed, defendant McDonald's did not manufacture, process, or prepare quarter pounders sold at his restaurant. Defendant McDonald's did not supply quarter pounders or any of its ingredients to defendant ACNC. And, defendant McDonald's did not employ the workers that assembled the quarter pounders. Simply put, defendant McDonald's had nothing to do with the quarter pounder involved in this accident. Moreover, since defendant McDonald's had no franchise relationship with the franchisee on the date of plaintiffs alleged incident, there can be no liability based on a franchisor-franchisee relationship. But even if plaintiff were to join the franchisor, McDonald's USA, LLC in this lawsuit, there would be no liability on that entity either based on the law covering franchises.

In anticipation of plaintiff arguing in opposition that this motion is premature because depositions have not been conducted yet, defendant McDonald's argues that while that is true, additional discovery is not a basis to avoid dismissal where the discovery will not reveal anything that could be used in opposition to the motion.

Plaintiff's Opposition

Based on a reading of the complete franchise agreement, Defendant McDonald's thus controls the food quality, food service, food preparations aspects of the local restaurant's

activities virtually completely, and is liable for injury caused to plaintiff. Further, there is an issue of fact concerning defendant McDonald's control over the conduct of ACNC. And in order to determine whether franchisor may be held vicariously liable for the acts of its franchisee, in personal injury suit, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred.

McDonald's Corp. seeks dismissal merely on the basis of the language in the franchisee agreement for the McDonald's Corp. alone, but it has failed to demonstrate the real facts that matter on the motion — the true extent of McDonald's Corp.'s direction and control over the entire operation of their food supply system and the operation of the local restaurants. It is undisputed that McDonald's Corp. meticulously regulates, monitors and controls the production and services of their food and supervises the quality of food associated with the McDonald's Corp. name. McDonald's Corp. has failed to mention the portions of the franchise agreement that shows how McDonald's Corp. designates the menu, the types of food and beverages to be served, the preparation method and quality appearance of the food, and the uniformity of the food specifications; all taught and trained in McDonald's Corp.'s "Hamburger University" where they also train employees, mandate uniforms, require compliance with premises display and space, dictating procedures on all matter from food production to fiances, including the procedures at the restaurant. McDonald's Corp. may have a franchise agreement for the ACNC, but McDonald's Corp. never relinquished control.

Finally, significant portions of discovery which are specifically aimed at exploring information critical to the issues in this litigation need to be explored, namely the extent and

degree of control that McDonald's Corp. exercises over ACNC Inc. Clearly, even from the franchise agreement, McDonald's Corp. controls every detail of the food production and service. McDonald's Corp. designates the menu, the type of food and beverages to be served, preparation method and quality appearance of the food, and the uniformity of the food specifications. Accordingly, the Court should deny defendant McDonald's Corp.'s motion to dismiss.

McDonald's Reply

Defendant McDonald's has submitted evidence that it did not manufacture, process, or prepare quarter pounders sold at the subject restaurant. Plaintiff argues, however, that there is an issue of fact with respect to the extent that defendant McDonald's exercised control over the food quality and production by citing to various provisions in the franchise agreement. While it is true that defendant McDonald's sets forth certain standards, including the "McDonald's System," for development, operations, and maintenance of the McDonald's restaurant location by a franchisee. that cannot cast defendant McDonald's in liability for the food prepared by a separate legal entity as a matter of law.

First, defendant McDonald's was not a party to the Franchise Agreement repeatedly cited and quoted by plaintiff in her opposition. In the original Franchise Agreement for the operation of a McDonald's restaurant at this location, defendant McDonald's was the franchisor and McDonald's Restaurants of New York, Inc was the franchisee. *See,* Defendant's Motion, Exhibit "D". However, defendant McDonald's assigned its rights and status as franchisor to McDonald's USA, LLC *before* the subject incident. *See,* Defendant's Motion. Exhibit "E". McDonald's Restaurants of New York, Inc. assigned its rights as franchisee to A,C.N.C. CORP. on February

20, 1995. See, Defendant's Motion, Exhibit "F". So all of the language from the Franchise Agreement cited by plaintiff is irrelevant.

Second, even if plaintiff were to join the franchisor, McDonald's USA. LLC, 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. Here, relying on an agreement to which defendant McDonald's not even a party, plaintiff is urging the Court to hold in direct contradiction to this binding First Department case law.

The undisputed evidence clearly establishes that defendant McDonald's did not exercise control over the day-to-day food preparation; does not supply quarter pounders or any of its ingredients to this restaurant; did not employ any of the workers there.

DISCUSSION

Summary Judgment (Defendant is Movant)

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501

NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

In the instant case, defendant McDonald's has established its *prima facie* entitlement to summary judgment. The evidence demonstrates that Defendant McDonald's had nothing to do with the quarter pounder involved in this accident. And, as defendant McDonald's explains, defendant McDonald's was not a party to the Franchise Agreement repeatedly cited and quoted by plaintiff in her opposition.

Plaintiff fails to raise an issue of fact sufficient to overcome defendant McDonald's showing. And, further discovery will not alter that determination.

Further, further discovery is unwarranted in order to decide the issue of summary judgment herein. Again, as pointed out by defendant, courts have held when appropriate that

"although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent, the mere hope that further discovery will reveal the existence of a triable issue of fact, is insufficient to delay determination of the motion." Weber Chester v. Alsol Enterprises, Ltd., 95 A.D.3d 922 (2d Dept. 2012). Here, the motion is based on plaintiffs allegations in her First Amended Complaint concerning how her accident occurred and the applicable Franchise Agreement. The Court needs nothing else to resolve the motion now as a matter of law.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Defendant McDonald's Corporation, s/h/a McDonald's Corp., for an Order, pursuant to CPLR §3212, granting summary judgment dismissing the Amended Complaint of plaintiff Elie Yoo is granted, and **said claim is hereby severed and dismissed. And, the Clerk of the Court shall enter judgment accordingly.** And it is further

ORDERED that counsel for defendant McDonald's Corporation, s/h/a McDonald's Corp. shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel

Dated: August 28, 2015

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD