SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

CLARE AMIANO,
Plaintiff,
-against-

GREENWICH VILLAGE FISH COMPANY, INC., JOSEPH GURRERA, 205 EAST 75TH STREET LLC, and CITARELLA EAST LLC,
Defendants.

INDEX NO. 150361/2013
MOTION DATE 07/20/2016
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6 - 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion is granted to the extent that all causes of action are dismissed except for the negligence cause of action against Defendants Greenwich Village Fish Company, Inc., and 205 East 75th Street, LLC.

Plaintiff commenced this action for personal injuries she sustained while dining at Fulton Restaurant located at 205 East 75th Street, New York, New York. The full name of the restaurant being 205 E. 75th Street, LLC, d/b/a Fulton Restaurant (herein 205 East 75th""). Fulton was a subsidiary of Greenwich Village Fish Company, Inc. (herein " Greenwich"), which presently does not exist but did so at the time of the incident. Greenwich did business under the names Fulton Restaurant and Citarella. (Defendants 205 East 75th and Greenwich are collectively referred to herein as Fulton). Citarella East, LLC (herein "Citarella") is the food supplier for Fulton. Defendant Joseph Gurrera (herein "Gurrera") is the owner of Fulton and the President of Citarella. (Defendants Fulton, Gurrera, and Citarella are collectively referred to herein as "Defendants").

Plaintiff asserted causes of action for negligence, and breach of implied and express warranties. Plaintiff claims to have been injured by a piece of fish bone left in her flounder, after she had requested that the whole flounder be filleted. The

Defendants Answered, and the parties proceeded with discovery.

Defendants now move for an Order for summary judgment pursuant to CPLR §3212, dismissing the Complaint. Plaintiff opposes the motion.

Defendants argue that under the "reasonable expectations doctrine," the Plaintiff cannot maintain an action for negligence against the Defendants because the presence of bones in fish, even after being filleted, is reasonably expected. According to the deposition testimony of Fulton's manager Ms. Helen Gurrera (Mot. Exh. F), flounder was served whole unless requested to be filleted. Upon such a request the fish would be grilled whole, then filleted by being cut in half, with the vertebrae, head and tail being removed. The Plaintiff cannot show that the Defendants were negligent because all bones visible to the eyes were removed, and all pin bones cannot be expected to be removed as they are located in the flesh of the fish.

Defendants also argue that the breach of warranty claim must be dismissed because the Plaintiff must show an existence of a warranty agreement, and there is no evidence of such an agreement. As for the claim for breach of an express warranty, this must be dismissed because there was no breach of an express warranty here. Plaintiff made the decision to order the flounder filleted, and there is no guarantee given by the restaurant, on the menu or otherwise, that the fish would be completely clear from any bones. (Copy of Menu attached as Exhibit H; see also deposition testimony of former Fulton head chef Jacob Barrios- Mot. Exh. G). The claim for breach of an implied warranty of fitness for human consumption must also be dismissed because the fish fillet was neither bad for consumption or unwholesome. It is common sense that a fish has bones, and the testimony given by Ms. Gurrera as to fillet preparation affirms that the flounder was fit for consumption, and the Plaintiff has failed to prove otherwise.

Defendants also argue that no cause of action against Defendant Gurrera, individually, can be sustained because as an individual shareholder he is not responsible for the alleged negligence of the corporation. Defendant Gurrera was only a corporate officer and did not run or operate Fulton, therefore no vicarious liability may attach. Defendant Citarella, as the food supplier to Fulton, supplied a whole flounder that was fit for consumption. Likewise, neither Citarella or Defendant Gurrera were involved in processing, inspecting, handling or serving the flounder, therefore they cannot be held negligently liable.

Plaintiff opposes the motion arguing that genuine issues of material fact exist, such as whether the Defendants are in fact free from negligence, whether it is reasonable for a consumer to expect such a large fishbone to be present in filleted fish, and whether the filleted flounder Plaintiff was served was unfit for human consumption, and/or unfit for its intended purpose. Plaintiff contends that she attempted to chew a piece of fish and immediately felt a large fishbone in her mouth,

which she removed. She argue that this bone was approximately 2 inches in length and 1/4 of an inch thick. (Aff. In Opp. Exh. I-2). Immediately thereafter she attempted to swallow and felt another large bone get stuck in her throat. This bone, which is the bone that perforated her esophagus and was later surgically removed, was much larger than a pinbone and was noted in the hospital records as being approximately 2 x 0.5x0.2cm. (Id); and that Defendants provide no evidence affirming their claim that the fillet was adequately deboned, or that the bone Plaintiff swallowed was just a pinbone.

Plaintiff also argues that as Fulton's seafood supplier, Citarella cannot be dismissed from the action because it is within the food distribution chain. It therefore may be liable under the strict products liability and breaches of warranty causes of action. Plaintiff further argues that Defendant Gurrera must remain in the action because he is the owner of Fulton. Testimony from Defendants' employees provided that Gurrera controlled the restaurant's menu, and therefore any lack of warnings regarding fish bones could be attributed to him. For these reasons Plaintiff contends that summary judgment in favor of the Defendants must be denied.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

"The 'reasonable expectation' doctrine provides a plaintiff can recover for breach of implied warranty of fitness if it is found that the natural substance was not reasonably anticipated to be in the food, as served. In an action for common law negligence, the 'reasonable expectation' test requires a restaurant owner to use ordinary care to remove from the food as served, such harmful substance as the

consumer would not ordinarily anticipate. (Stark v. Chock Full O'Nuts, 77 Misc.2d 553, 356 N.Y.S.2d 403[1st Dept. 1974]). A plaintiff has no right to expect a perfect piece of fish, as everyone knows that tiny bones may remain in even the best fillets of fish. (Vitiello v. Captain Bill's Rest., 191 A.D.2d 429, 594 N.Y.S.2d 295 [2nd Dept. 1993], citing Yong Cha Hong v. Marriott Corp., 656 F.Supp. 445).

A fish bone is one that is reasonably anticipated to be present in fish, even if the fish is filleted. (See Vitiello, Supra). The flounder served to Plaintiff was not spoiled, and did not contain a substance not reasonably anticipated to be present thereby warranting dismissal of an action for breach of implied warranty of fitness. Therefore, the breach of implied warranty of fitness cause of action must be dismissed.

To establish a cause of action alleging a breach of an express warranty, there has to be evidence that such warranty was created by "affirmation of fact or promise, "description" or "sample or model...made part of the basis of the bargain." (Gunning ex rel. Gunning v. Small Feast Caterers, Inc., 4 Misc.3d 209, 777 N.Y.S.2d 268 [Sup. Court, NY County], New York Uniform Commercial Code §2-313). Defendants argue that no such warranty existed, that there is no evidence on the menu or otherwise that the fish will be completely free from any bones, and the Plaintiff fails to provide evidence to the contrary. Therefore, the cause of action for breach of an express warranty is hereby dismissed.

However, Defendants do not provide sufficient evidence eliminating all questions of fact on the negligence cause of action against Fulton, and therefore fail to make a prima facie showing entitling them to summary judgment dismissing the Complaint in its entirety. There remain issues of fact as to whether or not the flounder was filleted properly, whether or not the Plaintiff in fact choked on a pinbone or a larger bone, and whether or not the size of the bone that injured Plaintiff's throat is a bone that could be reasonably anticipated to be present in filleted fish. (Kaplan v. American Multi-Cinema, Inc., 21 Misc.3d 1103(A), 873 N.Y.S.2d 234 [Civil Ct., NY County 2008]). The Defendants do not provide sufficient evidence in the form of testimony or an affidavit from an individual with knowledge of the fish that was filleted and served to the Plaintiff. To the extent that the Defendants argue Plaintiff did not take care in eating the flounder, this is a question of fact for the jury to decide. Therefore, summary judgment on the negligence cause of action against Fulton is denied.

The Complaint as to Defendant Gurrera must be dismissed. "A corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." Peguero v. 601 Realty Corp., 58 A.D.3d 556, 873 N.Y.S.2d 17 [1st Dept. 2009], citing Espinosa v. Rand, 24 A.D.3d 102, 806 N.Y.S.2d 186 [1st Dept. 2005]). "The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on

a corporate officer for nonfeasance, i.e. a failure to act." (Peguero, Supra, citing Michaels v. Lispenard Holding corp., 11 A.D.2d 12, 201 N.Y.S.2d 611 [1st Dept. 1960]). Defendant Gurrera did not fillet the flounder, nor was he present at the restaurant when the incident occurred. Therefore, in the absence of Defendant Gurrera commiting an affirmative tortious act, he cannot be held liable to the Plaintiff and the action against him must be dismissed.

Defendant Citarella seeks to be dismissed from the action on the theory that it cannot be held negligent because it supplied the fish whole to Fulton, and did not process, inspect, handle or serve the flounder to the Plaintiff. Plaintiff argues that a supplier in the wholesale food distribution chain can be potentially liable under a theory of strict products liability. The only case law set forth on this issue was by Plaintiff in citing Rudloff v. Wendy's Rest. Of Rochester, Inc., 12 Misc.3d 1081 [City of Rochester Ct., Rochester 2006]. Rudloff provides that liability on a negligence theory may be sustained where a defendant fails to set forth proof that there were safeguards present during processing, inspecting, and testing to guard against potential injury-causing articles being in the product. (Id.) Further, as a supplier in the wholesale food distribution chain it may potentially remain liable. (Id., citing McSpedon v. Kunz, 271 N.Y. 131, 2 N.E.2d 513 [1936], Smith v. City of New York, 133 A.D.2d 818, 520 N.Y.S.2d 195 [2nd Dept. 1987]). Plaintiff's argument fails to raise an issue of fact on the motion to dismiss Defendant Citarella. Citarella supplied a whole fish to the restaurant, and took no part in it being prepared, cooked, or filleted. The whole fish that was served to Plaintiff was not spoiled; If anything, the only potential liability to be found is in the way the fish was filleted, which would be attributable only to the restaurant. Therefore, Citarella cannot be held liable to Plaintiff, and the action against it must be dismissed.

Accordingly, it is ORDERED, that Defendants Greenwich Village Fish Company, Inc., Joseph Gurrera, 205 East 75th Street LLC, and Citarella East, LLC's motion for summary judgment dismissing the Complaint is granted to the extent that all causes of action are dismissed except for the negligence cause of action against Defendants Greenwich Village Fish Company, Inc., and 205 East 75th Street, LLC, and it is further,

ORDERED, that summary judgment dismissing the Complaint in favor of Defendant Joseph Gurrera is granted, and it is further,

ORDERED, that the causes of action against Defendant Joseph Gurrera are hereby severed and dismissed, and it is further,

ORDERED, that summary judgment dismissing the Complaint in favor of Defendant Citarella East, LLC is granted, and it is further,

ORDERED, that the causes of action against Defendant Citarella East, LLC are hereby severed and dismissed, and it is further,

ORDERED, that summary judgment dismissing the causes of action for breach of warranty, breach of an express warranty, and breach of implied warranty is granted, and it is further,

ORDERED, that the causes of action for breach of warranty, breach of an express warranty, and breach of implied warranty are hereby severed and dismissed, and it is further,

ORDERED, that the remainder of the relief requested is denied, and it is further,

ORDERED, that the cause of action for negligence against Defendants Greenwich Village Fish Company, and 205 East 75th Street LLC remain, and it is further,

ORDERED, that the caption is amended to reflect the dismissal of all the causes of action against Defendants Joseph Gurrera and Citarella East LLC, and it is further,

ORDERED, that the new caption shall read as follows:

CLARE AMIANO,

Plaintiff,

-against-

GREENWICH VILLAGE FISH COMPANY, INC. and 205 EAST 75TH STREET, LLC,

Defendants.

---

and it is further,

ORDERED, that within 20 days from the date of entry of this Order the moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at, genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: September 9, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**