Rodriguez v Unified Brands, Inc.
2018 NY Slip Op 31408(U)
May 4, 2018
Supreme Court, Bronx County
Docket Number: 20677/2013E
Judge: Lizbeth Gonzalez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 10

----------X

NOEMI RODRIGUEZ,

Plaintiff,

-against-

UNIFIED BRANDS, INC., GROEN, INC., GROEN, CULINARY DEPOT, INC., FRESH DIET EXPRESS CORP., YS CATERING LLP, PRO-TEK OF NY INC., PRO TEK OF NEW YORK, INC., PROTEK OF NEW YORK, INC., PRO TEK SERVICES, PRO TEK SERVICES, PRO TEK SERVICES KITCHEN REPAIR & MAINTENANCE CO., and PRO TECH SERVICES KITCHEN REPAIR & MAINTENANCE CO.,

Defendants.

----------X

Index No: 20677/2013E

DECISION/ORDER

HON. LIZBETH GONZALEZ:

Plaintiff commenced this action seeking to recover damages sustained on June 3, 2012 when she suffered burns from a defective kettle while working in a commercial kitchen operated by defendant YS Catering LLP ("YS Catering"). Defendants Fresh Diet Express Corp. ("Fresh Diet") and YS Catering seek summary judgment dismissing plaintiff's amended complaint and all cross-claims as against them. Culinary Depot, Inc. ("Culinary Depot") seeks (1) dismissal of the complaint for failure to state a cause of action; (2) summary judgment dismissing the complaint; and (3) dismissal of all cross-claims as against it. Defendant Pro Tek of New York, Inc. ("Pro Tek") cross-moves, seeking an order dismissing the complaint and all cross-claims as against it on the ground that plaintiff fails to state a cause of action against it.[1]

[1]Plaintiff's complaint, as amended, identifies six different entities having the same or similar name as Pro Tek. The record establishes that these entities actually refer to a single

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

The motion and cross motion are determined as follows:

Plaintiff alleges that while working as a prep cook for YS Catering and Fresh Diet, she sustained burns as she was draining a large commercial steam kettle manufactured by defendants Unified Brands, Inc., and Groen Inc. ("Unified").[2] She claims that a drain valve built into the bottom of the kettle suddenly, and unexpectedly, separated from the kettle, causing hot liquid to drain from the kettle onto her foot and leg. Unified designed, manufactured and sold the kettle. Pro Tek performed maintenance and/or repairs to the kettle.

YS Catering is a foreign limited liability partnership licensed to do business in New York. It operates a commercial kitchen in Brooklyn, New York and occasionally does business as "The Fresh Diet." YS Catering was originally known as YS Catering, Inc.; however, it converted to YS Catering, LLP, prior to the date of the occurrence.[3] YS Catering and Fresh Diet further contend that Fresh Diet, a mobile food vendor related to YS Catering, ceased operation prior to the date of the occurrence.

Unified designed and manufactured the kettle at issue, identified as a Groen EE-80 Kettle. It was sold by Unified to Culinary Depot, which sells and distributes commercial food service supplies, including the subject kettle, to third parties. Culinary sold the kettle to YS Catering prior to the date of the occurrence.

---

defendant, Pro Tek.

[2]Although plaintiff identifies each entity as a separate defendant, it appears that both entities merged into Unified. Additionally, court records indicate that a stipulation of discontinuance with prejudice as to plaintiff's second cause of action for breach of express warranty and for punitive damages as against Unified was filed on March 28, 2016.

[3]YS Catering submits a Certificate of Conversion filed with the Florida Department of State, dated April 9, 2010. YS Catering, Inc. ceased to exist as of the date of such filing.

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

As noted above, Defendants Fresh Diet Express Corp. ("Fresh Diet") and YS Catering seek summary judgment dismissing plaintiff's amended complaint and all cross-claims as against them. Culinary Depot, Inc. ("Culinary Depot") seeks (1) dismissal of the complaint for failure to state a cause of action; (2) summary judgment dismissing the complaint; and (3) dismissal of all cross-claims as against it. Defendant Pro Tek of New York, Inc. ("Pro Tek") cross-moves, seeking an order dismissing the complaint and all cross-claims as against it on the ground that plaintiff fails to state a cause of action against it.

ANALYSIS

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact requiring a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

YS Catering and Fresh Diet

YS Catering made a prima facie showing of entitlement to summary judgment dismising the action as against it on the basis that the action is barred under the exclusivity provisions of Workers' Compensation Law§ 11 (*see Paulino v Lifecare Transp.*, 57 AD3d 319 [1st Dept 2008]; *see Carty v E. 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529 [1st Dept 2011]).

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

YS Catering relied upon a copy of the claim filed with Travelers' Insurance acknowledging YS Catering as plaintiff's employer; a copy of a Notice of Decision from the Workers' Compensation Board dated June 20, 2013; a copy of a Notice of Termination of benefits; a copy of the Notice of Workers' Compensation Hearing; and, plaintiff's W-2 for the year in which the occurrence happened, all identifying YS Catering as plaintiff's employer at the time of the occurrence. Also submitted is a copy of plaintiff's deposition wherein plaintiff admits to applying for, and receiving, Workers' Compensation benefits. These documents demonstrate that after the occurrence, plaintiff received Workers' Compensation benefits, having sustained injuries while in the course of her employment with YS Catering.

Fresh Diet made a prima facie showing that no action lies against it. In her detailed, sworn affidavit, Ana Mateo, Human Resources Administrator and Office Manager for YS Catering, stated that YS Catering is a foreign limited liability corporation operating a commercial kitchen in Brooklyn, occasionally doing business as "The Fresh Diet." She confirms that YS Catering Inc. was converted to YS Catering, LLP prior to the date of the occurrence, and further, that Fresh Diet, a mobile food vendor, ceased operations prior to the date of the occurrence. Further, Ms. Mateo asserts that while YS Catering has informally used the d/b/a "The Fresh Diet," the legally named entity Fresh Diet has no involvement with YS Catering's operation of the Brooklyn premises where the alleged occurrence took place. Ms. Mateo states that plaintiff was hired by YS Catering in October of 2011 and remained in its employ until the date of the occurrence. Thereafter, plaintiff received Workers' Compensation benefits under the Traveler's Insurance policy issued to YS Catering.

YS Catering and Fresh Diet also made a prima facie showing that they were not involved in the design, manufacture, distribution and/or sale of the allegedly defective kettle, and therefore,

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

cannot be held liable for causally related injuries as a matter of law (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983][plaintiff must show that the product was defective and that the defective product was a substantial factor in causing her injury]; *Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512, 512 [2nd Dept 1999]). Here, it is undisputed that the kettle was manufactured by Unified; sold to Culinary Depot, a distributer of commercial kitchen equipment; and then sold by Culinary Depot to YS Catering. Further, YS Catering made a prima facie showing of entitlement to summary judgment dismissing plaintiff's claim for breach of warranty on the basis that YS Catering was not the manufacturer, seller or distributor of the alleged defective product (*see Watford v Jack LaLanne Long Island, Inc.*, 151 AD2d 742 [2nd Dept 1989]).

In opposition, plaintiff alleges that there are issues of fact as to whether YS Catering -- as opposed to the now defunct YS Catering, Inc. -- was in fact her employer. Plaintiff submits payroll statements prepared by ADP (on behalf of YS Catering, Inc.), and a lien letter from Travelers Indemnity Co. as proof that YS Catering was not her employer on the date of the occurrence. YS Catering acknowledges that ADP, its third-party payroll company, mistakenly identified YS Catering Services, Inc., as plaintiff's employer. YS Catering contends -- and the Court agrees -- that such identification was the result of a typographical error on the part of ADP, and not cannot serve to raise a triable issue of fact (*see Hynes v Start Elevator, Inc.*, 2 AD3d 178, 181[1st Dept 2003]["when an employee files a workers' compensation claim, and the Workers' Compensation Board determines that an identified party is the employer, the employee is thereafter estopped in a civil action from asserting that a different entity is the employer"). Therefore, plaintiff failed to raise a triable issue of fact.

Unified also opposes, relying upon the deposition testimony of Nicole Jackson, operations

manager on behalf of Fresh Diet. However, Ms. Jackson's testimony is of no probative value inasumch as she denied having any personal knowledge regarding the legal name of the company or entity that employed either plaintiff or herself in June of 2012. Furthermore, she has no personal knowledge regarding the legal name of the company or entity that currently employs her to date.

Unified claims that there are issues of fact surrounding the purchase and ownership of the kettle. However, the receipt relied upon by Unified indicates that YS Catering was actually billed for the subject kettle and that the kettle was shipped by Culinary Depot, Inc. to YS Catering's location in Brooklyn, New York.

Unified also argues that YS Catering and Fresh Diet's motion should be denied because discovery remains outstanding, particularly, the deposition of Ms. Mateo. However, plaintiff filed the note of issue and certificate of readiness on January 31, 2016, and as corrected, on December 6, 2017, both noting that all outstanding discovery had been completed. The corrected note of issue filed December 6, 2017 incorporated a copy of the compliance order dated October 11, 2017, which makes no mention of Ms. Mateo's outstanding deposition testimony.

Accordingly, there are no triable issues of fact as to whether YS Catering was plaintiff's employer on the date of the occurrence. Similarly, there are no issues of fact as to whether Fresh Direct had any involvement with (1) plaintiff, (2) the premises where the occurrence happened, or (3) the subject kettle. Thus, the court need not address any other remaining contentions of Unified or plaintiff as they relate to these defendants.

Culinary Depot

"It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002][internal quotation marks omitted]). Pleadings shall be liberally construed (*see Id*). "The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, . . . the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory. The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013][internal citations omitted]; *see Leon v Martinez*, 84 NY2d 83 [1994]).

As a threshold issue, plaintiff has sufficiently alleged a cause of action as against Culinary Depot. "It is well established that [a] party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]; *see Rosado v Proctor & Schwartz*, 66 NY2d 21, 25–26 [1999]). In this regard, "[t]he distributor of a defective product is subject to the doctrine of strict liability even if the distributor has merely taken an order and directed the manufacturer to ship the product directly to the purchaser, and has never inspected, controlled, installed or serviced the product (86 NY Jur 2d, Products Liability § 108; *see Perillo v Pleasant View Assoc.*, 292 AD2d 773, 774 [2002])" (*Fernandez v Riverdale Terrace*, 63 AD3d 555, 555–56 [1st Dept 2009]; *see Godoy v Abamaster of Miami*, 302 AD2d 57, 62 [2nd Dept 2003], *lv. dismissed* 100 NY2d 614 [2003]).

Pro Tek

Plaintiff contends that Pro Tek's cross-motion is untimely, and as such, should not be considered. However, whether an untimely cross motion will be considered lies within the sound discretion of the court (*see e.g. Whitehead v City of New York*, 79 AD3d 858, 860-861 [2nd Dept

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

2010]; *Gray v City of New York*, 58 AD3d 448, 449 [1st Dept 2009]). Moreover, an untimely cross motion "may be considered even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (*Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006][citation omitted]). However, "[t]he court's search of the record . . . is limited to those causes of action or issues that are the subject of the timely motion"(*Id*). Here, Pro Tek's cross motion seeks relief nearly identical to that sought in the timely-made underlying motion.

Additionally, although Pro Tek failed to attach the pleadings pursuant to CPLR 3212(b), a complete set of the papers was made available to the Court when the respective parties have each and severally e-filed a copy of the pleadings with their motions *(see Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012] [failure to include the pleadings with its motion was properly overlooked, "as the pleadings were filed electronically and thus were available to the parties and the court"]).

With respect to the merits of the cross motion, Pro Tek argues that although it had a service agreement with Fresh Diet for the repair and maintenance of commercial cooking and refrigeration equipment, the equipment list identifying the covered equipment did not include the subject Groen EE-80 kettle. Pro Tek relies upon the deposition testimony of Chad Daniels, its Director of Operations, and the Cooking and Refrigeration Equipment Maintenance Agreements with Fresh Diet entered into on September 27, 2010 and on August 27, 2012, with their respective Equipment lists identifying the covered equipment. A Groen EE-80 kettle with serial number 88887 was added to the 2012 Agreement, but was not identified as a covered piece of equipment for servicing by Pro Tek in the earlier 2010 Agreement. Pro Tek further contends that it did not repair, replace, service or

FILED: BRONX COUNTY CLERK 05/10/2018 11:57 AM INDEX NO. 20677/2013E
NYSCEF DOC. NO. 422 RECEIVED NYSCEF: 05/10/2018

maintain any Groen kettle at the subject premises before the date of plaintiff's occurrence on June 3, 2012.

Pro Tek also relies upon the deposition testimony of Diane Rossi, its General Manager. She testified that the initial 2010 Agreement between Pro Tek and Fresh Diet did not include the subject kettle involved in the occurrence. She further stated that after the date of the occurrence, the 2012 Agreement included a Groen EE-80 kettle for servicing by Pro Tek. In addition, she stated that there was no agreement, oral or otherwise, requiring Pro Tek to maintain the kettle for Fresh Diet or any affiliate of Fresh Diet at any time prior to and including the date of the occurrence.

Neither plaintiff nor Unified raise any triable issues of fact as to whether Pro Tek serviced or otherwise repaired and maintained the subject kettle on or before the date of the occurrence. Accordingly, Pro Tek is entitled to dismissal of all claims and cross-claims as against it.

Accordingly, it is hereby

ORDERED that the motion of defendants YS Catering and Fresh Diet is granted in its entirety and the action and all cross-claims are dismissed as against both defendants; and it is further,

ORDERED that defendant Culinary Depot's motion is granted solely as to dismissal of all cross-claims for contribution and indemnification as against it and is otherwise denied; and it is further,

ORDERED that defendant Pro Tek's cross-motion is granted in its entirety and the action and all cross-claims are dismissed as against it.

This constitutes the decision and order of the court.

Dated : May 4, 2018

Lizbeth Gonzalez, J.S.C.