

Monaco v Great Atl. & Pac. Tea Co., Inc.

2019 NY Slip Op 33421(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 150182/2013

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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MONACO, JOSEPH; CAROL MONACO

Plaintiffs,

INDEX NO. 150182/2013

MOTION DATE 10/15/2018

MOTION SEQ. NO. 004

- v -

GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. d/b/a
THE FOOD EMPORIUM; RSJ GROUP CORP. d/b/a
ROSANJIN TRIBECA; TRUE WORLD FOODS NEW YORK,
LLC.

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 113, 114, 115, 116

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury matter, defendants/third-party plaintiffs Great Atlantic & Pacific Tea Company, Inc. d/b/a The Food Emporium ("A&P") and RSJ Group Corp. d/b/a Rosanjin Tribeca ("RSJ") seek a leave to file an untimely summary judgment motion for good cause shown, and for summary judgment pursuant to CPLR 3212 dismissing the complaint, all cross-claims and all counterclaims. Defendant/third-party defendant True World Foods New York, LLC ("TWF") cross-moves for an order allowing restoration and re-filing of TWF's motion for summary judgment submitted September 11, 2015, and for summary judgment pursuant to CPLR 3212 dismiss plaintiffs' complaint and all cross-claims against TWF. Plaintiffs oppose the motion. The Decision and Order is as follows:

FACTS

On November 16, 2012, plaintiff Joseph Monaco went to The Food Emporium located at 405 East 59th Street in the city, county, and state of New York to purchase dinner (NYSCEF #99 – Monaco EBT 35). Mr. Monaco purchased a Salmon Sushi Nigiri Combo¹ which consisted of six to seven pieces of sushi, some pieces of ginger, and wasabi (*id.* at 45). Mr. Monaco testified that he "probably ate the whole thing" (*id.*). Two days later, on November 18, Mr. Monaco went to the emergency room at New York Presbyterian Hospital because of extreme pain in his midsection that had started earlier that day (*id.* at 10-11).

¹ Nigiri sushi consists of thin slices of raw fish served atop rice.

A CAT scan at the hospital revealed that Mr. Monaco had a mass that caused blockage in his intestines which required surgery (*id.* at 18). Mr. Monaco had abdominal surgery on November 21, 2012, to remove the blockage (*id.* at 15). After discharge on November 25, a pathology report on the mass established that it was caused by a parasite known as anisakis that caused Mr. Monaco's condition known as anisakiasis², which presents in humans who eat undercooked or raw fish (*id.* at 23-25).

Mr. Monaco claims that the sushi he purchased at The Food Emporium caused his gastrointestinal episode. The sushi was prepared by RSJ, with fish supplied by TWF, and sold at the Food Emporium, an A&P subsidiary.

Helder Cabrita, TWF's Hazard Analysis Critical Control Point (HACCP) and Compliance Manager testified on April 28, 2014, that all of their salmon was farm raised (NYSCEF #102 – Cabrita EBT at 16). Karma Dhondup was deposed on behalf of RSJ and testified that salmon arrived from TWF frozen “solid like stone” (NYSCEF #103 – Dhondup EBT at 28).

Mr. Monaco testified to eating sushi on other occasions in his life. Mr. Monaco testified that he recalled eating sushi in Tokyo, Japan and Miami, Florida in the year preceding his episode.

Procedural History

Plaintiffs initiated this action in January 2013 against all defendants except TWF (NYSCEF #1 – Complaint). A third-party action was subsequently initiated by A&P and RSJ against TWF (NYSCEF #5 – Third-Party Complaint). Plaintiffs followed and amended their complaint to add TWF as a primary defendant (NYSCEF #17 – Amended Complaint).

On September 11, 2015, defendant TWF filed a summary judgment motion to dismiss plaintiffs' complaint, all cross-claims, and all third-party claims (NYSCEF #29 – Notice of Motion MS2). On October 7, 2015, defendants A&P and RSJ filed a summary judgment motion dismissing plaintiffs' complaint and all cross-claims against it (NYSCEF #52 – Notice of Motion MS3).

However, A&P filed for bankruptcy on October 26, 2015, during the pendency of the motions. A&P submitted notice of the bankruptcy on May 20, 2016, and this matter was automatically stayed (NYSCEF #64 – Notice of Bankruptcy). On March 15, 2017, the two summary judgment motions were denied on the basis of the bankruptcy stay, allowing the parties to “stipulate to restore the motion under a new motion sequence number” (NYSCEF ##76-77 – Orders of Hon. Jennifer

² Anisakis is a parasitic nematode; anisakiasis is the disease caused by anisakis.

Schechter dated March 15, 2017). When this matter was assigned to this Part, this court had the defendants to re-notice and re-file their respective motions. A&P's motion was filed on October 11, 2018 and TWF's cross-motion was filed on October 17, 2018 (NYSCEF ## 84 & 95).

DISCUSSION

As a preliminary matter, this court will consider the late summary judgment motions given the procedural history in this case, without objection by plaintiffs. The bankruptcy stay was lifted in September 2018, and this court directed the parties to re-notice and re-file their summary judgment motions, and they promptly did so.

Summary Judgment Standard

Turning to the motions in earnest, a party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes InterOil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Conflict Between the Parties' Experts

Defendants' respective motion and cross-motion for summary judgment are denied due to the conflicting expert testimony. "Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment" (*Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]). The parties' experts sharply disagree whether Mr. Monaco could have contracted his anisakiasis from defendants' farm-raised salmon sushi in a two-day timeframe; this is question of fact requires a jury determination.

Defendants point to the statement of Mr. Monaco's consulting infectious disease physician, Dr. Howard Rosenberg, M.D., who opined that it is doubtful that the "granulomatous inflammation producing an ileal mass with small bowel

obstruction” occurred within a 48-hour time frame after eating the salmon (NYSCEF #101 – Rosenberg Letter at 2).

Defendants’ epidemiological expert Melvin Kramer, Ph.D, MPH, claims that Monaco’s anisakiasis came from an alternate source and not from his ingestion of sushi on November 16, 2012 (NYSCEF #93 – Kramer Affidavit at ¶9). Kramer averred that the parasite could not have been present in defendants’ sushi because defendants used farm-raised salmon (*id.* at ¶5-6). Kramer claims that the Food and Drug Administration (FDA) does not consider farm raised fish as having a parasite hazard (*id.*). Kramer further elaborated that freezing and storing at a temperature of -4 degrees Fahrenheit or below for 7 days or more is sufficient to kill parasites (*id.*). Kramer affirmed with a reasonable degree of epidemiological certainty that Monaco’s anisakiasis was not caused by salmon processed and sold by defendants.

In contrast, plaintiffs’ forensic sanitarian expert Robert Powitz, Ph.D, MPH, claims that the United States Department of Agriculture (USDA) does not exempt farm raised fish from the potential of harboring parasites, noting only that anisakis does not appear in farm raised fish so long as their feed does not include raw fish (NYSCEF #114 – Powitz Affidavit at 5). Powitz points out that Cabrita’s testimony indicated that there were six suppliers of salmon to TWF, however only three were named. One of the named suppliers, Fulton Fish Market, comingles lots from individual fishing boats and suppliers. Powitz points out that there was no testimony that indicated that the salmon were not fed fish as part of their aquaculture diet (*id.*).

Critically, Powitz states in his affidavit that “[a]ccording to the CDC and other medical sources, intestinal anisakiasis has an incubation period from a few to 5-days. The plaintiff [Mr. Monaco] consumed the nigiri combo approximately 44-hours prior to this intestinal event. It is therefore within the range of the accepted incubation period for intestinal anisakiasis and probable that the infestation would have originated with the nigiri combo purchased and consumed two days before the onset of symptoms” (*id.*).

As such, the primary issue is whether Mr. Monaco could have contracted the anisakiasis from the farm-raised salmon sushi within two days of ingestion – defendants’ expert says no; plaintiffs’ expert says yes. This is a question of material fact that precludes summary judgment at this time.

In any event, Cabrita’s testimony regarding the farmed fish prevents summary judgment in favor of defendants. Cabrita did not testify with specificity as to the diet of the farmed fish. As what the farmed fish were fed is unknown, defendants cannot establish that their supply chain was free from anisakis. As such, a finder of fact is required to determine whether defendants’ sushi caused Monaco’s intestinal episode.

Accordingly, it is ORDERED that defendants' Great Atlantic & Pacific Tea Company, Inc. d/b/a The Food Emporium, RSJ Group Corp. d/b/a Rosanjin Tribeca, and True World Foods New York, LLC respective motion and cross-motion for summary judgment are denied in total.

This constitutes the Decision and Order of the court.

11/19/2019

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE