SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

ERIK JOHNSON,

Plaintiff,

-against-

APPLE INC. and CPR CELL PHONE REPAIR,

Defendants.

Index No. 610339/2015

Mot Seq: 003 MG,

Decision/Order

The following papers were read upon these motions:

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Plaintiff moves this Court for an Order granting him leave to file and serve an amended verified complaint adding MMI-CPR, LLC (MMI) as a defendant in this action, pursuant to CPLR § 3025 (b), and amending the caption accordingly. Defendant CPR Cell Phone Repair (CPR) opposes the requested relief.

Plaintiff commenced this personal injury action in 2015, after he allegedly suffered burns and other injuries on February 14, 2015, when his Apple iPhone 5c experienced a thermal event while the phone was in his pants pocket.

The complaint alleges three causes of action against Apple sounding in breach of the warranties of merchantability and fitness, defective product (strict product liability), and negligent manufacture of the phone (negligent product liability). Regarding CPR, the complaint alleges a cause of action sounding in negligent repair of the phone in January 2015. Specifically, plaintiff alleges that CPR "caused an unsafe and hazardous condition" with the phone when it repaired the phone's screen. The Bill of Particulars alleges that CPR was careless, reckless and negligent in the replacement/repair of the phone's screen, specifying, *inter alia*, that CPR failed to warn plaintiff about overheating and exploding, failed to effectively test the phone before giving it back to plaintiff, and failed to obey industry standards.

The instant motion to add MMI as a direct defendant was made on January 26, 2018. Plaintiff submits, *inter alia*, the original complaint and answers, the first supplemental Bill of Particulars alleged against CPR, the proposed amended complaint, CPR's responses to discovery, the deposition testimony of CPR's owner/operator, Nigan Vyas, and the franchise operations manual. Exhibit 4 is the proposed amended complaint containing a fifth cause of action alleged against MMI. Apart from alleging that MMI is the franchisor of CPR, the proposed amendment reads in pertinent part as follows:

> 70. That due to the negligence (sic) actions of CPR Cell Phone Repair in fulfilling its obligations under the franchise agreement the plaintiff was caused to suffer injuries.
>
> 71. That defendant MMI-CPR, LLC exercised complete dominion and control over the daily operations of defendant CPR Cell Phone Repair's business and that such dominion and control resulted in the plaintiff's injury.

It is undisputed that, on or about September 22, 2016, CPR disclosed in its responses to Apple's request for production of documents its status as a franchisee of MMI. As part of that disclosure, CPR provided an "Agreement Amending Franchise Agreement," a "Rider," a "Cell Phone Repair Marketing Campaign Participation Agreement," and a "Franchise Operations Manual." CPR also responded that, "CPR is not in possession of the original full Franchise Agreement, which was sent to the original Franchisor [CPR-Cell Phone Repair Franchise Systems, Inc.]. CPR is in the process of tracking down the original and shall make this available to the parties when it is in our possession."[1] To date, it is further undisputed that the full Franchise Agreement has not been disclosed by CPR, only pages 1 and 38 thereof.

CPR's owner/manager, Nigan Vyas, testified at deposition held on September 28, 2017, during which Vyas was questioned not only about the repairs made to plaintiff's phone on two occasions before it experienced the thermal event, but also about CPR's business relationship with its franchisor, MMI. Vyas' deposition was completed on September 28, 2017. Vyas testified that he entered into the franchise agreement on April 1, 2011, which is the date appearing on page 1 of the Franchise Agreement that was disclosed by CPR in response to Apple's demands.

The Court recognizes that leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (***CPLR § 3025***, ***Northbay Construction Co., Inc. v. Bauco Construction Corp.,*** 275 AD2d 310 [2d Dept 2000]; ***Sewkarran v. DeBellis,*** 11 AD3d 44 [2d Dept 2004]), and unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit (***Smith-Hoy v. AMC Property Evaluations, Inc.***, 52 AD3d 809 [2d Dept 2008] *citing* ***Lucido v. Mancuso***, 49 AD3d 220 [2d Dept 2008]). Leave to amend to add a party is subject to the same permissive standard as adopted in determining a motion for leave to amend a pleading pursuant to CPLR § 3025 (b) (***Pansini Stone Setting, Inc. v. Crow and Sutton Associates, Inc.***, 46 AD3d 784 [2d Dept 2007]).

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[1] At some point in time after CPR became a franchisee, the original franchise was purchased by MMI-CPR, LLC.

"[A] plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance" (***Lucido***, ***supra*** at 227). Only "where the lack of merit of a proposed [amendment] is clear and free from doubt" should the motion be denied on that basis (***Id.***). "No evidentiary showing of merit is required under CPLR 3025 (b)" (***Id.*** at 229; *see also* ***Krakovski v. Stavros Associates, LLC***, 2019 NY Slip Op 05112 [2d Dept 2019]; ***MBIA Insurance Corporation v. J.P. Morgan Securities, LLC***, 144 AD3d 635 [2dDept 2016]).

Also, "[m]ere lateness is not a basis for denying an amendment; '[i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'" (***Krakovski***, ***supra*** at 3, *quoting* ***Public Administrator of Kings County v. Hossain Construction Corp.***, 27 AD3d 714 [2d Dept 2006]).

Here, CPR opposes the instant motion alleging that "[p]laintiff's argument is a fallacy intended only to bring a deep pocket into this action because CPR does not have insurance to cover any judgment in the unlikely event it would be found liable for plaintiff's injuries." CPR also states that the "preliminary training [provided by MMI to Mr. Vyas] and an operations manual for its individual franchise . . . does not rise to the level required to find MMI-CPR, LLC liable for any alleged negligence committed by CPR. Thus, the proposed amendment lacks merit and should be denied." CPR's argument in this regard relies upon caselaw holding that franchisors cannot be held liable for a franchisee's negligence if the franchisor does not exercise dominion and control over the franchisee's daily operations that caused a plaintiff's injury. The fact that CPR opposes the instant motion on behalf of MMI raises the question as to how much control MMI exerts over CPR because, logically, it seems that it would be to CPR's advantage to have an additional defendant in this action who may share in any potential liability.

That said, the Court is aware that a franchisor may not be held vicariously liable for the acts of its franchisee merely because of its status as a franchisor; rather the most significant factor in determining whether a franchisor may be held vicariously liable for its franchisee's acts is the degree of control that the franchisor exercises over the daily operations of the franchisee, specifically the manner of performing the very work in the course of which the accident occurred (***Khanimov v. McDonald's Corporation***, 121 AD3d 1050 [2d Dept 2014]; ***Repeti v. McDonald's Corporation***, 49 AD3d 1089 [3d Dept 2008]; ***Hart v. Marriott International, Inc.***, 304 AD2d 1057 [3d Dept 2003]; ***Schoenwandt v. Jamfro Corp.***, 261 AD2d 117 [1st Dept 1999]; ***Andreula v. Steinway Baraqfood Corp.***, 243 AD2d 596 [2d Dept 1997]). The Court's function on the instant motion, however, is not to determine liability, but merely to determine if it is "clear and free from doubt" that the proposed addition of MMI as a defendant in this action is lacking in merit.

Mr. Vyas' deposition testimony and the submitted operations manual, in the context of the permissive standard to be applied to motions of this kind, do not demonstrate that the proposed addition of MMI as a defendant is patently without merit, especially in the absence of the complete Franchise Agreement. CPR is the party to this litigation that has failed to provide the complete Franchise Agreement that would presumably further illuminate the Court as to the terms and conditions of the franchisor-franchisee relationship existing between it and MMI. It

may well be that MMI possesses the complete Agreement entered into by the parties on April 1, 2011.

CPR also claims that it will suffer "significant prejudice" if plaintiff is allowed to amend his pleading since all the depositions have been completed and CPR "will incur the cost of repeating the depositions all over again" when MMI engages in discovery. CPR further claims that it will be "hindered in the preparation of its case due to the likelihood that [MMI] would have destroyed crucial records pursuant to its normal document destruction policies, and any witness recollections have likely faded further." CPR also raises the timeliness of the instant motion.

The Court does not find these arguments to be persuasive. CPR's speculation about plaintiff's motive for seeking to add MMI as a defendant is irrelevant to the determination of the instant motion. Furthermore, CPR's contention that MMI would have destroyed records "pursuant to its normal document destruction policies" is equally speculative. It is unknown if MMI has record-destruction policies, and if so, what those policies are, and/or how CPR would be aware of those policies. In short, CPR provides no factual basis for these claims.

Plaintiff's motion is granted in its entirety. Leave to file and serve the proposed Amended Summons and Amended Verified Complaint contained in plaintiff's Exhibit 4 is granted, and the caption of this action shall be amended to include MMI-CPR, LLC as the second-named defendant in this action.

The proposed Amended Summons and Amended Verified Complaint is deemed filed as of the date of this Order. Service upon MMI-CPR, LLC shall be made in accordance with the applicable provisions of the CPLR.

Plaintiff shall serve all parties who have appeared, and the Suffolk County Clerk, with a copy of this Decision and Order within 15 days from the date hereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 24, 2019
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

Seq 003: FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]