SHORT FORM ORDER

INDEX No. 16-618852
CAL. No. 19-00101OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 6-20-19 (002 & 003)
ADJ. DATE 8-1-19
Mot. Seq. # 002 - MotD
003 - MotD

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KIM RILEY-MURPHY,

Plaintiff,

- against -

COMMUNITY AMBULANCE COMPANY, INC., LOUGHLIN VINEYARDS, INC., ZEGEL CLAM LTD., CAPTREE CLAM, INC. and LONG ISLAND CLAM, INC.,

Defendants.

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Upon the following papers numbered read on these e-filed motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant Loughlin Vineyards, Inc., dated May 13, 2019; by defendant Community Ambulance Company, Inc., dated May 16, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated July 18, 2019; Replying Affidavits and supporting papers by defendant Loughlin Vineyards, Inc., dated July 30, 2019; by defendant Community Ambulance Company, Inc., dated July 31, 2019; Other Amended Notice of Motion, by Loughlin Vineyards, Inc., dated June 6, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 002) by defendant Loughlin Vineyards, Inc., and the motion (seq. 003) by defendant Community Ambulance Company, Inc., are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Loughlin Vineyards, Inc., dismissing the complaint and the cross claims against it is granted in part and denied in part; and it is further

ORDERED that the motion by defendant Community Ambulance Company, Inc., dismissing the complaint against it is granted in part and denied in part.

Plaintiff Kim Riley-Murphy commenced this action to recover damages for injuries she allegedly sustained as a result of consuming raw oysters on July 16, 2016, during an event in honor of nonparty Jamie Atkinson, which was hosted by defendant Community Ambulance Company, Inc. The subject event allegedly occurred at the premises known as Loughlin Vineyards, located at 255 to 299 County Road 65 in Sayville, New York, which is owned by defendant Loughlin Vineyards, Inc. Atkinson allegedly ordered the defective oysters from defendant Zegel Clam Ltd., for the subject event. Defendants Long Island Clam, Inc., and Captree Clam, Inc., allegedly supplied raw oysters and clams to Zegel Clam Ltd., at the time of the incident. Long Island Clam, Inc., allegedly supplied the raw clams and oysters served at the subject event. Plaintiff alleges claims for strict products liability, breach of implied and express warranties, and common-law negligence. By the complaint, as amplified by the bill of particulars, plaintiff alleges that defendants were negligent in, among other things, the preparation, the handling, the storage, and the distribution of shellfish. By order dated January 26, 2018, the Court (Pitts, J.) granted plaintiff's motion for a default judgment in her favor and against defendants Captree Clam, Inc., and Long Island Clam, Inc., on the issue of their liability.

Loughlin Vineyards, Inc., now moves for summary judgment dismissing the complaint and the cross claims against it. It contends that the claims against it for strict products liability and breach of implied warranty must be dismissed, because it did had no connection or involvement with the food ordered at the subject event. Loughlin Vineyards, Inc., also contends that the claim against it for breach of express warranty must be dismissed, as it made no statement to plaintiff on the date of the incident. In addition, Loughlin Vineyards, Inc., contends that the claim sounding in common-law negligence should also be dismissed, because it owned no duty to plaintiff, as it lacked the requisite awareness to be held liable for the conduct of third parties. In support of its motion, Loughlin Vineyards, Inc., submits, among other things, the deposition testimony of plaintiff, Marc MacDonnell, Omar Carrion, and Patricia Jones. The Court notes that it considered Loughlin Vineyards, Inc.'s amended notice of motion (*see* CPLR 3025 [a]).

Community Ambulance Company, Inc., also moves for summary judgment dismissing the complaint against it. It contends that the claims against it for strict products liability and breach of implied warranty should be dismissed, because it did not manufacture, sell, or distribute the allegedly defective products. Community Ambulance Company, Inc., also contends that the claim for breach of express warranty should be dismissed, because it made no statement to plaintiff which induced her to consume the allegedly defective oysters. In support of its motion, Community Ambulance Company, Inc., submits, among other things, the deposition testimony of plaintiff, Marc MacDonnell, Omar Carrion, and Patricia Jones. In opposition to the motions by Loughlin Vineyards, Inc., and Community Ambulance Company, Inc., plaintiff contends that triable issues of fact remain which preclude the award of summary judgment.

According to plaintiff's testimony, she and her husband arrived at the subject event at approximately 12:00 p.m. on the date of the incident. It allegedly was a warm and sunny day. Plaintiff stated that there were approximately six tables set up outside for the subject event. Plaintiff also stated that there were at least two tables with food, one of which contained seafood including raw oysters and clams. The raw oysters allegedly were placed over ice. She did not recall whether the oysters were displayed in a shaded area. Plaintiff allegedly did not observe how the oysters were transported to the subject event.

Plaintiff testified that a female was removing the oysters from their shells and was serving the clams and the oysters. She further testified that she was served approximately six raw oysters within an hour of her arrival at the subject event, and that she consumed at least three raw oysters within ten minutes of obtaining them. The raw oysters allegedly neither exhibited an unusual texture nor exuded an unusual odor. Plaintiff allegedly did not take any other food from the table containing seafood.

Patricia Jones testified that she was president of Loughlin Vineyards, Inc., at the time of the incident, and that she has been an owner since 2017. According to Jones' testimony, the subject premises consisted of 15 acres, which included a vineyard, tasting room, storage facility, and processing plant. Jones further testified that the only beverages available at the tasting room were water and wine. She testified that Loughlin Vineyards, Inc., provided crackers for its customers to cleanse their palettes following a tasting. The tasting room allegedly accommodated approximately 22 to 25 people. Jones testified that although the property is not available for groups or organizations to lease or to use for special events, Loughlin Vineyards had been used to host parties. She further testified that no food, refrigeration, cooking facilities, or serving utensils were provided by Loughlin Vineyards, Inc., at such parties.

Jones testified that her father was the prior owner of Loughlin Vineyards, Inc., until his death in 2017, and that he was an honorary member of Community Ambulance Company, Inc. According to her testimony, her father had donated a portion of Loughlin Vineyards for Community Ambulance Company, Inc.'s use for the subject event, and that she was not involved in organizing it. Jones further testified that it appeared that an individual by the name of Stephanie from Community Ambulance Company, Inc., appeared to have some control over the setup of the subject event. Jones stated that she did not have any conversation regarding Stephanie's responsibilities for the subject event because Loughlin Vineyards, Inc., "ha[d] done prior events like this for them, so everyone kind of kn[ew] their job description."

Jones testified that she was present at Loughlin Vineyards on the subject date, but that she did not attend the subject event. According to Jones' testimony, Loughlin Vineyards was open on the date of the incident. Her father and her sister were also present on the property on the subject date. Loughlin Vineyards, Inc., allegedly had no other employees present on the subject premises on the date of the incident. Jones allegedly was working in the tasting room during the duration of the subject event. According to Jones' testimony, guests started arriving for the subject event after 11:00 a.m., and a truck arrived at the property between 11:00 and 11:30 a.m. The subject event allegedly started at approximately 11:00 a.m., and ended at approximately 3:00 p.m. There allegedly were approximately 75 and 80 people at the subject event. Jones testified that she did not see anyone set up the picnic tables to display food. She further testified that she never saw any shellfish displayed or any servers present at the subject event.

Construction tape allegedly was used to designate an outside area of approximately 30 feet by 12 feet reserved for Community Ambulance Company, Inc.'s use for the subject event. According to Jones' testimony, Loughlin Vineyards, Inc., permitted Community Ambulance Company, Inc., to use three of its picnic tables for the subject event. It allegedly did not offer to provide any services for the subject event. Jones testified that Loughlin Vineyards, Inc., did not provide cooking tools, napkins, or utensils for the subject event. Community Ambulance Company, Inc., allegedly removed all of the trash from the subject event. No one from Loughlin Vineyards, Inc., allegedly requested that Community Ambulance Company, Inc., obtain permits from governmental or state agencies prior to the subject event. Jones stated that Loughlin Vineyards, Inc., did not provide ice or coolers for the subject event.

Marc MacDonnell testified that he served as the treasurer and the business manager of Community Ambulance Company, Inc., which is a volunteer ambulance service, for 25 years. He stated that he handled the financial workings of Community Ambulance Company, Inc., including check issuances, deposits, and bank transactions. He testified that Community Ambulance Company, Inc., held special events, including events honoring former chiefs, when new ambulances came into service. MacDonnell testified that no payment or advance notice was required to attend the subject event. He further testified that the subject event was not a fundraising event.

MacDonnell testified that the subject event was catered by an entity known as The Fish Store, which was hired by Community Ambulance Company, Inc. Community Ambulance Company, Inc., allegedly did not transport the food. MacDonnell further testified that Community Ambulance Company, Inc., did not order clams and oysters from The Fish Store. MacDonnell allegedly was not aware that clams and oysters were being purchased from Long Island Clam, Inc., or Zegel Clam Ltd., for the subject event. He also stated that Community Ambulance Company, Inc., never received any invoices for the clams or the oysters served at the subject event. Mac Donnell testified that Atkinson had not ordered clams and oysters at previous Community Ambulance Company, Inc., events.

According to MacDonnell's testimony, Community Ambulance Company, Inc., provided ice for beer and soda, which was transported by it. MacDonnell testified that Community Ambulance Company, Inc., did not provide services to open clams or oysters at the subject event, and that he did not know who provided such services. Community Ambulance Company, Inc., allegedly did not arrange to have servers at the subject event. MacDonnell allegedly was not present at the subject event.

Omar Carrion testified that he is the president and the owner of Zegel Clam Ltd. He testified that his responsibilities included receiving orders. Atkinson allegedly placed an order directly with Carrion for raw clams and oysters. Carrion testified that he provided Atkinson with the total cost, which included the costs of the clams, the oysters, and the shuckers. He stated that Long Island Clam, Inc., supplied the clams and the oysters for the subject event. Carrion testified that Phil Holewinski loaded the clams and the oysters in a cooler with ice for delivery in his pick-up truck at approximately 10:45 a.m. on the date of the subject event.

According to Carrion's testimony, he never spoke with anyone from Community Ambulance Company, Inc., regarding the clams and the oysters for the subject event. Carrion testified that he never spoke with anyone from Loughlin Vineyards, Inc., prior to the subject event. He also testified that he never made any deliveries or had been requested to deliver any seafood products to events that were coordinated or organized by Community Ambulance Company, Inc., before this occasion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party 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* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

A manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition may be held strictly liable for injury caused by such a product regardless of privity, foreseeability, or the exercise of due care (*see* ***Finerty v Abex Corp.***, 27 NY3d 236, 32 NYS3d 44 [2016]; ***Sukljian v Ross & Son Co.***, 69 NY2d 89, 511 NYS2d 821 [1986]; ***Tyminskyy v Sand Man Bldg. Materials, Inc.***, 168 AD3d 1118, 92 NYS3d 409 [2d Dept 2019]). A product may be defective due to a mistake in manufacturing, an improper design, or a failure to provide adequate warnings regarding its use (*see* ***Matter of New York City Asbestos Litig.***, 27 NY3d 765, 37 NYS3d 723 [2016];

Voss v Black & Decker Mfg. Co., 59 NY2d 102, 463 NYS2d 398 [1983]; ***Mendez-Canales v Agnelli Macchine S.R.L.***, 165 AD3d 646, 85 NYS3d 188 [2d Dept 2018]). The Court of Appeals has stated that strict liability more appropriately applies to sellers who engage in product sales in the ordinary course of their business (*see* ***Sprung v MTR Ravensburg***, 99 NY2d 468, 758 NYS2d 271 [2003]). Such sellers "may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods" (***Finerty v Abex Corp.***, *supra* at 241, quoting ***Sukljian v Ross & Son Co.***, *supra* at 95; *see* Restatement [Second] of Torts § 402A, Comment *c*).

The implied warranty of merchantability is a guarantee by the seller that "goods 'are fit for the intended purpose for which they are used and that they will pass in the trade without objection'" (***Fahey v A.O. Smith Corp.***, 77 AD3d 612, 617, 908 NYS2d 719, 724 [2d Dept 2010], quoting ***Wojcik v Empire Forklift, Inc.***, 14 AD3d 63, 66, 783 NYS2d 698, 700 [3d Dept 2004]; *see* UCC 2-314; ***Saratoga Spa & Bath v Beeche Sys. Corp.***, 230 AD2d 326, 656 NYS2d 787, 35 [3d Dept 1997]). The implied warranty of merchantability only applies where a seller is a merchant that holds itself out as having knowledge or skills relating to goods of that kind (*see* UCC 2-104 [1]; UCC 2-314 [1]; *see* ***Simmons v Washing Equip. Tech.***, 51 AD3d 1390, 857 NYS2d 412 [4th Dept 2008]). The implied warranty of fitness arises "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods" (UCC 2-315; *see* ***Simmons v Washing Equip. Tech.***, *supra*).

To establish a cause of action for breach of an express warranty, a plaintiff must demonstrate that the defendant breached a specific representation made by the seller regarding a product upon which the buyer relied upon (*see* ***Aracena v BMW of N. Am., LLC***, AD3d 664, 71 NYS3d 614 [2d Dept 2018]; ***Schimmenti v Ply Gem Indus.***, 156 AD2d 658, 549 NYS2d 152 [2d Dept 1989]). Pursuant to Uniform Commercial Code § 2-313 (1) (a) and (b), "any description of the goods, or affirmation of fact or promise relating to the goods, which is made part of the basis of the bargain creates an express warranty that the goods shall conform to such description, affirmation or promise" (***Nigro v Lee***, 63 AD3d 1490, 1491, 882 NYS2d 346, 347 [3d Dept 2009]). Accordingly, a party that is outside the manufacturing, selling, or distribution chain cannot be held liable under theories of strict products liability or breach of warranty (*see* ***Dann v Family Sports Complex, Inc.***, 123 AD3d 1177, 997 NYS2d 836 [3d Dept 2014]; ***Mussara v Mega Funworks, Inc.***, 100 AD3d 185, 952 NYS2d 568 [2d Dept 2012]; ***Quinones v Federated Dept. Stores, Inc.***, 92 AD3d 931, 939 NYS2d 134 [2d Dept 2012]; ***Spallholtz v Hampton C.F. Corp.***, 294 AD2d 424, 741 NYS2d 917 [2d Dept 2002]; ***Joseph v Yenkin Majestic Paint Corp.***, 261 AD2d 512, 690 NYS2d 611 [2d Dept 1999]).

To hold a defendant liable in common-law negligence, a plaintiff must demonstrate a duty owed by the defendant to him or her, a breach of such a duty, and that the breach constituted a proximate cause of his or her injuries (*see* ***Mendez-Canales v Agnelli Macchine S.R.L.***, *supra*; ***Hamdamova v New Dawn Tr., LLC***, 163 AD3d 786, 81 NYS3d 495 [2d Dept 2018]; ***Pasquaretto v Long Is. Univ.***, 150 AD3d 1129, 52 NYS3d 646 [2d Dept 2017]). A property owner, or one in possession or control of property, has a duty to take reasonable measures to control the foreseeable conduct of third parties on its property to prevent them from intentionally harming or creating an unreasonable risk of harm to others (*see* ***Morris v Chase Bank***, 125 AD3d 731, 4 NYS3d 105 [2d Dept 2015]; ***Tiranno v Warthog, Inc.***, 119 AD3d 772, 990 NYS2d 248 [2d Dept 2014]; ***Couture v Miskovitz***, 102 AD3d 723, 961 NYS2d 192 [2d Dept 2013]). Such a duty arises when there is an ability to and opportunity to control the third-party's conduct, and an awareness of the need to do so (*see* ***Morris v Chase Bank***, *supra*; ***Tiranno v Warthog, Inc.***, *supra*; ***Couture v Miskovitz***, *supra*). A property owner or party in possession cannot be held to a duty to take protective measures unless he or she either knows or has reason to known from past experience "that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor" (***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 519, 429 NYS2d 606, 614 [1980], quoting Restatement [Second] of Torts

§ 344, Comment *f*; *see* ***Tiranno v Warthog, Inc.***, *supra*; ***Jean v Wright***, 82 AD3d 1163, 919 NYS2d 377 [2d Dept 2011]).

Loughlin Vineyards, Inc., and Community Ambulance Company, Inc., established their prima facie entitlement to summary judgment dismissing the claims for strict products liability and breach of implied and express warranties (*see* ***Dann v Family Sports Complex, Inc.***, *supra*; ***Mussara v Mega Funworks, Inc.***, *supra*; ***Quinones v Federated Dept. Stores, Inc.***, *supra*; ***Joseph v Yenkin Majestic Paint Corp.***, *supra*). They established, prima facie, that they were outside of the manufacturing, selling, or distribution chain of the allegedly defective oysters (*see* ***Dann v Family Sports Complex, Inc.***, *supra*; ***Mussara v Mega Funworks, Inc.***, *supra*; ***Quinones v Federated Dept. Stores, Inc.***, *supra*; ***Joseph v Yenkin Majestic Paint Corp.***, *supra*). In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Mussara v Mega Funworks, Inc.***, *supra*; ***Quinones v Federated Dept. Stores, Inc.***, *supra*; ***Joseph v Yenkin Majestic Paint Corp.***, *supra*).

However, Loughlin Vineyards, Inc., and Community Ambulance Company, Inc., failed to establish their prima facie entitlement to summary judgment dismissing the claims sounding in common-law negligence (*see* ***Tiranno v Warthog, Inc.***, *supra*; ***Boderick v RY Mgt. Co., Inc.***, 71 AD3d 144, 897 NYS2d 1 [1st Dept 2009]). Contrary to Loughlin Vineyards, Inc.'s contention, it failed to eliminate triable issues of fact as to whether it had the knowledge, authority, or opportunity to control the conduct of the third parties supplying and serving food on its premises, and as to whether such conduct posed a reasonably foreseeable risk of harm to others (*see* ***Tiranno v Warthog, Inc.***, *supra*). Although neither Loughlin Vineyards, Inc., nor Community Ambulance Company, Inc., prepared the food, there are issues of fact as to whether they were responsible for its proper storage and service (*cf.* ***Amit v Hineni Heritage Ctr.***, 49 AD3d 574, 856 NYS2d 146 [2d Dept 2008]). As Loughlin Vineyards, Inc., failed to establish its freedom from negligence in the happening of plaintiff's accident, that branch of its motion for summary judgment dismissing the cross claims against it for indemnification and contribution is denied (*see* ***Gatto v Coinmach Corp.***, 172 AD3d 1176, 101 NYS3d 390 [2d Dept 2019]; ***Dow v Hermes Realty, LLC***, 155 AD3d 824, 63 NYS3d 698 [2d Dept 2017]; ***Martin v Huang***, 85 AD3d 1132, 926 NYS2d 622 [2d Dept 2011]).

Accordingly, the motions for summary judgment by defendants Loughlin Vineyards, Inc., and Community Ambulance Company, Inc., are granted in part and denied in part.

Dated: Riverhead, New York
January 9, 2020

VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION