IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HORACE M. McCLAIN,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N09C-06-275 PLA
v.	)	
	)	
McDONALD'S RESTAURANTS OF DELAWARE, INC.,	)	
	)	
	)	
Defendant.	)	

Submitted: May 16 2011
Decided: July 5, 2011

UPON DEFENDANT McDONALD'S RESTAURANTS
OF DELAWARE, INC.'S MOTION FOR SUMMARY JUDGMENT
GRANTED
UPON PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT
DENIED
UPON PLAINTIFF'S MOTION TO VACATE
DENIED

Edward J. Fornias, III, Esquire, ROEBERG, MOORE & FRIEDMAN, P.A., Wilmington, Delaware, Attorney for Plaintiff.

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ABLEMAN, JUDGE

I. Introduction

In this personal injury action, the Court must determine the consequences of the plaintiff's misidentification of the location where he was injured and the proper defendant. Plaintiff Horace McClain filed suit in June 2009 against six owners or operators of different McDonald's restaurants, alleging that he was injured in the course of delivering a refrigerator to a McDonald's in Elsmere two years before. After counsel for the defendants requested confirmation of the location where McClain's accident took place, a stipulated order was entered dismissing all of the defendants except for McDonald's Restaurants of Delaware, Inc. ("MROD"), which was apparently the sole entity responsible for operating the Elsmere McDonald's.

Almost a year after entry of the stipulated order of dismissal, McClain's deposition revealed that his accident actually occurred at a different McDonald's restaurant, which was separately operated by McDonald's Corporation. Based upon this information, MROD moves for summary judgment on McClain's claims against it. In response, McClain seeks to vacate the stipulated order of dismissal and amend his complaint to correct the location of the litigated incident and re-assert claims against McDonald's Corporation. McClain argues that the prejudice to McDonald's Corporation is minimal because it had been named as a defendant in his initial complaint.

Upon review of the record and applicable law, the Court finds that the absence of any reasonable explanation for McClain's repeated misidentification of the premises, his lack of diligence in identifying the correct location in response to defense counsel's inquiries, the expiration of the limitations period, and the risk of significant undue prejudice to McDonald's Corporation all weigh against permitting amendments to the complaint that would relate back to the time of filing in 2009. Similar considerations also prevent the Court from vacating the stipulated order of dismissal on the basis of excusable neglect or mistake. Therefore, McClain's motion to amend and motion to vacate are **DENIED** for the reasons discussed in this opinion. MROD cannot be considered a proper defendant in light of the inaccuracies in McClain's complaint, and its motion for summary judgment therefore must be **GRANTED**.

II. Factual and Procedural Background

McClain alleges that he suffered permanent injuries to his legs while delivering a refrigerator/freezer unit ("the refrigerator") to a McDonald's restaurant on June 26, 2007. McClain, who was employed at that time as a truck driver for McDermott Transportation Company, arrived at the restaurant and spoke to a manager. According to McClain, the McDonald's manager instructed him to bring the refrigerator in via a particular door. McClain indicated that he would require

assistance because accessing the selected door required lifting the refrigerator over a curb. The manager sent a Hispanic male employee to assist McClain.

McClain placed the refrigerator on a dolly, which he brought to the curb. McClain recounts that he positioned himself to lift the top of the dolly and instructed the McDonald's employee to lift the bottom of the dolly upon a count of three. McClain began to lift, but alleges that the assisting employee either did not lift or released the refrigerator, causing most of the weight of the unit to fall on McClain. McClain's knees buckled and he tore both of his quadriceps, necessitating emergency surgery.

McClain filed this suit on June 26, 2009. In his complaint, McClain brought negligence and premises liability claims against Dukart Management Corp. and five so-called "McDonald's entities": MROD; McDonald's Corporation; McDonald's Restaurant Operations, Inc.; McDonald's of Delaware, Inc.; and McDonald's Enterprises. The complaint states that the refrigerator delivery occurred at "a McDonald's Restaurant in Elsmere,"[1] and alleges "in the alternative" that each of the six defendants owned, operated, and controlled the restaurant where his accident occurred.

Counsel for the defendants wrote McClain's counsel on January 15, 2010, soon after entering his appearance in the case. The letter noted that during a

[1] Pl.'s Compl. ¶ 9.

September 22, 2009 teleconference between the attorneys, questions emerged regarding "whether the McDonald's Restaurant, on New Road in Elsmere, identified in the Complaint, is the correct restaurant."[2] These concerns arose because the Elsmere McDonald's had not received any notice of an incident until the filing of McClain's lawsuit. Defense counsel's letter confirmed that McClain's attorney had agreed to follow up on the issue, so that the identity of the proper defendant or defendants could be ascertained:

> You told us that you would discuss the question with Mr. McClain to verify the location of the accident. If, in fact, the accident occurred at the McDonald's on New Road, [MROD] would be the correct defendant and the other McDonald's entities, as well as Dukart Management, a McDonald's franchisee, could be dismissed leaving [MROD] as the only defendant.[3]

One week later, McClain's counsel responded by e-mail, confirming that the "[a]ccident happened at the Ellsmere [*sic*] McDonalds, on the Wilmington side of the bridge right before [Delaware Route] 100. I believe it is New Road."[4] McClain's counsel promised to stipulate to the dismissal of "the entities not associated with this location" based upon the representations of defense counsel that the stipulation "will leave in the case only defendants who could be potentially

[2] Def. MROD's Mot. for Summ. J., Ex. B.

[3] *Id.*

[4] Def. MROD's Mot. for Summ. J., Ex. C.

liable for that location."[5] Consistent with this exchange, on March 22, 2010, McClain filed a stipulation and order to amend the caption and dismiss all of the original defendants except MROD.

McClain was deposed on March 9, 2011. During his deposition, McClain recalled that he had delivered refrigerators of various sizes before and had delivered to locations where he had to lift over a curb, although it was unusual.[6] He explained that he knew the refrigerator he was delivering to the McDonald's restaurant was too heavy for him to lift over the curb without assistance, and stated that if the restaurant had not been able to provide a capable employee to help him, he would have contacted McDermott Transportation's dispatcher to get a co-worker's help.

After McClain testified to the circumstances of his injury, defense counsel showed him a series of photographs of the Elsmere McDonald's restaurant operated by MROD. McClain did not recognize in the photographs key features of the restaurant where his injury occurred. He provided a bill of lading from the delivery, which revealed that the litigated incident took place at a different McDonald's restaurant, located in Prices Corner on Kirkwood Highway.[7] The

[5] *Id.*

[6] Horace McClain Dep. Tr., Mar. 9, 2011, at 69:2-17.

[7] *Id.* at 82:6-84:14.

Prices Corner McDonald's is controlled by McDonald's Corporation, not MROD. Although the address on the bill of lading listed the restaurant's location as Wilmington, McClain explained that "I don't know Elsmere from Wilmington," as he paid attention only to street addresses when making deliveries.[8]

III. Parties' Contentions

Soon after McClain's deposition, MROD moved for summary judgment, raising two alternative arguments. MROD first contends that McClain's deposition testimony that he knew that he could not safely lift the refrigerator himself and would have called McDermott Transportation for assistance if potential help was not available on-site constitute an admission that his negligence allegations are not sustainable. Second, MROD asserts that McClain's complaint is defective for failing to identify the correct restaurant location. According to MROD, McClain's "failure to provide correct information" placed it "at material disadvantage in defending the case since it has not been able to locate any employees who have any knowledge related to McClain's allegations."[9]

McClain filed a response to MROD's summary judgment motion, as well as a motion to vacate the March 30, 2010 stipulation and order dismissing McDonald's Corporation and a motion to amend his complaint to reflect that the

[8] *Id.* at 85:22-86:8.

[9] Def. MROD's Mot. for Summ. J. 4.

incident occurred at the Prices Corner McDonald's. McClain concedes that his complaint misidentified the location of the delivery, but emphasizes that McDonald's Corporation, which operates the Prices Corner McDonald's, was originally named and served in this case. McClain submits that the stipulation dismissing McDonald's Corporation arose from a mutual mistake regarding the location of his accident, and that it should be vacated now that the correct location has been identified. Because "payroll records, time sheets or other information which might suggest the identities of the witnesses to the incident are still in the possession of a McDonald's Defendant," McClain suggests that vacating the stipulation to re-name McDonald's Corporation as a defendant and amending the complaint to describe the proper premises would result in only minimal prejudice.[10]

In addition, McClain argues that he has supported his claims of negligence. He re-asserts the theories expressed in his complaint that the McDonald's restaurant to which he delivered the refrigerator negligently directed him to deliver the unit through a service door that required navigating a curb and that the employee sent to assist negligently failed to lift or dropped his load. Although McClain testified that McDonald's did not have an obligation or duty to provide a curb-free ingress or offer its employee's assistance in lifting the refrigerator, he

[10] Pl.'s Mot. to Amend Compl. ¶ 5.

suggests that these statements were essentially irrelevant lay opinion, not concessions on the legal issues of duty or breach.

IV. Analysis

McClain does not dispute that his claims against MROD are unsupportable in light of his testimony and documentation establishing that the accident occurred at the Prices Corner McDonald's.[11] There is no evidence that MROD bore any responsibility for that location. Accordingly, MROD is entitled to summary judgment based upon the absence of any material factual dispute regarding its liability.[12]

McClain's ability to proceed with his suit therefore depends upon whether he may assert corrected claims against McDonald's Corporation that relate back to the filing of his initial complaint, which occurred on the last day of the two-year

[11] Under Superior Court Civil Rule 9(b), circumstances constituting alleged negligence must be pled with particularity. Rule 9(f) further provides that "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." This Court has previously held that "the requisite particularity [under Rule 9] includes some indication of the time and place of the alleged injuries." *Archie v. 4520 Corp.*, 2003 WL 832549, at *1 (Del. Super. Mar. 3, 2003).

[12] Because McClain has conceded his misidentification of the premises, the Court does not reach MROD's argument that his negligence allegations against it are substantively undermined by his deposition testimony that McDermott Transportation could have provided lifting assistance and that he did not believe that the restaurant where he was injured was responsible for providing a curb-free ingress.

limitations period applicable to his claims.[13] When a party seeks to amend a pleading after a responsive pleading has been served, amendment is available "only by leave of court or by written consent of the adverse party."[14] Superior Court Civil Rule 15(a) provides that leave to amend "shall be freely given when justice so requires."[15] Nevertheless, "justice may not require that leave to amend be freely given if the party seeking to amend has been inexcusably careless, or if the amendment would unfairly prejudice an opposing party."[16]

The existence of unfair prejudice is evaluated in light of Rule 15(c), which addresses the circumstances under which amendments to a pleading will relate back to the date of the original pleading. Under Rule 15(c), where a party seeks to change the party against which it asserts a claim, the movant must satisfy three criteria:

> (1) The claim asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;
> (2) Within the period provided by statute or the Superior Court Civil Rules for service of the summons and complaint, the party to be brought in

[13] *See* 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained[.]").

[14] Super. Ct. Civ. R. 15(a).

[15] *Id.*

[16] *Hess v. Carmine*, 396 A.2d 173, 176 (Del. Super. 1978) (citing *Annone v. Kawasaki Motor Corp.*, 316 A.2d 209 (Del. 1974)).

> by amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and
> (3) The party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[17]

If leave to amend would otherwise be freely given, it will be "given with a relation-back consequence if the requirements of Rule 15(c) are met."[18]

Because McClain's motion to amend arises from his own inexcusable neglect and would unfairly prejudice McDonald's Corporation if granted, the Court cannot permit his proposed amendment. McClain's protracted failure to identify the correct McDonald's location, and thus the correct defendant, cannot be explained other than by inexcusable carelessness. Counsel for MROD and McDonald's Corporation raised concern about McClain's premises identification as early as September 2009, before any answer to the complaint was filed. If the ubiquity of the McDonald's brand did not alert McClain and his counsel to the importance of verifying the correct premises out of numerous possibilities, defense counsel's letter directly raised the issue. In January 2010, McClain's counsel stated to defense counsel that the complaint properly identified the Elsmere McDonald's as the location of his accident. McClain made the delivery, and apparently kept the bill of lading in his possession from the time of the incident. It

[17] Super. Ct. Civ. R. 15(c).

[18] *Annone*, 316 A.2d at 211.

is difficult to perceive any more reasonable and circumspect course of action defense counsel could have undertaken to obtain the correct location, and even more difficult to understand how or why McClain and his counsel persisted in their misidentification. Under the circumstances, the misstatements of fact contained in the complaint and in plaintiff's counsel's communications are wholly ascribable to neglect on plaintiff's part. McClain has not offered any explanation to excuse those misstatements, nor is any reasonable justification apparent from the record before the Court.[19]

[19] In interpreting and applying Federal Rule of Civil Procedure 15(c)(1)(C)(ii), the United States Supreme Court recently held that the inquiry into whether a defendant to be brought in by amendment "knew or should have known that the action would have been brought against it, but for a mistake" concerning its identity must focus on "what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known" when the original complaint was filed. *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2493 (2010). The Supreme Court's decision casts some doubt on prior federal court opinions holding that a plaintiff's failure to exercise reasonable diligence in correctly identifying defendants precludes relation-back under Rule 15(c). *See, e.g.*, *In re Enron Corp. Sec.*, 465 F. Supp. 2d 687, 723 (S.D. Tex. 2006). Nevertheless, the *Krupski* opinion allows that "[i]nformation in the plaintiff's possession" may be relevant under Rule 15(c), but only if it "bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity." 130 S. Ct. at 2493-94. In this case, McClain's failure to provide information in his possession regarding the location of his accident bears directly upon McDonald's Corporation's understanding of its dismissal. Moreover, the Court finds persuasive the proposition that a plaintiff's inexcusable neglect constitutes a valid consideration in its "exercise of discretion under Rule 15(a) whether to allow the change" in parties. 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1498.3 (3d ed.). This approach comports with both *Krupski* and Delaware case law. *See Krupski*, 130 S. Ct. at 2496 ("[A] court may consider a movant's 'undue delay' or 'dilatory motive' in deciding whether to grant leave to amend under Rule 15(a)."); *Annone*, 316 A.2d at 211 (stating that leave to amend may not be required in the interest of justice "if the party seeking to amend has been inexcusably careless"); *Hess*, 396 A.2d at 176; *Parker v. State*, 2003 WL 24011961, at *7 (Del. Super. Apr. 30, 2004).

Furthermore, allowing McClain's proposed amendment would significantly and unfairly prejudice McDonald's Corporation, such that subsections (b) and (c) of Rule 15(c) cannot be satisfied. McClain proposes that the prejudice to McDonald's Corporation is minimal because relevant evidence is "still in the possession of a McDonald's Defendant." This argument ignores the significant lapse in time since the limitations period expired, as well as the advanced status of this case. Discovery in this case closed March 4, 2011, and dispositive motions were due by March 21, 2011. The litigated event took place more than four years ago, and in those intervening years, McDonald's Corporation has had no opportunity to develop the facts or potential defenses to McClain's claims, nor has it been aware of any need to do so.

In essence, the "notice" McDonald's Corporation received of McClain's suit was notice of a materially different set of operative facts from those encompassed by McClain's proposed amendments. McClain cannot demonstrate that McDonald's Corporation "knew or should have known that, but for a mistake concerning the identity of the proper party" it would have remained a party, because his "mistake" did not stem directly from misnomer or misidentification of the defendant, but from a failure to ascertain the correct premises (and thus the responsible entity). Although McDonald's Corporation had notice of McClain's lawsuit when it was named as one of the original defendants, its premises were not

identified in the complaint and it was dismissed from the suit based upon statements by McClain's counsel from which it could reasonably conclude that it was not a proper defendant. From McDonald's Corporation's perspective, McClain's "mistake" occurred when it was named and served as a defendant in the first instance.

The existence of inexcusable neglect and the prospect of undue prejudice to McDonald's Corporation also prevent the Court from vacating the stipulated order that dismissed McDonald's Corporation from the case in March 2010. McClain's motion to vacate must be considered under Civil Rule 60(b)(1), which provides that the Court may relieve a party from an order on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." Although Rule 60(b) is given a liberal construction, "the burden is upon the movant to establish the basis for relief."[20] The moving party must show that one of the grounds for relief exists, and that the non-movant will not suffer substantial prejudice if the requested relief is granted.[21] Here, the considerations of undue prejudice discussed in the context of Rule 15 militate equally against permitting relief under Rule 60(b), as the prospect of substantial prejudice to McDonald's Corporation is evident.

[20] *Phillips v. Siano*, 1999 WL 1225245, at *2 (Del. Super. Oct. 29, 1999)

[21] *Battaglia v. Wilm. Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977); *Scureman v. Judge*, 1998 WL 409153 (Del. Ch. June 26, 1998), *on reh'g in part,* 747 A.2d 62 (Del. Ch. 1999).

Furthermore, McClain has not shown entitlement to relief on the basis of either mutual mistake or excusable neglect.

Where a party seeks relief from a consent judgment under Rule 60(b)(1) on the basis of "mistake," the movant must show a mutual mistake of fact.[22] Because the consent judgment is similar to a contract between the parties, "the Court should not allow a party to free himself from the judgment unless there is some theory in operation which would free him from a contract."[23] Given that the order of dismissal in this case resulted from a stipulated agreement between McClain and McDonald's Corporation, the Court considers that the same standard would apply here.

The Court utilizes the Restatement (Second) of Contracts approach to analyzing mutual mistake.[24] The doctrine of mutual mistake will not apply where the adversely-affected party assumed the risk of the mistake.[25] A party's fault in producing the mistake does not bar relief unless it "amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."[26] Illustration 2 to § 157 of the Restatement supports that a party's misrepresentation

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[22] *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 829 (Del. Super. 1976).

[23] *Id.*

[24] *Liberto v. Bensinger*, 1999 WL 1313662, at *15 (Del. Ch. Dec. 28, 1999).

[25] *Id.*

[26] Restatement (Second) of Contracts § 157.

that it has verified mistaken material factual information in its possession constitutes such a failure:

> B, on finding that A's bid [for a construction project] is the lowest, asks A to check his figures to make certain that there has been no mistake. A states that he has done so although he has not *and although such a check would have revealed his mistake* [in omitting a $50,000 item from the total bid amount]. B then accepts A's bid. A's conduct amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing, and he cannot avoid the contract.[27]

McClain's identification of the Elsmere McDonald's as the site of his accident *after defense counsel's request for confirmation* is indistinguishable, and precludes Rule 60(b)(1) relief on the basis of mistake.

Excusable neglect under Rule 60(b)(1) occurs when the moving party has committed "neglect which might have been the act of a reasonably prudent person under the circumstances."[28] McClain had the bill of lading showing the address of the correct McDonald's restaurant in his possession, and even if he had not, it was incumbent upon him and his counsel to timely identify the premises in response to defense counsel's inquiries. McClain's counsel not only failed to correct the initial error, but reinforced it. McClain has offered no explanation for this conduct, and the Court therefore cannot find that his actions amount to excusable neglect.

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[27] *Id.* illus. 2 (emphasis added).

[28] *Hardy v. Harvell*, 930 A.2d 928, 2007 WL 1933158, at *2 (Del. July 3, 2007) (TABLE) (quoting *Battaglia*, 379 A.2d at 1135 n.4).

V. Conclusion

Defendant McDonald's Restaurants of Delaware, Inc.'s Motion for Summary Judgment must be **GRANTED**, as it is not a proper defendant. For the reasons explained above, McClain has not demonstrated that he is entitled to amend his complaint and escape the consequences of the stipulated order of dismissal, which resulted from his own failure to verify the correct location of his injury despite the opposing parties' reasonable request that he do so. Accordingly, McClain's Motion to Vacate the Stipulation and Court Order of March 30, 2010, and his Motion for Leave to Amend the Complaint are both **DENIED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve