

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
URSULA ROCCHIO and EUGENE ROCCHIO,
Plaintiffs,

Index No. 010580/06
Sequence #001
Part 40

- against -

BURGER KING CORPORATION, 340
HEMPSTEAD OPERATING CORP. and
MARQUEZ FOOD CORP., Defendants.

1/10/2007

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Upon the foregoing papers, plaintiff's motion for multiple relief is determined as follows:

This personal injury action involves a trip and fall accident which occurred on April 3, 2006 on a cement walkway at a Burger King located in West Hempstead, New York. Plaintiff's right ankle was fractured.

The original defendant to the action was Burger King Corporation. 340 Hempstead Operating Corp., as property owner/lessee was added in a supplemental summons and complaint dated August 11, 2006. Both defendants answered by the same attorney who was later replaced by different counsel.

During the ensuing months various disclosure took place and defendants produced for depositions the president of 340 Hempstead Operating Corp. which owns the Burger King franchise and John Martinez, the general manager at the West Hempstead franchise. It was ascertained that on August 22, 1996 Burger King franchised the building and land to Marquez Food Corporation who in turn assigned it to 340 Hempstead Operating Corp. In November 1999, the current franchisee/lessee obtained a successor agreement from Burger King Corporation.

340 Hempstead Operating Corp. admitted that it was responsible for maintaining the cement walkway in good condition and the Burger King Corporation has exercised no control over the premises. Its president explained that by the successor agreement and assignment it took over the Marquez Food Corporation franchise for the remaining period left on the contract and it assumed all of Marquez' obligations and responsibilities. The agreement between Burger King and the Marquez Corporation verifies this admission and explanation.

On July 23, 2007, the Court so-ordered a stipulation to add Marquez Food Corporation as a first- party defendant and counsel for the two current defendants agreed to accept service on Marquez' behalf.

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As agreed, on August 21, 2007, plaintiff served the supplement summons and complaint on defendants attorney adding the additional defendant, Marquez Food Corporation based on its operation, maintenance, management and control of the premises on April 3, 2006.

Defendants' counsel has since declined to accept service on behalf of Marquez Food Corporation explaining an error was made by agreeing in the first instance. Counsel states upon information and belief that Marquez is no longer in business. The Court cannot compel counsel to accept service on an entity it does not represent and counsel's initial agreement to do so, even if so-ordered, is null and void. Consequently, the request for a default judgment against Marquez is denied.

In any event, in the discovery conducted thus far there is no evidence whatsoever that Marquez is a proper party to this action. Defendant 340 Hempstead, as an independent contractor, is the admitted responsible party.

Plaintiff may serve the supplemental summons and complaint upon Marquez but it must be accomplished forthwith. Default issues may be addressed later, if necessary. However, the undersigned notes that the newly-added defendant, if served, may move pursuant to CPLR §3211(1) for dismissal of the complaint against it. The undersigned will address such an application on an expedited basis.

Defendant is ordered to produce forthwith a witness from defendant Burger King Corporation for an examination before trial since counsel has agreed to do so on several occasions.

Before the Court is a copy of the agreement between Marquez and Burger King dated August 22, 1996. It is the undersigned's understanding that in November 1999 when Marquez assigned the lease to 340 Hempstead, a successor agreement was required indicating Burger King's authorization and consent (EBT J. Syed p. 41-42).

Defendants are ordered to provide plaintiff with both the assignment document and successor agreement document which refer specifically to 340 Hempstead Operating Corp.

Plaintiff may review the Manual of Operating Data at defense counsel's office.

In all other respects defendants have complied with plaintiff's demands.

The time by which plaintiff must file a note of issue is extended to March 31, 2008.

**ENTERED**

JAN 22 2008

Dated: January 15, 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

J.S.C.