LEXSEE 2002 U.S. DIST. LEXIS 15707

STEWART–STERLING ONE, LLC VERSUS TRICON GLOBAL RESTAURANTS, INC., ET AL

CIVIL ACTION NO. 00–477 SECTION "N"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2002 U.S. Dist. LEXIS 15707

August 16, 2002, Decided
August 16, 2002, Filed; August 16, 2002, Entered

DISPOSITION: [*1] Defendant Martin Franchises, Inc.'s motion for summary judgment granted with respect to plaintiff's claims under Civil Code article 2322 and for absolute liability, unjust enrichment and abuse of right, and otherwise denied.

LexisNexis(R) Headnotes

COUNSEL: For STEWART–STIRLING ONE, plaintiff: Gladstone N. Jones, III, Peter Newton Freiberg, Kevin Earl Huddell, Jones, Verras & Freiberg, LLC, New Orleans, LA.

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For YUM BRANDS INC, defendant: Stephen P. Schott, Jason Ross Anders, Montgomery, Barnett, [*2] Brown, Read, Hammond & Mintz, New Orleans, LA.

For YUM BRANDS INC, KENTUCKY FRIED CHICKEN AMERICA, INC., defendants: James B. Irwin, V, Alan Dabdoub, Irwin Fritchie Urquhart & Moore, LLC, New Orleans, LA.

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JUDGES: KURT D. ENGELHARDT, UNITED STATES DISTRICT JUDGE.

OPINIONBY: KURT D. ENGELHARDT

OPINION:

ORDER AND REASONS

Before the Court is a Motion for Summary Judgment on Behalf of Martin Franchises, Inc. ("Martin"). For the reasons that follow, the motion is GRANTED IN PART, in that it is granted with respect to plaintiff's claims under Civil Code article 2322 and for absolute liability, unjust enrichment, and abuse of right. It is DENIED IN PART, in that it is denied in all other respects.

I. BACKGROUND

Plaintiff, Stewart–Sterling, L.L.C., the owner of Oakridge Shopping Center at 800 Metairie Road, alleges that the dry–cleaning chemical perchloroethylene ("PCE") and its metabolites have migrated onto its property from the adjacent property at 700 and 702 Metairie Road. Seeking remediation [*3] of its property pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), as well as damages under state law, plaintiff has sued various companies connected to the dry cleaning businesses that operated on the property up through 1991. Plaintiff also has sued the current owner of the 700 and 702 properties, Kentucky Fried Chicken America, Inc., and its parent company, Yum! Brands,

Inc. (collectively "KFC").

From as early as 1962, franchisees of Martin operated dry cleaning establishments at 700 and/or 702 Metairie Road. From 1962 through 1977, the franchisee was Metairie OHM, Inc. ("OHM"), a corporation that is no longer in existence. During the period from 1977 to 1991, three dry-cleaning related businesses were operated on the property by Joseph Lowenthal: (1) Supervisory Services, Inc. ("SSI"), a franchisee of Martin, which ran a One-Hour Martinizing dry-cleaning business; (2) Cleaners Machinery, Inc. ("CMI"), a representative of Martin and licensed dealer of Martin dry-cleaning equipment; and (3) Cleaners and Laundry Supply, a dry cleaning supply company, which had no contractual relationship to Martin.

II. LAW AND ANALYSIS

Plaintiff's RCRA claim against [*4] Martin was the subject of a previous motion. At issue here are plaintiff's state law claims. Martin argues that the state law claims are prescribed and that, even if they are not, summary judgment should be granted because plaintiff cannot carry its burden of proof on each essential element of each cause of action. Martin also argues it cannot be held liable for the acts of OHM, Lowenthal, CMI, or SSI because the facts do not support the type of relationship necessary to impose vicarious liability.

In response to the motion, plaintiff has consented to judgment against it on its claims of absolute liability, abuse of right, and strict liability under Civil Code article 2322, but has opposed the motion in all other respects. In an Order and Reasons dated August 14, 2002 (Rec. Doc. 121), this Court decided a motion for partial summary judgment seeking dismissal of plaintiff's state law claims against KFC. In doing so, the Court addressed several of the arguments raised by Martin. Specifically, this Court's reasoning regarding prescription and unjust enrichment are directly applicable here. Thus, for the reasons stated there, the Court finds that Martin is not entitled to judgment as [*5] a matter of law on the issue of prescription, but is entitled to judgment as a matter of law dismissing plaintiff's claim for unjust enrichment.

A. Summary Judgment Standard:

"A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact." *Roberts v. Cardinal Services, Inc., 266 F.3d 368, 373 (5th Cir. 2001), cert. denied, 152 L. Ed. 2d 353, 122 S. Ct. 1357 (2002).* "An issue is material if its resolution could affect the outcome of the action." *Id.* "A factual dispute precludes a grant of summary judgment if the evidence would permit a reasonable jury to return a verdict for the nonmoving party." *Hunt v. Rapides Healthcare System, LLC, 277 F.3d 757, 762 (2001).* In making this determination, "'the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.'" *Id. at 764* (quoting *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)).* It "must disregard all evidence favorable to the moving party that the [*6] jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached." *Roberts, 266 F.3d at 373.*

B. Vicarious Liability:

Under Louisiana law, "liability for the negligent and tortious acts of another does not flow simply because of a principal-agent or principal-mandatary relationship." *Rowell v. Carter Mobile Homes, Inc., 500 So.2d 748, 751 (La. 1987).* "Only when the relationship of the parties includes the principal's right to control physical details of the actor as to the manner of his performance which is characteristic of the relation of master and servant does the person in whose service the act is done become subject to liability for the physical tortious conduct of the actor." *Id.; see also Rivera v. United Gas Pipeline Co., 697 So.2d 327, 338-39 (La. App. 5th Cir. 1997)* (where company shared in decisions on scheduling and operation, as well as use of labor and materials, trial court did not err in finding company vicariously liable), *writ denied, 704 So.2d 1196, 1197 (La. 1997); Urbeso v. Bryan, 583 So.2d 114, 118-19 (La. App. 4th Cir. 1991)* [*7] (where tortious actor attested that sheriff determined certain aspects of tow operation and decided whether actor would remain on the approved list of operators, genuine issue of fact existed as to degree of control exercised by sheriff, which precluded summary judgment on issue of vicarious liability).

Martin argues that it does not satisfy this test because it did not pay wages or benefits to Lowenthal and supervised his companies very little. Indeed, according to Martin, its franchise product was little more than an advertising program. However, the Court disagrees that no genuine issue exists as to the touchstone of vicarious liability: Martin's right to control physical details of SSI's, CMI's, and/or Lowenthal's performance. In addition to granting its franchisee's the right to use its advertising slogans (*e.g.*, "Martinizing" and "One Hour Martinizing"), Martin's franchise agreement granted the franchisee the right to use the Martin "System." *See* Opp. Memo, Exh. 33. The "System" referred to Martin's "high quality method" of operating a dry cleaning store and

specifically included Martin's "standardized dry cleaning service." *See, e.g., id.*, 1984 Agreement at PP 1, [*8] 2. In the agreements, SSI expressly acknowledged "the necessity of using proper methods and procedures . . . to maintain the quality standards of dry cleaning services associated with the System." *Id.* at P 4. Toward this end, SSI agreed to "utilize at the Store and keep in good operating condition dry cleaning and related equipment which meets the specifications for such items specified from time to time by Martin." *Id.* SSI also agreed "to allow Martin or its Representatives reasonable access to the Store for inspection purposes." *Id.* The Representative Agreement between Martin and CMI reinforces that Martin considered it "necessary that Store Owners periodically be checked to assure that the standards of quality, service, cleanliness and all other elements of the System, as promulgated from time to time by Martin, shall be adhered to by Store Owners. . . ." Opp. Memo., Exh. 34, § 2. Further, Martin did in fact inspect the store at 702 Metairie Road on multiple occasions, evaluating the store on its dry cleaning operation, personnel, store design, and equipment. Opp. Memo., Exh. 35. Martin also issued an Operational Manual to its franchisees, which gave detailed instructions [*9] for all aspects of store operation, including specific tasks such as reclaiming solvent from filter sludge. Opp. Memo, Exh. 37, pp. 65–66.

Obviously, facts also exist which favor Martin. However, the Court is not permitted to weigh the evidence on summary judgment. *Hunt, 277 F.3d at 764.* Drawing all inferences in plaintiff's favor, the Court finds that a genuine issue exists as to Martin's right to control the details of SSI's, CMI's, and/or Lowenthal's performance of the operations at 700 and 702 Metairie Road. This precludes summary judgment on plaintiff's claims under Civil Code article 2315 (negligence and trespass), article 2317 (acts of persons for whom the defendant is answerable), and articles 667 through 669 (nuisance).

C. Punitive Damages Under Former Civil Code Article 2315.3:

The Court is not convinced at this juncture that Martin is entitled to judgment as a matter of law on plaintiff's claim for punitive damages under former Civil Code article 2315.3. Citing *Anderson v. Avondale Industries, Inc., 798 So. 2d 93 (La. 2001),* Martin argues that application of article 2315.3 here would constitute an impermissible retroactive [*10] application. The Court disagrees. *Anderson* held that article 2315.3 may not be applied to conduct that occurred exclusively before the statute became effective on September 4, 1984. *Id. at 102.* Where, as here, a plaintiff has alleged damages caused, at least in part, by post–1984 conduct, the retroactivity of article. 2315.3 "is not implicated." *Bulot v. Intracoastal Tubular Services, Inc., 778 So. 2d 583, 584 (La. 2001).*

Also without merit is Martin's suggestion that article 2315.3 is inapplicable here because no one discovered the contamination until 1998, two years after the article's repeal. The act which repealed article 2315.3, "provides that it is applicable only to those causes of action which arise after its effective date" of April 16, 1996. *Bulot v. Intracoastal Tubular Services, Inc., 730 So. 2d 1012, 1015 (La. App. 4th Cir. 1999)* (citing Act No. 2 of the 1st Ex. Sess. of 1996). Thus, for purposes of determining whether article 2315.3 applies, "the relevant time period is the time the injury occurs" and the cause of action arises; not the date the plaintiff discovers the injury. *Id.* ("We do distinguish, however, [*11] the time when a cause of action arises from when prescription begins to run. A cause of action arises when injury occurs, while prescription begins to run only when the injured party becomes aware of his injury."); *see also La. Civ. Code art. 3493.*

Martin's final argument is that it is entitled to summary judgment on plaintiff's article 2315.3 claim because there is no evidence that it directly "engaged in" the storage, handling, or transportation of PCE. The Court agrees that plaintiff has produced no such evidence. However, Martin has failed to brief the issue of vicarious liability under article 2315.3. At least one Louisiana appellate court has held that such liability is appropriate where the requisites for vicarious liability are otherwise met. *See Rivera v. United Gas Pipeline Co., 697 So. 2d 327, 336* (La. App. 5th Cir.) ("we find that negligence for punitive damages, like any other type of negligence, may be imputed to a principal through the acts of an agent"), *writ denied, 704 So.2d 1196, 1197 (La. 1997).* n1 Because the parties have not briefed the issue, the Court will not decide it at this time. Rather, the Court merely finds that Martin has failed to [*12] carry its burden of demonstrating that it is entitled to judgment as a matter of law.

n1 The Court notes, however, that the Louisiana Supreme Court has before it a case that, although not directly on point, could shed light on the issue. *See Ross v. Conoco Inc., 813 So. 2d 414 (La. 2002).*

III. CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that the Motion for Summary Judgment on Behalf of Martin Franchises, Inc. (Rec.Doc. 85) is

GRANTED IN PART, in that it is granted with respect to plaintiff's claims under Civil Code article 2322 and for absolute liability, unjust enrichment, and abuse of right; and **DENIED IN PART**, in that it is denied in all other respects.

New Orleans, Louisiana, this 16th day of August 2002.

KURT D. ENGELHARDT

UNITED STATES DISTRICT JUDGE