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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CAIYUN MU, **Plaintiff,** **v.** **HYOUN MIN OH,** **Defendant.**	**CIVIL ACTION NO. 11-0352** **ORDER DENYING MOTION FOR LEAVE TO AMEND THE COMPLAINT**

I. INTRODUCTION

THIS MATTER came before the Court on a motion for leave to amend the complaint on March 27, 2013, at 9:00 a.m. in Courtroom 202A. Caiyun Mu ("Plaintiff") was represented by Victorino DLG. Torres, Esq. Hyoun Min Oh ("Defendant") was represented by Mark A. Scoggins, Esq. Plaintiff brought a motion for leave to amend the complaint that seeks to add a defendant in this matter.

Based on the papers submitted and arguments of counsel, the Court hereby DENIES Plaintiff's motion for leave to amend the complaint.

II. BACKGROUND

This is a personal injury case involving a vehicle-pedestrian accident. On February 4, 2010, Plaintiff was injured while standing on the road when Defendant hit her while driving a motor vehicle. On December 27, 2011, Plaintiff filed a complaint against Defendant based on negligence. On February 25, 2013, Plaintiff deposed Defendant from which Plaintiff first learned of a possible *respondeat superior* theory of liability. On March 5, 2013, Plaintiff filed a motion for leave to amend the complaint to add Defendant's business, D.K.K., Inc. ("DKK"),

as a defendant to the lawsuit based on an "employer – employee or master – servant relationship liability." A jury trial in this matter is scheduled for April 22, 2013.

III. LEGAL STANDARD

A motion for leave to amend is governed by Rule 15(a) of the Commonwealth Rules of Civil Procedure. After a responsive pleading has been filed, the complaint may be amended only by leave of court or by written consent of the adverse party. NMI R. Civ. P. 15(a). "[L]eave shall be freely given when justice so requires." *Id*. It is within the court's discretion to allow amendments under Rule 15(a). *Commonwealth v. Superior Court*, 2008 MP 11 ¶ 14.

IV. DISCUSSION

Plaintiff seeks to add Defendant's business, DKK, as a defendant in this matter under Rule 15(a) of the Commonwealth Rules of Civil Procedure. Plaintiff supports her Rule 15(a) amendment because it was filed less than two weeks after Plaintiff first learned of DKK's potential liability, and DKK will not be prejudiced because it had actual or constructive knowledge of the lawsuit from the date it was filed since Defendant is DKK's general manager, vice president and shareholder. Plaintiff also stresses that leave to amend should be granted liberally.

"Although leave to file a second amended complaint should be granted liberally, a trial court may deny leave for several reasons including "'undue delay, bad faith[,] or dilatory motive[,] . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment.'" *Commonwealth*, 2008 MP 11 ¶ 14 (citing *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2002) (quoting *Ferguson v. Roberts*, 11 F.3d 696, 706 (7th Cir. 1993))). Defendant opposes Plaintiff's motion based on each of the Supreme Court's enumerated reasons for denying a motion for leave to amend. The Court agrees with Defendant that Plaintiff's motion is "futile" because: (1) the amendment is time-barred by the applicable statute of limitations, and the amendment does not relate back to the date of the

original pleading under Rule 15(c); and (2) the facts do not support a *respondeat superior* theory of liability for DKK.[1]

A. THE AMENDMENT IS TIME-BARRED UNDER THE STATUTE OF LIMITATIONS

The statute of limitations for the instant action is two years. 7 CMC § 2503(d). The injury occurred on February 4, 2010 and thus the statute of limitations expired on February 4, 2012. DKK was not served with a summons and complaint within the statutory period, which generally precludes Plaintiff from suing DKK for the February 4, 2010 incident. Also, DKK was not served within 120 days after the filing of the complaint in this matter in violation of Rule 4(m), which generally requires the court to "dismiss the action without prejudice as to that defendant." Notwithstanding 7 CMC section 2503(d) and NMI R. Civ. P. 4(m), Plaintiff may amend the complaint to add DKK as a defendant if the amendment relates back to the date of the original pleading pursuant to Rule 15(c)(3).

Under Rule 15(c)(3), an amendment to a complaint naming a party against whom a claim is asserted relates back to the date of the original pleading when:

> the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) 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.

Plaintiff must satisfy both parts of this two-part inquiry for the amendment to relate back. *See id*.; *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) ("[T]he 'notice' *and* 'mistake' clauses in subpart (3) [of Rule 15(c)] . . . must be satisfied.") DKK had notice of the action since DKK's co-owner, Defendant, was properly served with the complaint. *See id*. ("[O]ur court will infer notice if there is an identity of interest between the original defendant and the defendant sought to be added or substituted.") Also, DKK would not be prejudiced by the

[1] Because the Court finds that the amendment is futile, the Court declines to discuss Defendant's alternative grounds for denying Plaintiff's motion. However, the Court does note its concern that this motion was filed more than a year after the complaint was filed and less than two months from the scheduled jury trial.

amendment because there is no change in the factual or legal allegations that would necessitate any additional discovery.[2] The "notice" clause of Rule 15(c) is satisfied.

Plaintiff fails to satisfy the "mistake" clause of Rule 15(c). The U.S. Supreme Court held that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." *Krupski v. Costa Crociere S. p. A*., 130 S. Ct. 2485, 2490 (2010). In *Krupski*, the plaintiff sought compensation for injuries she sustained on a cruise ship. *Id*. Her passenger ticket, which was issued by Costa Cruise Lines, identified the carrier, Costa Crociere S. p. A. ("Costa Crociere"), as the proper party to sue. *Id*. The plaintiff filed a lawsuit against only Costa Cruise Lines, which answered that it was not the proper defendant and informed the plaintiff that Costa Crociere was the only proper defendant. *Id*. at 2490-91. After the limitations period had expired, the plaintiff moved to substitute Costa Crociere as the defendant under Rules 15(a) and 15(c). *Id*. at 2491.

The Eleventh Circuit Court of Appeals held that the amendment did not relate back because the plaintiff "either knew or should have known of the proper party's identity and thus determined that she made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading." *Id*. at 2493. Also, the Eleventh Circuit found that the plaintiff "had unduly delayed in seeking to file, and in eventually filing, an amended complaint." *Id*. at 2496. The Supreme Court disagreed with the Eleventh Circuit's legal analysis because the plaintiff's actual or constructive knowledge of the proper parties to sue, and the amending party's diligence are usually not relevant considerations under Rule 15(c).[3] *Id*. The proper inquiry is what the ***defendant*** knew or should have known during the Rule 4(m) period. *Id*. at 2493 (emphasis added).

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[2] Defendant claimed that DKK would be prejudiced because witnesses who would be helpful to DKK's defense are no longer available. However, Defendant provided no declaration or certification to this effect, and provided no specific facts regarding the identities of the witnesses and how they would have been helpful to DKK's defense. Therefore, this argument is unpersuasive.

[3] "Information in the plaintiff's possession is relevant to the relation back inquiry only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity." Edward Sherman, Annotation, *Amendment Relates Back to Date of Original Pleading for Purposes of Statute of Limitations*, 3-15 Moore's Federal Practice – Civil § 15.19[3][d] (2013).

In reversing the Eleventh Circuit, the Supreme Court held that Costa Crociere knew or should have known that plaintiff mistakenly sued Costa Cruise because: (1) Costa Crociere had constructive knowledge of the complaint within the Rule 4(m) period, (2) the complaint made clear that the plaintiff meant to sue the company that owned the cruise ship, and (3) Costa Cruise and Costa Crociere were related corporate entities with very similar names. *Id*. at 2497-98. These facts are easily distinguishable from the facts in the case at bar. Although DKK had constructive knowledge of Plaintiff's complaint within the Rule 4(m) period, there is no reason why DKK knew or should have known that Plaintiff would have sued it but for a mistake in identity. The injury was caused solely by Defendant while driving her personal vehicle off of DKK's premises. Also, at the time of the accident, Defendant was not carrying out any duties or en route to perform any duties for DKK. Furthermore, as is discussed below, there is a well-established common law principle that precludes *respondeat superior* liability under the circumstances in this case.

B. *RESPONDEAT SUPERIOR* DOES NOT APPLY

Respondeat superior is the theory that an employer is subject to vicarious liability for a tort committed by its employee. *Respondeat superior* liability, or vicarious liability, is triggered when an employee commits a tort while "acting within the scope of employment." Restatement (Third) of Agency § 7.07 (2006). Plaintiff contends that Defendant was acting within the scope of employment when she was driving away from her business after briefly stopping there to check on her employees and give them food. Even assuming these facts are true, Plaintiff has not established any grounds for applying *respondeat superior* liability.

The general rule prevalent among most, if not all, U.S. jurisdictions is that "an employee going to and from his place of employment is not considered as acting within the course and scope of his employment." Christopher Vaeth, Annotation, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R. 5th 174 (2012). This principle is known as the "'going and coming rule' [that] generally precludes an employer's liability for the torts of an employee committed during the employee's commute to and from work. *Sharrock v. United States*, 673 F.3d 1117, 1119 (9th Cir. 2012) (citation

omitted). Some jurisdictions recognize the "special errand exception," or some equivalent thereof, to this rule. *Id*. The special errand exception "provides for *respondeat superior* liability where the employee is commuting to or from work on a special errand either as part of his regular duties or at the order or request of his employer." *Id*. (citation omitted).

Defendant committed the alleged tort of negligence when she was driving away from her workplace, invoking the "going and coming rule" that generally precludes vicarious liability. No exception to this rule applies because Defendant did not leave work on a special errand either as part of her regular duties or at the order or request of her employer. It is unknown where Defendant was driving to, but there is no evidence that she was en route to perform any special errands for DKK. Under the coming and going rule, it is irrelevant whether Defendant promoted DKK's interests or engaged in any work for DKK prior to leaving there. "The primary purpose for this coming and going rule is to avoid imposing liability 'on an employer for conduct of its employees over which it has no control and from which it derives no benefit.'" *Newman v. White Water Whirlpool*, 169 P.3d 774, (Ut. Ct. App. 2007) (quotation omitted). At the time of the accident, DKK had no control over Defendant and did not derive a benefit from Defendant's conduct. Under the circumstances, the going and coming rule precludes the possibility that DKK may be found vicariously liable for Defendant's alleged tort.

V. CONCLUSION

For the foregoing reasons, Defendant's motion to for leave to amend the complaint is hereby **DENIED**.

IT IS SO ORDERED this 5th day of April, 2013.

/s/
ROBERT C. NARAJA, Presiding Judge