

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PHILLIP SHERMAN AND
TINA SHERMAN

VS.

CASE NO. CV - 2008 - 4379-4

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MCDONALDS CORPORATION;
MATHEWS MANAGEMENT COMPANY, AND
AARON BRUMMLEY

DEFENDANTS

BRIEF IN SUPPORT OF AMENDED MOTION TO DISMISS

INTRODUCTION

Plaintiff has brought suit against McDonald's Corporation under various invasion of privacy theories. Plaintiff alleges that a cell phone belonging to Phillip Sherman was left at the subject restaurant located in Fayetteville, Arkansas. After leaving the cell phone, plaintiff claims one of the restaurant's employees took the phone and obtained access to explicit photographs contained therein. It is further alleged that once access was obtained, this individual then downloaded these photographs to the internet for various others to view. Finally, plaintiff alleges this individual sent these photographs to people plaintiff knew in an attempt to cause plaintiff embarrassment and distress.

It is plaintiffs' position that due to McDonald's Corporation's franchise agreement with this Fayetteville restaurant, it is liable for the actions allegedly taken by this employee. However, McDonald's Corporation does not exercise any control over the day-to-day operations of this restaurant, and it does not control the actions of those employees currently or previously employed at this

restaurant. Therefore, McDonald's Corporation cannot be held vicariously liable for actions taken by this restaurant or its employees.

ARGUMENT

McDonald's Corporation does not exercise sufficient control over the subject restaurant as to give rise to vicarious liability for the actions taken by this restaurant or its employees. To establish a claim for vicarious liability, it must be shown "that the franchisor exercised control over the operations of the franchisee to a substantial degree." Jones v. Flier, Inc., 43 F. Supp. 2d 1052, 1057 (W.D. Ark. 1999), Also, "franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability for all purposes or as a general matter." Miles v. Century 21 Real Estate LLC, 2007 U.S. Dist. LEXIS 2334, 12 (E.D. Ark. 2007).

Where one entity does not exercise control over the operations of another entity to a substantial degree, the first entity cannot be held vicariously liable for the actions of the second entity. Jones v. Flier, Inc., 43 F. Supp. 2d 1052 at 1057. In Flier, the plaintiff brought suit against Flier d/b/a Midas Muffler Shop (Flier) for damages sustained in an automobile accident. Plaintiff was injured in the accident, and the driver of the other vehicle (Hall) was killed. It was plaintiff's position that due to the negligent work Flier performed on Hall's brakes. Hall lost control of his vehicle and crashed into plaintiff. Id. at 1053. Plaintiff also brought

suit against Midas International Corporation (Midas) on the basis that pursuant to the franchise agreement between Flier and Midas, Midas was liable for Flier's actions. Id.

Prior to trial, Midas filed a Motion for Summary Judgment claiming it could not be held vicariously liable for the acts of Flier. It was Midas' position that:

Flier, Inc. [was] solely responsible for the management and operation of the Midas Muffler Shop. Flier, Inc., collects all of the income from shop operations and pays all operational expenses. Midas International receives a monthly royalty payment and payments for goods purchased, but does not participate in the shop's net profits or losses. All personnel who have worked for the Midas Muffler Shop from the beginning of the term of the Agreement have been employees of Flier, Inc. Flier, Inc. has always been responsible for hiring, firing, setting the wages, and supervising those employees.

Id. at 1054. The Court granted Midas' Motion finding there was not sufficient evidence of Midas' control over Flier as to give rise to vicarious liability. In coming to this conclusion, the Court stated:

the mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such a relationship. Whether the control retained by the franchisor is also sufficient to establish a master-servant relationship depends in each case upon the nature and extent of such control as defined in the franchise agreement or by the actual practice of the parties.

Id. at 1057. Further, "there [was] no evidence that Midas exercised actual control over Flier." Id. It was the Court's position "that under the terms of the Franchise Agreement, Flier [was] merely the recipient of a license granted by Midas to operate a shop under the Midas name and to use Midas' Proprietary Marks in connection therewith." Id. The Court then went on to reason:

Midas does control, to some extent, the public image of Flier's shop by requiring Flier to "keep his shop open to the public during all

normal business days and hours" and "maintain interior and exterior painting and decor in such manner and form as may be reasonably prescribed from time to time by Midas." *Franchise Agreement*, at § 6.5(b) at 6. Midas does not, however, "exercise control over the operations of the franchisee to a substantial degree." 62B Am Jur.2d, *Private Franchise Contracts* § 492 at 408 (1990). In other words, there is no evidence that Midas controls the manner in which Filer performs the daily operations of its business, *i.e.*, it does not control the manner in which Filer hires and fires employees; trains and supervises employees; or performs services. Furthermore, the fact that Filer purchases and uses Midas products and utilizes the Midas System, does not, in and of itself, create an agency relationship, absent additional evidence of control.

Id. Taking into consideration the above propositions, "the Court conclude[d] that there [was] no genuine issue of material fact with respect to whether an agency relationship exist[ed] between Midas and Filer. Therefore, Midas' motion for summary judgment will be granted." *Id.*

This is exactly the situation the Court now faces. In our current situation, McDonald's Corporation does not exercise control over the day-to-day operations of the restaurant located in Fayetteville, Arkansas. See Exhibit "A" ¶¶ 4, 11. Further, McDonald's Corporation does not control the actions of any employees, either currently or previously employed at the restaurant located in Fayetteville, Arkansas. That is, it does not have the right to, hire, discharge or discipline any employees of the subject restaurant. See Exhibit "A" ¶ 5. These attributes of control are reserved solely by West 6th, Inc., the franchisee of the subject restaurant. See Exhibit "A" ¶ 12. McDonald's Corporation does not own the subject restaurant located in Fayetteville, Arkansas. Exhibit "A" ¶ 3. McDonald's Corporation also does not pay any utilities of this restaurant, does not sell or supply any products to this restaurant, and does not file a tax return on behalf of


this restaurant. Exhibit "A" ¶¶ 6, 7, 9, 10. Furthermore, McDonald's Corporation is not even the franchisor of the subject restaurant. Therefore, taking these propositions into consideration, McDonald's Corporation cannot be held vicariously liable for the actions taken by the franchisee restaurant located in Fayetteville, Arkansas.

CONCLUSION

Plaintiffs' Complaint should be dismissed because plaintiff cannot establish a claim of vicarious liability against McDonald's Corporation. McDonald's Corporation does not exercise sufficient control over the subject restaurant located in Fayetteville, Arkansas as to give rise to such a claim. Therefore, McDonald's Corporation prays this Court to grant its Amended Motion to Dismiss, award costs associated herewith, and for all other just and proper relief to which it is entitled.

Respectfully submitted,

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