

D.N. UWY-CV-15-6025912-S : **SUPERIOR COURT**
JAMES GRECHIKA : **J.D. OF WATERBURY**
v. : **AT WATERBURY**
WHOLE FOODS MARKET
GROUP, INC. : **JULY 8, 2016**

PLAINTIFF’S REPLY TO DEFENDANT’S OBJECTION TO
MOTION TO CITE IN ADDITIONAL DEFENDANT

Pursuant to §§ 9-18 and 9-22 of the Connecticut Practice Book, the plaintiff moved to cite in **WFM PROPERTIES CHESHIRE, LLC** as an additional defendant on June 29, 2016 because it owned, possessed, controlled, managed, maintained, and/or exercised responsibility over the Whole Food Market Distribution Center property at 400 East Johnson Avenue, Cheshire, Connecticut. In accordance with C.G.S.A §§ 52-107, the plaintiff respectfully requests that the court allow this motion because a complete determination cannot be had without the presence of this party.

While the plaintiff is aware that his trial is scheduled to begin on August 8, 2016, the inclusion of **WFM PROPERTIES CHESHIRE, LLC** is essential to a full, fair, and equitable resolution of his claims in this action. **WFM PROPERTIES CHESHIRE, LLC** is the owner of the property and may be a central party to the case despite the defendant’s assertion to the contrary. A complete determination of this case cannot be

had without this potential defendant. The plaintiff moves to cite in this entity in good faith and with knowledge of his rights under law.

The plaintiff did not discover the interest of **WFM PROPERTIES CHESHIRE, LLC** until **WHOLE FOOD MARKET GROUP, INC.** filed interrogatory responses dated May 14, 2015. Until this point, the plaintiff was unaware that the defendant was a viable defendant in the case, nor was he aware that this defendant existed or had anything to do with the case. This interest was confirmed by responses to the plaintiff's request for admission dated June 29, 2016.

In its objection, **WHOLE FOOD MARKET GROUP, INC.** argues that the statute of limitations bars the plaintiff from citing in an additional defendant. On the contrary, the plaintiff's motion was filed well within the statute of limitations. § 52-584 of Connecticut General Statutes provides in relevant part:

No action to recover damages for injury to the person, or to real or personal property, caused by negligence, . . . shall be brought but *within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of*, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed.

(Emphasis added.) *Id.* Connecticut courts have addressed the somewhat obscure meaning of this provision. In Hamilton v. Smith, 773 F.2d 461, 463-64 (2d Cir. 1985), the United

States Court of Appeals for the Second Circuit, per Honorable Judge Cardamone, thoroughly explained the requirements of this section:

[Section 52-584] applies to all actions to recover damages for injury to the person or to property caused by negligence, reckless or wanton misconduct, or malpractice. Two specific time requirements are imposed on prospective plaintiffs. The first requires a plaintiff to bring an action ‘within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.’ The second provides that in no event shall a plaintiff bring an action ‘more than three years from the date of the act or omission complained of.’ Thus, to file a timely claim a plaintiff must satisfy both the two-year and the three-year requirements of the statute.

...

The statute’s first requirement is that the plaintiff sue within two years from the date that he or she discovered or should have discovered the ‘injury.’

...

The second part of the Connecticut statute provides that no action may be brought more than three years from the date of the act or omission complained of. This three-year time limit causes the statutory clock to begin running when the negligent conduct of the defendant occurs.

Therefore, the statute in question, C.G.S. § 52-584, can be subdivided into two sections: the two-year statute of limitations and the three-year statute of repose. Both the two-year and the three-year requirements of the statute must be met in order for a plaintiff to be in compliance with the statute. In the current action, the plaintiff has met both requirements and, as such, may avail himself of the time allotted in the statute of repose. The plaintiff

met the first requirement, i.e. the two-year requirement by initially filing suit for the injuries he sustained on December 17, 2014, well within the two-year time period. Therefore, the plaintiff brought his claims in a timely manner with respect to the two-year requirement. The plaintiff met the second requirement because the plaintiff became aware that a potentially liable defendant was missing from the action, moved to cite the defendant in, and served the defendant within three years from the date of the act or omission complained of. The Hamilton Court continued by articulating the purpose of the statute of limitations:

Decisional law makes it clear that the basic purpose of the statute of limitations is to encourage promptness in instituting claims and to avoid prejudice to defendants which results when a plaintiff delays prosecuting his claim The two-year constraint of § 52-584 is a “discovery rule” type of limitations statute, that is it starts when the plaintiff discovers or should have discovered his injury. With discovery rules, the limitations period clock does not begin to tick as long as the plaintiff is unaware of the right he seeks to assert. This alleviates some potential harshness to plaintiffs So read, the limitations period for bringing suit might well be over before a plaintiff even knew that he had a cause of action. This scenario is one that the discovery rule was designed to avoid.

Hamilton v. Smith, 773 F.2d 461, 465 (2d Cir. 1985). Although the statute of limitations is meant to impose a constraint on a potential plaintiff’s delay in prosecuting a claim, the court expressly states that the statute is not meant to be harsh toward plaintiffs and that it was meant to avoid any scenario in which the limitations period runs before the plaintiff is even aware of his right to bring a claim. However, the statute also provides a repose clause, which suggests that, in fairness to defendants, barring certain circumstances, a plaintiff should not

be able to bring a claim for negligence more than three years after the date of the act or omission complained of. Therefore, the statute has protections built in so that a plaintiff is not barred from bringing a meritorious claim simply because that plaintiff did not know that a cause of action even existed.

In this action, the plaintiff realized his injury on the date of accident, October 4, 2013. He filed suit with the court on December 17, 2014. Ordinarily, a plaintiff who brings a claim within the two-year period of time immediately following the date of accident is able to bring in another defendant via a motion to cite in, pursuant to Practice Book § 9-22. “The decision whether to grant a motion for the addition or substitution of a party to legal proceedings rests in the sound discretion of the trial court.” (Internal quotation marks omitted.) Fuller v. Planning & Zoning Commission, 21 Conn. App. 340, 346, 573 A.2d 1222 (1990). “Factors to be considered include the timeliness of the application, the possibility of prejudice to the other party and whether the applicant’s presence will enable to court to make a complete determination of the issues.” A. Secondino & Son, Inc. v. LoRicco, 19 Conn. App. 8, 14, 561 A.2d 142 (1989). Here, the plaintiff moved to cite in this defendant on July 30, 2016, more than two years after the date of his accident, but not more than three years from the date of the act or omission complained of.

The defendant’s logic would suggest that the plaintiff cannot avail himself of the “not to exceed three years” language of the statute. However, that position has no basis in the law

as it is written. Neither statutory language nor case law suggest that a plaintiff, who filed suit against all known parties within the two year limitation, must file against any other later identified defendants within two years from the date of discovering their identity, even if it is before the three-year statute of repose. The “three year repose period represents a legislative compromise between the public policy of protecting individuals from the uncertainty that could result from unduly protracted time limits for filing legal claims and the public policy favoring the vindication of meritorious claims in the courts.” Tarnowsky v. Socci, 271 Conn. 284, 296, 856 2d 408, 415-16 (2004). The plaintiff in the current action, just as any plaintiff, is entitled to the full statutory protection as he has met both the two-year and three-year requirements. The Tarnowsky Court further supports the current plaintiff’s position in its discussion of actionable harm:

First, the very phrase “actionable harm” suggests that knowledge of the identity of the tortfeasor is one of its elements. The defendant makes no claim that an injury is “actionable,” i.e., that an action may be brought, when a specific defendant has not been identified.

...

In any event, a plaintiff who has incurred an actionable injury and knows the identity of one or more of the tortfeasors, but has no reason to suspect the existence of additional responsible parties, clearly cannot bring an action against the unknown parties until he discovers their existence. In such cases, the blameless failure to discover the existence of the unknown tortfeasors is tantamount to a blameless failure to discover a causal connection between the tortfeasor’s breach of duty and the injury, a failure that clearly tolls the statute of limitations.

Second, the legislature's purpose in distinguishing “injury,” or actionable harm, from “the act or omission complained of” in § 52–284, and providing a three year statute of repose, was to avoid the “draconian effect”; running the

two year limitation period from the date of the defendant's negligence in cases in which the plaintiff is unable to bring an action because he could not discover an essential jurisdictional fact, despite the exercise of reasonable care. To hold that a claimant forfeits a cause of action because he is unable to identify the tortfeasor, despite reasonable efforts to do so, would undermine this legislative purpose. Moreover, . . . such a holding would be inconsistent with this state's general policy of allowing meritorious claims to be vindicated in the courts.

(Internal citations omitted.) Tarnowsky v. Socci, 271 Conn. 284, 288-93, 856 A.2d 408, 411-14 (2004). Therefore, by citing in the defendant, **WFM PROPERTIES CHESHIRE, LLC** on June 30, 2016 —within three years from the date of the act or omission complained of—the plaintiff asserted his negligence claim in a proper and timely manner. Finally, “while a statute of limitations defense may serve to bar a stale claim, generally this issue is not decided on a motion to cite . . . These procedural vehicles do not allow a court to reach some of the substantive or factual issues that must be resolved before determining the merits of the statute of limitations defense.” Clark v. Ne. Carriers, LLC, No. CV085009680, 2010 WL 2764717, at *2 (Conn. Super. May 28, 2010).

The plaintiff understands the inconvenience of this late motion and apologizes to both defense counsel and this Court. It is, however, just and essential for these entities to be cited in to the present action. The plaintiff maintains that this Court may grant his Motion to Cite In without prejudice to the current defendant, **WHOLE FOODS MARKET GROUP, INC** and it does not appear that **WFM PROPERTIES CHESHIRE, LLC** and the current defendant have any conflicts of interest. It is precisely

the relationship between the defendant and **WFM PROPERTIES CHESHIRE, LLC** that make them essential to the determination of this case. Current counsel for the defendant may also represent **WFM PROPERTIES CHESHIRE, LLC**, as it appears to be a Whole Foods Market company that was created solely for ownership of the property. Therefore, the defendant was given notice of a potential cause of action, and has been aware of the potential interests of all entities subject to this motion, for much longer than the plaintiff.

Furthermore, “[t]he general rule regarding premises liability in the landlord-tenant context is that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control.” LaFlamme v. Dallessio, 802 A.2d 63, 70 (Conn. 2002) (citation omitted). Whether a particular landlord possesses and controls a property is “essentially a matter of intention to be determined in the light of all the significant circumstances,” unless the terms of the lease between the landlord and tenant expressly states otherwise. Id. Therefore, **WFM PROPERTIES CHESHIRE, LLC** must be added as an additional party if a trier of fact is to determine whether it possessed and controlled the premises leased by **WHOLE FOODS MARKET GROUP, INC.** In the alternative, the plaintiff will incur substantial prejudice and injustice. The plaintiff has only one opportunity to seek compensation from the responsible parties, including the defendant **WFM PROPERTIES CHESHIRE, LLC**. The plaintiff may face preclusion on some or all of his claims, and will have been denied just access to claims against responsible

parties, if the trial in the present case is allowed to go forward. If even one party is missing, the plaintiff's ability to be fully compensated by all responsible parties will be jeopardized. Furthermore, only one other deposition will need to be taken in this matter, and it could be done in advance of the trial date. This will not cause create undue prejudice to the defendants.

The interests and allegations relating to the aforementioned entities are set forth more fully in the Amended Complaint, attached hereto as **Exhibit A**.

WHEREFORE the undersigned moves that the plaintiff be permitted to amend his complaint to state facts showing the interest of **WFM PROPERTIES CHESHIRE, LLC** in this action and that said entity be summoned to appear in this action as a co-defendant.

THE PLAINTIFF,
JAMES GRECHIKA

//430809

Joseph R. Rossetti
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Juris No.: 408519
His Attorneys

CERTIFICATION

I certify that a copy of this document was mailed or delivered electronically or non-electronically on July 8, 2016 to all attorneys and self-represented parties of record, and to all parties who have not appeared in this matter, and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

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//430809
Joseph R. Rossetti

EXHIBIT A

DOCKET NO.: UWY-CV-15-6025912-S : SUPERIOR COURT
JAMES GRECHKA : J. D. OF WATERBURY
V. : AT WATERBURY
WHOLE FOODS MARKET
GROUP, INC., ET AL : JUNE 29, 2016

AMENDED COMPLAINT

FIRST COUNT:
(JAMES GRECHKA V. WHOLE FOODS MARKET GROUP, INC.)

1. At all times mentioned herein, the defendant, **WHOLE FOODS MARKET GROUP, INC.**, was and is a foreign corporation authorized to transact business in the State of Connecticut with a principal place of business located at 550 Bowie Street, Austin, Texas.

2. At all times mentioned herein, the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its servants and/or employees, owned, possessed, managed, controlled and/or maintained the Whole Foods Market Distribution Center premises located at 400 East Johnson Avenue, Cheshire, Connecticut, including the exterior brick/paver stone walkway.

3. On October 4, 2013 and at all times mentioned herein, the plaintiff, **JAMES GRECHKA**, was lawfully walking on the subject premises, on the exterior brick/paver stone walkway when he was caused to fall due to a broken and/or uneven surface on the

exterior front walkway area, thereby causing the plaintiff to suffer the injuries and losses more fully set forth below.

4. The incident was caused by the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and/or employees, in one or more of the following ways:

- a. It failed to properly maintain the exterior brick/paver stone walkway area;
- b. It failed to properly and reasonably inspect the exterior brick/paver stone walkway area on the premises;
- c. It knew or in the exercise of reasonable care and inspection should have known of the aforementioned conditions and should have taken measures to remedy and correct the same but this they carelessly and negligently failed to do;
- d. It failed to warn the plaintiff of the dangerous condition of the exterior brick/paver stone walkway area on the premises;
- e. It failed to erect barriers for those lawfully on the premises not to use the subject exterior brick/paver stone walkway area and/or prevent those lawfully on the premises from falling due to the dangerous and/or hazardous condition; and/or

- f. It failed to repair the exterior brick/paver stone walkway area in a timely manner.
5. As a result of the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and/or employees, the plaintiff, **JAMES GRECHIKA**, suffered the following injuries, some or all of which may be permanent in nature:
 - a. Left wrist pain;
 - b. Left arm pain;
 - c. Right forearm laceration;
 - d. Right arm pain;
 - e. Right hand laceration;
 - f. Right hand pain;
 - g. Left wrist fracture requiring surgical intervention with associated pain and discomfort; and
 - h. Pain and suffering, both mental and physical.
6. As a further result of the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and/or employees, the plaintiff, **JAMES GRECHIKA**, was forced to expend large sums of money for hospital and medical care,

surgery, medicines, diagnostic tests and therapy, all necessary to his recovery, and may be forced to expend additional sums in the future.

7. As a further result of the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and /or employees, the plaintiff, **JAMES GRECHKA**, was unable to work, to his financial detriment.

8. As a further result of the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and /or employees, the plaintiff, **JAMES GRECHKA**, has sustained a loss of earning capacity.

9. As a further result of the negligence of the defendant, **WHOLE FOODS MARKET GROUP, INC.**, its agents, servants and/or employees, the plaintiff, **JAMES GRECHKA**, was unable, and remains unable, to participate in and enjoy his usual activities.

SECOND COUNT: (JAMES GRECHKA V. WFM PROPERTIES CHESHIRE, LLC)

1. At all times mentioned herein, the defendant, **WFM PROPERTIES CHESHIRE, LLC**, was and is a foreign corporation authorized to transact business in the State of Connecticut with a principal place of business located at 550 Bowie Street, Austin, Texas.

2. The plaintiff first learned of the identity of **WFM PROPERTIES CHESHIRE, LLC** through interrogatory responses dated May 14, 2015 and was later confirmed on June 29, 2016 when the co-defendant, **WHOLE FOODS MARKET GROUP, INC.**, responded to the plaintiff's Requests for Admissions.

3. At all times mentioned herein, the defendant, **WFM PROPERTIES CHESHIRE, LLC**, its servants and/or employees, owned, possessed, managed, controlled and/or maintained the property on which the Whole Foods Market Distribution Center premises was located, 400 East Johnson Avenue, Cheshire, Connecticut, including the exterior brick/paver stone walkway.

4. On October 4, 2013 and at all times mentioned herein, the plaintiff, **JAMES GRECHIKA**, was lawfully walking on the subject premises, on the exterior front walkway when he was caused to fall due to a broken and/or uneven surface on the exterior brick/paver stone walkway area, thereby causing the plaintiff to suffer the injuries and losses more fully set forth below.

5. The incident was caused by the negligence of the defendant, **WFM PROPERTIES CHESHIRE, LLC**, its agents, servants and/or employees, in one or more of the following ways:

- a. they failed to properly maintain the exterior brick/paver stone walkway area;

- b. they failed to properly and reasonably inspect the exterior brick/paver stone walkway area on the premises;
- c. they knew or in the exercise of reasonable care and inspection should have known of the aforementioned conditions and should have taken measures to remedy and correct the same but this they carelessly and negligently failed to do;
- d. they failed to warn the plaintiff of the dangerous condition of the exterior brick/paver stone walkway area on the premises;
- e. they failed to erect barriers for those lawfully on the premises not to use the subject exterior brick/paver stone walkway area and/or prevent those lawfully on the premises from falling due to the dangerous and/or hazardous condition; and/or
- f. they failed to repair the exterior front walkway area in a timely manner.

6. As a result of the negligence of the defendant, **WFM PROPERTIES CHESHIRE, LLC**, his agents, servants and/or employees, the plaintiff, **JAMES GRECHIKA**, suffered the following injuries, some or all of which may be permanent in nature:

- a. Left wrist pain;
- b. Left arm pain;

- c. Right forearm laceration;
- d. Right arm pain;
- e. Right hand laceration;
- f. Right hand pain;
- g. Left wrist fracture requiring surgical intervention with associated pain and discomfort; and
- h. Pain and suffering, both mental and physical.

7. As a further result of the negligence of the defendant, **WFM PROPERTIES CHESHIRE, LLC**, its agents, servants and/or employees, the plaintiff, **JAMES GRECHIKA**, was forced to expend large sums of money for hospital and medical care, surgery, medicines, diagnostic tests and therapy, all necessary to his recovery, and may be forced to expend additional sums in the future.

8. As a further result of the negligence of the defendant, **WFM PROPERTIES CHESHIRE, LLC**, its agents, servants and /or employees, the plaintiff, **JAMES GRECHIKA**, was unable to work, to his financial detriment.

9. As a further result of the negligence of the defendant, **WFM PROPERTIES CHESHIRE, LLC**, its agents, servants and /or employees, the plaintiff, **JAMES GRECHIKA**, has sustained a loss of earning capacity.

10. As a further result of the negligence of the defendant, WFM PROPERTIES CHESHIRE, LLC, its agents, servants and/or employees, the plaintiff, JAMES GRECHIKA, was unable, and remains unable, to participate in and enjoy his usual activities.

WHEREFORE, the plaintiff claims money damages.

THE PLAINTIFF,
JAMES GRECHIKA

By



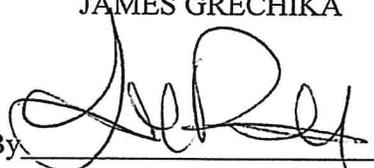
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STATEMENT OF AMOUNT IN DEMAND

The amount of money damages claimed is greater than Fifteen Thousand Dollars (\$15,000.00), exclusive of interest and costs.

THE PLAINTIFF,
JAMES GRECHIKA

By 

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CERTIFICATION

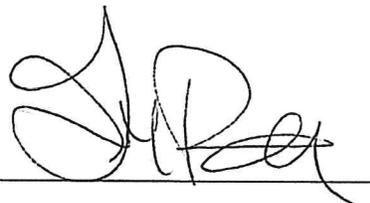
I certify that a copy of this document was mailed or delivered electronically or non-electronically on June 29, 2016 to all attorneys and self-represented parties of record and to all parties who have not appeared in this matter and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

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