

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

DAIRY FOCUS, INC.,

Plaintiff,

vs.

BEST EXPRESS FOODS, INC.;;
and ALLAN BERLIANT,

Defendants.

Case No. 17-03629-CBB

HON. CHRISTOPHER P. YATES

ORDER DENYING *EX PARTE* MOTION TO AMEND COMPLAINT

On April 25, 2017, Plaintiff Dairy Focus, Inc. (“Dairy Focus”) filed a three-count complaint against two defendants. Specifically, Count One requested recovery of a sum certain from Defendant Best Express Foods, Inc., on a breach-of-contract theory, Count Two alleged that Defendant Allan Berliant should be held liable for the corporate debt because of a personal guaranty, and Count Three demanded relief from both defendants on an account-rendered claim. Dairy Focus was able to serve the corporate defendant, and ultimately Dairy Focus obtained a default against that defendant. But accomplishing service upon the individual defendant, Allan Berliant, was much more challenging. Although the Court granted Dairy Focus’s motion to extend the summons, the Court entered an order denying Dairy Focus’s motion for alternate service. Eventually, the summons expired, leaving Dairy Focus with the ability to proceed against only one of the two named defendants.

In response to the Clerk’s order of dismissal of all claims against Defendant Berliant for non-service on November 1, 2017, Plaintiff Dairy Focus promptly filed an *ex parte* motion to amend the complaint in order to reassert the claims against Berliant that had been dismissed for non-service.

Although this approach seems to make procedural sense, our Court of Appeals has ruled – albeit in an unpublished decision – that this approach is impermissible. On facts virtually identical to those in the instant case, our Court of Appeals explained:

Instead of refileing the action against [the defendant], plaintiffs filed an amended complaint in the same action. Contrary to the plaintiffs’ arguments on appeal, the filing of the amended complaint did not set aside the dismissal of the action against [the defendant] nor did it extend the initial summons.

PAG, Inc v Alpinist Endeavors, LLC, No 309253, slip op at 10 (Mich App June 26, 2014), quoting Durfy v Kellogg, 193 Mich App 141, 143-144 (1992). That decision not only bars Dairy Focus from filing an amended complaint to add Defendant Berliant back into this action, but also prescribes the proper procedure for reasserting the dismissed claims against Berliant, *i.e.*, Dairy Focus must file a new action against Berliant, obtain a new summons in that action, and serve Berliant. See id. Thus, the Court must deny Dairy Focus’s *ex parte* motion to amend its complaint in the instant case.

IT IS SO ORDERED.

Dated: November 2, 2017



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge