

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D30423  
W/kmb

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Argued - January 28, 2011

WILLIAM F. MASTRO, J.P.  
PETER B. SKELOS  
RUTH C. BALKIN  
JOHN M. LEVENTHAL, JJ.

2010-01672

DECISION & ORDER

Mildred Mele, appellant, v USTA Construction, et al.,  
defendants, Muslum Avei, respondent.

(Index No. 4637/08)

Phillips Krantz & Levi, LLP, New York, N.Y. (Lisa Michael of counsel), for  
appellant.

Gannon, Rosenfarb & Moskowitz, New York, N.Y. (John H. Shin of counsel), for  
respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (R. Miller, J.), dated January 6, 2010, as granted that branch of the motion of the defendant Muslum Avei which was for summary judgment dismissing the complaint insofar as asserted against him.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Muslum Avei which was for summary judgment dismissing the complaint insofar as asserted against him is denied.

“The general rule is that an employer who hires an independent contractor is not liable for the independent contractor’s negligent acts” (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668; *see Kleeman v Rheingold*, 81 NY2d 270, 273-274). Here, under the circumstances presented, the defendant Muslum Avei failed to establish, prima facie, that the defendant USTA Construction was his independent contractor, and that the so-called “independent contractor rule” therefore applied (*see Willis v City of New York*, 266 AD2d 208; *cf. Pittman v S. P. Lenox Realty, LLC*, 49 AD3d 621). Since Avei did not tender “sufficient evidence to demonstrate

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the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), he failed to meet his prima facie burden and, thus, it is not necessary to consider the sufficiency of the plaintiff’s opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Accordingly, the Supreme Court should have denied that branch of Avei’s motion which was for summary judgment dismissing the complaint insofar as asserted against him.

MASTRO, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court