STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JONATHAN GENRICH,

Plaintiff

-vs- Index#97/5231

RALPH GUARY, III,
THE TOWN OF IRONDEQUOIT and
TRAILCRAFT MANUFACTURING LIMITED,

Defendants.

APPEARANCES:

ANGELO G. FARACI, ESQ., OF COUNSEL
JOHN FALK, ESQ., OF COUNSEL
FARACI & LANGE LLP
ATTORNEYS FOR THE PLAINTIFF

FRANK G. MONTEMALO, ESQ., OF COUNSEL
CULLEY, MARKS, TANENBAUM & PEZZULO LLP
ATTORNEYS FOR DEFENDANT, TOWN OF IRONDEQUOIT

DECISION AND ORDER

RAYMOND E. CORNELIUS, J.

The Plaintiff, Jonathan Genrich, commenced this action for personal injuries, which were allegedly sustained as the result of an amusement ride on July 4, 1996. This was part of an Independence Day celebration, which had been sponsored by the Defendant, the Town of Irondequoit, for approximately twenty-five years. Except for a race and the traditional parade, other activities, including entertainment, food,

games and fireworks, occurred on the Town Hall grounds.

In 1996, the Town entered into a contract with the Defendant, Ralph Guary III, a vendor who operated amusement rides, to provide for, among other services, a ride called the "Spaceball". This particular activity was designed to simulate the experience of weightlessness associated with travel in outer space. The rider was strapped into a seat, and by means of an operator manually spinning a wheel, would experience being rolled over and turned around. There was no governor or other mechanical limits controlling the speed, and according to pre-trial deposition testimony, the ride was capable of going forty miles per hour, or possibly fifty to sixty miles per hour if two people operated the wheel. The Defendant, Trailcraft Manufacturing Limited, a Canadian corporation, was the manufacturer of this device. The evidence, in this case, indicates that the Plaintiff was spun at a very high rate of speed, and as a result, sustained a brain stem injury.

The written contract between the Town and Mr. Guary is entitled "1996 July 4th Vendor Policy and Agreement." In relevant part, the contract provided that vendors would be "...Subject to frequent inspections by the Event Committee." In this connection, paragraph 22 of the agreement reads as follows:

> The Department of Parks and Recreation Staff may check any vendor during the time of the event. It is expected that the vendor will comply with any reasonable request made by a member of the Staff.

Further, the contract provided that the Department of Parks and Recreation would provide overnight security on July 3. The price charged for services was required to be submitted and approved by the event chairman, or a designee, who had the authority to change prices to a reasonable or competitive amount. A vendor was not permitted to change prices during the event, without prior approval of the chairman. This form contract also provided for the Town to receive a percentage of the gross

sales, and pursuant to a notation, which appears to have been made on July 1, 1996, Mr. Guary agreed to remit 40% of his ticket sales to the Town of Irondequoit. It should also be mentioned that, because this was a Town festival, the vendor was not required to obtain a license or permit in order to operate the amusement ride.

During his deposition, Mr. Guary, who had obtained a certificate of ownership as a licensed operator of the "Spaceball" ride, acknowledged that the machine was capable of causing injury and an awareness that the ride should not be operated at an extremely fast speed. On the day of the Plaintiff's injury, Mr. Guary was not on the premises, and it would appear that a person by the name of Jacob Gray, an employee who had received some training concerning the ride, was primarily responsible for its operation. However, at the time of the Plaintiff's injury, the ride was actually being operated by Ralph Guary IV, the 15 year old son of the Defendant, Ralph Guary III. According to Mr. Gray's testimony, Ralph Guary IV operated the "Spaceball" too fast, and in fact, was responding to the crowd yelling, "faster, faster." When Mr. Gray spoke to Ralph Guary IV, the latter admitted "that I just spun that kid really fast."

Pursuant to the "1996 Indemnification Agreement," which was signed by both Ralph Guary III and Michael M. Spang, Director of the Town of Irondequoit Parks and Recreation Department, liability insurance was made a condition precedent to the performance of any service. This agreement provided that the policy of insurance would be obtained from a carrier acceptable to the Town insurance agent and subject to an amount, terms and conditions as determined by the Town insurance agent and Town attorney. In fact, Mr. Guary did not obtain a liability insurance policy covering the "Spaceball" ride, and as a practical matter, it is doubtful that he has sufficient assets to satisfy any money judgment. The president of the Defendant, Trailcraft Manufacturing Limited, was served with process in this case. However, he

subsequently died, and Trailcraft Manufacturing Limited is probably a defunct corporation. Although the Defendant, Town of Irondequoit, could certainly satisfy any judgment in this case, a motion has now been made, on behalf of this Defendant, for summary judgment.

Based upon the aforementioned recitation of facts, it is apparent that the Town of Irondequoit was both a promoter of the July 4th celebration, as well as owner of the premises where Plaintiff sustained his injuries. However, the Court would agree with counsel for the Plaintiff that this is not a premises liability case. Liability is usually imposed upon an owner of property because of some defective condition, which was known or should have been known to such owner, or alternatively, was created by such individual. In addition, landowners have been held to "...have a duty to act in a reasonable manner to prevent harm to those on their property...", such as responsibility for injuries caused by an intoxicated guest. D'Amico v. Christie, 71 NY2d 76, 85(1987), citing Basso v. Miller, 40 NY2d 233, 241(1976). The decision in DiGiulio v. City of Buffalo, 237 AD2d 938(4th Dept. 1997) *rearg and/or lv to appeal denied* 1997 WL 652048, which is cited by counsel for the Town of Irondequoit, appears to have been based, in part, upon premises liability law, and specifically, the failure to establish actual or constructive notice of any alleged defect. In another decision, which is somewhat more comparable to the facts in the pending case, a municipal corporation was held to owe a duty of reasonable and ordinary care against foreseeable dangers to those who accepted an invitation to enter and use recreational areas owned by the municipality. Caldwell v. Village of Island Park, 304 NY 268(1952). The Plaintiff, in this case, had been injured as the result of firecrackers being discharged by other users of the recreational area.

In the pending case, the Plaintiff was not injured as the result of some defect in the property owned by the Town, nor by the actions of third parties, whose only

relationship with the Town was use of its property. The Town of Irondequoit hired Mr. Guary to provide the "Spaceball" ride, and as such, he performed these services as an independent contractor. Although the Town owned the property, upon which the injury occurred, it also served as promoter of the July 4th event, and in effect, became a general contractor. As a general rule, a general contractor is not legally responsible for the negligent acts of an independent contractor, as opposed, for example, to an employee or agent. This is based upon the rationale that an individual, who employs an independent contractor, has no right to control the manner in which the work is to be performed by the latter. Kleeman v. Rheingold, 81 NY2d 270(1993). However, as the Court of Appeals acknowledged, there are at least three exceptions to this rule – 1) negligence of the employer in selecting, instructing or supervising the contractor, 2) employment for work "inherently" dangerous, and 3) instances in which the employer is under a specific, non delegable duty.

Liability, under a common law cause of action for negligence, depends upon the existence of a duty of care owed by a defendant to the claimant, and a breach of that duty, which results in damages. The question of whether or not a certain relationship gives rise to a duty of care is a question of law to be decided, in the first instance, by the Court. Purdy v. Public Administrator of County of Westchester, 72 NY2d 1 (1988) *rearg denied* 72 NY2d 953(1988), Eiseman v. State of New York, 70 NY2d 175(1987), Pulka v. Edelman, 40 NY2d 781(1976) *rearg denied* 41 NY2d 901(1977). Once the nature of the duty of care is determined by the Court, as a matter of law, a question of fact may then arise as to whether or not the defendant owed a duty to a particular plaintiff. Kimmell v. Schaefer, 89 NY2d 257(1996). Each of the exceptions, exempting a general contractor from liability for the negligent acts of an independent contractor, necessarily involves a determination as to whether or not a duty of care arose in a particular situation. In regard to the first of the

aforementioned exceptions to the general rule, there is insufficient evidence, in this Court's opinion, to justify a finding that the Town was negligent in selecting and/or instructing Mr. Guary. The issue, therefore, becomes whether or not the Town was negligent in supervising this independent vendor, and this, in turn, may depend upon the amount of control they exercised over him.

Frequently, the issue of responsibility for an independent contractor's negligence arises in the context of construction accidents. In order to establish a duty of care in such situations, a plaintiff must establish that the owner or general contractor exercised supervision and control over the work performed, or alternatively, had actual or constructive notice of an unsafe or dangerous condition, which caused the accident. Comes v. New York State Electric & Gas Corp., 82 NY2d 876(1993), Custer v. Cortland Housing Authority, 266 AD2d 619(3rd Dept. 1999) *lv to appeal denied* 94 NY2d 761(2000), Sprague v. Peckham Materials Corp., 240 AD2d 392(2nd Dept. 1997). General supervisory authority provided in a contract between an owner and contractor, has been held to be insufficient to establish the requisite supervision and control, and absent other proof, summary judgment should be granted to the defendant. Enderlin v. Hebert Indus.Insulation, Inc., 224 AD2d 1020(4th Dept. 1996. Indeed, in DiGiulio v. City of Buffalo, supra, which involved causes of action for both common law negligence and violation of Labor Law, §200, the Court reversed denial of the summary judgment motion, in part, because plaintiffs had failed to controvert proof that the defendant did not supervise or control the manner or method of assembling the booth. Conversely, where there is evidence, for example, that a defendant had the ability to coordinate the work activity of subcontractors, the capacity to exclude work in a particular area, or the authority to direct a subcontractor not to engage in a particular work activity, there would be a triable issue of fact as to whether a defendant had the requisite control over the

methods of the subcontractors and other employees to prevent the creation of an unsafe condition. See Rizzuto v. L.A Wenger Contracting Co.,Inc., 91 NY2nd 343(1998). Likewise, summary judgment should be denied where, for example, an owner or general contractor maintained a safety manager on the job site, exercised direct control over a subcontractor, and was responsible for the construction schedule. See Freitas v. New York City Transit Authority, 249 AD2d 184(1st Dept. 1998).

In the Court's opinion, the facts in the pending case, some of which have been discussed above, present, at the very least, a question of fact whether or not the Town of Irondequoit exercised sufficient control over Mr. Guary's activities to have permitted representatives to prevent the unsafe operation of the "Spaceball," and thereby, justify imposition of a duty of care owed to the Plaintiff. In this regard, provisions contained in the "1996 July 4th - Vendor Policy and Agreement," are particularly significant, as well as the fact that monitors from the Department of Parks and Recreation supervised the grounds during the July 4th celebration. If there was sufficient control and supervision to impose a duty of care, the Town would be vicariously liable for any negligence of their independent contractor.

Another exception, enumerated by the Court of Appeals, which, in reality, may not be an exception at all, relates to instances in which the employer is under a specific non delegable duty. However, as the Court made clear in Kleeman v. Rheingold, supra, "...the class of duties considered 'nondelegable' is not limited to statutorily imposed duties," and "...whether a particular duty is properly categorized as 'nondelegable' necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations." p.275. Thus, in that case, the Court of Appeals held that an attorney had a non delegable duty to a client to exercise due care in the service of process, which could not be avoided by making arrangements with an independent process server to effect proper service. In another situation, involving

the discharge of fireworks, a municipality, acting as the promoter of an Independence Day celebration, has been held to owe a non delegable duty to safeguard the public, which could not be avoided by arranging with an independent contractor to discharge the fireworks. See Rill V. Chiarella, 50 Misc. 2d 105(1966) *mod* 30 AD2d 882(2nd Dept. 1968) *aff'd* 25 NY2d 702(1969).

Based upon the uncontested facts in this case, including the contractual provisions with the independent contractor, the fact that representatives of the Town did monitor the grounds, and the financial benefit to the Town from sales of tickets for the ride, the Court has concluded that a non delegable duty of care to the public should be imposed upon the Town, in this case. It should be emphasized that the 4th of July celebration was a long-standing annual event in the Town of Irondequoit, with the Town acting as promoter. The hiring of Mr. Guary, as an independent contractor to operate the amusement ride, as part of this event, was for a relatively brief period of time. When combined with the public expectations in connection therewith, policy considerations would seem to dictate the imposition of a duty of due care directly upon the municipality. Whether or not the Town discharged their duty of care, becomes of question of fact for the jury.

Counsel for the Defendant, Town of Irondequoit, contends that summary judgment should be granted because Plaintiff's participation in the "Spaceball" ride constituted a primary assumption of the risk. However, the Court is unable to agree that there was anything inherently dangerous, or any apparent danger in participating in this amusement ride. This was not a situation, for example, where a plaintiff accepts a ride on a go-cart, at an amusement park, and knows that the go-cart would bump into other objects and cause injury as a result of the impact. Cf. Loewenthal v. Catskill Funland, Inc., 237 AD2d 262(2nd Dept. 1997). In the pending case, injury occurred as a result of the apparent negligent operation of the amusement ride, by the

operator, and the possible defect arising from the lack of any mechanical control, which was not obvious to anyone accepting a ride.

Finally, counsel for the Plaintiff has made a motion to amend the Complaint to delete Trailcraft Manufacturing Limited, as a party Defendant. However, as aforementioned, the president of this corporation had been served with process in this case. Although defunct and without assets, any comparative negligence on the part of this corporation in the manufacture of the "Spaceball" may impact the proportionate share of responsibility of the Town of Irondequoit. See CPLR §1601. This is true notwithstanding the fact that the Court has found that the Town owed a non delegable duty to the Plaintiff. See Rangolan v. County of Nassau, 96 NY2d 42(2001). Under CPLR §1601, if any liability of the Town were found to be fifty percent or less of the total fault, responsibility for payment of non-economic damages would be limited to their equitable share. However, the culpable conduct of a non party would not be considered in determining any equitable share unless the claimant has established the inability to obtain jurisdiction over such non party, notwithstanding the exercise of due diligence. Although amendments to pleadings should be liberally permitted, the deletion of Trailcraft Manufacturing Limited, as a party in this case, may well be prejudicial to the Town of Irondequoit.

Based upon the foregoing reasons, it is hereby

ORDERED, that Defendant's motion for summary judgment is denied, and it is further

ORDERED, that Plaintiff's motion to amend the Complaint is denied.

Dated: 31 May 2001

Hon. Raymond E. Cornelius, JSC