

Wilson v Pathmark Stores, Inc.
2007 NY Slip Op 30852(U)
April 16, 2007
Supreme Court, New York County
Docket Number: 0403944/2005
Judge: Rolando T. Acosta
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA
Justice

PART 31

Index Number : 403944/2005

WILSON, NOVELLETTA T.

vs
PATHMARK STORES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

SO ORDERED

Dated: 4/16/07

[Signature]
ROLANDO T. ACOSTA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Novelletta T. Wilson,

Plaintiff,

– against –

Pathmark Stores, Inc., New York Pepsi-Cola
Distributors Association, Inc., Casey Distributors Inc.,
Pepsi-Cola Company and The Pepsi Bottling Group,
Inc. And Pepsi-Cola Bottling Company of New York,
Inc.

Defendants.

Pathmark Stores, Inc.,

Third-Party Plaintiff,

– against –

Pepsi-Cola Company and The Pepsi Bottling Group, Inc.,

Third-Party Defendants.

The following documents were considered in reviewing Defendant Pepsi-Cola Bottling Company of New York, Inc. and third-party defendants Pepsico In s/h/a Pepsi-Cola Company and The Pepsi Bottling Group, Inc. (“Pepsi Movants”)’s motion for an order granting summary judgment dismissing the complaint, cross-claims and counter claims alleged against them:

DECISION/ORDER

Index No. 403944/05

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

FILED
APR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion, Affirmation & Affidavits	1 (Exhibits A-I)
Pathmark's Affirmation in Opposition	2
Plaintiff's Affirmation in Opposition	3
Reply Affirmation	4

The plaintiff in this case claims that she suffered injuries when she was struck by a wooden pallet on June 1, 2004 while shopping at a Pathmark Store located at 410 West 207th Street in New York County. The claims against Pepsi Movants are based on an incident report (Exhibit F), which states that Pepsi pack-out employees left an empty pallet standing on its side.

According to the Pepsi Movants, it did not service, stock, deliver to, "pack-out," or operate any beverage products or pallets at the Pathmark store. Rather, it had a distributorship agreement (Exhibit G) with defendant Casey Distributor's Inc to service and deliver Pepsi products to Pathmark. The Pepsi Movants posit that the Incident Report mistakenly referred to Casey employees as Pepsi employees because Casey employees are required to wear uniforms bearing the Pepsi name whenever they make a Pepsi delivery. Based on these facts, the Pepsi Movants seek summary judgment dismissing all the claims, cross-claims and counter claims alleged against them.

The Pepsi Movants cannot be held liable for the negligence of an independent contractor unless one of the exceptions to the general rule against vicarious liability is applicable. Kleeman v. Rheingold, 81 N.Y.2d 270, 273-74 (1993); Finnegan v. Pepsi-Cola Bottling Co. of N.Y., Inc, 238 A.D.2d 468 (2nd Dept. 1997). Apropos to the facts of this case, liability can be predicated on negligently instructing or supervising an independent contractor. Id. Thus, notwithstanding the fact that Pepsi-Cola Distributors Association and Casey Distributors are designated as independent contractors in the distributor agreement with the Pepsi Movants, if the Pepsi Movants retained substantial control or supervision over the distributors, the distributors may nonetheless be deemed employees of the Pepsi Movants. See, e.g., In Re Santoro, 173 A.D.2d 1042 (3rd Dept. 1991). Given that discovery has not yet taken place in this case, the Court cannot dismiss the case against the Pepsi Movants until it is satisfied that the distributors are in fact independent contractors. Accordingly, based on the foregoing, it is hereby

ORDERED that Pepsi Movants (Defendant Pepsi-Cola Bottling Company of New

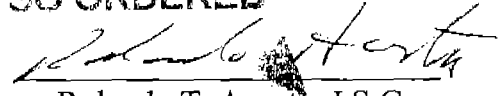
York, Inc. and third-party defendants PepsiCo In s/h/a Pepsi-Cola Company and The Pepsi Bottling Group, Inc.)'s motion is DENIED, CPLR 3212(f), with leave to file a subsequent motion after discovery on the above-stated issue has been conducted.

This constitutes the Decision and Order of the Court.

Dated: April 16, 2007

ENTER

SO ORDERED



Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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NEW YORK
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