

**Patrick v United Cerebral Palsy Assn. of
Capital Dist., Inc.**

2008 NY Slip Op 32253(U)

August 13, 2008

Supreme Court, Albany County

Docket Number: 0025342/0061

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ELIZABETH B. PATRICK, Guardian of the
Person of DAVID MICHAEL JOSEPH PATRICK,
a Mentally Retarded/Developmentally Disabled Person,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2534-06
RJI NO. 01-07-089609

THE UNITED CEREBRAL PALSY ASSOCIATION
OF THE CAPITAL DISTRICT, INC.,

Defendant.

THE UNITED CEREBRAL PALSY ASSOCIATION
OF THE CAPITAL DISTRICT, INC.,

Third-Party Plaintiff,

-against-

ALL METRO HEALTH CARE, ALL METRO HOME
CARE SERVICES, INC., ALL METRO HOME CARE
SERVICES OF NEW YORK, INC., and ALL METRO
AIDS, INC.,

Third-Party Defendants.

Supreme Court Albany County All Purpose Term, July 25, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.
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Stanley J. Tartaglia, Jr.
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Albany, New York 12203

TERESI, J.:

On December 18, 1998, David Patrick, a mentally disabled individual, was living and receiving care at "Reilly House", which is owned and operated by Defendant/Third Party Plaintiff (hereinafter "Third-Party Plaintiff"). Mr. Patrick had broken his leg earlier in 1998 and his guardian sought additional one-on-one care for him, to supplement the care that was regularly provided at Reilly House. Third-Party Plaintiff arranged for Third-Party Defendants to provide Mr. Patrick with the additional one-on-one care. Third-Party Defendants provided LaTonya Matthews, a certified Personal Care Aide, for Mr. Patrick. On December 18, 1998, while Ms. Matthews was assisting Mr. Patrick move from his wheelchair to the shower, Mr. Patrick fell and was injured.

Mr. Patrick, by his guardian, commenced this suit against Third-Party Plaintiff, in part, seeking damages due to the injury he sustained on December 18, 1998. Third-Party Plaintiff in turn brought suit against Ms. Matthews' employer, on a theory of vicarious liability, due to their employee's negligence. Issue was joined and discovery is now complete.

Third-party defendants bring this motion for summary judgement alleging that Ms. Matthews was a "special employee" of Third-Party Plaintiff, which precludes their being held vicariously liable. Third-Party Plaintiff opposes the motion. Because Third-Party Defendants have failed to prove, as a matter of law, the "special employee" relationship, summary judgment is denied.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). “[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden.” (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

“[W]hether a worker is a special employee of another presents a question of fact and that question should not be resolved on a motion for summary judgment unless the special employer's comprehensive and exclusive control and direction of the manner, details and ultimate results of the employee's work have been incontrovertibly established.” (Perkins v. Dryden Ambulance, Inc., 31 AD3d 859, 859-60 [3d Dept. 2006]). A “special employee” finding “is dependent upon a number of factors including, among others, the method of payment, ownership of equipment and

the relative nature of the work... the key to the determination is who controls and directs the manner, details and ultimate result of the employee's work". (Ribeiro v. Dynamic Painting Corp., 23 A.D.3d 795, 796 [2005] quoting Shoemaker v. Manpower, Inc., 223 A.D.2d 787 [3d Dept. 1996] lv. dismissed 88 NY2d 874 [1996][internal quotations omitted])

Here, Third-Party Defendants' motion is supported by their attorney's affidavit, with attachments. Only two of the attachments, however, provide facts to support the motion. They are, the affidavit of Catherine Kelly, dated June 16, 2008, (hereinafter "Kelly Affidavit") and the Third Party Plaintiff's Investigation Report. While the mere submission of an attorney's affidavit, with attachments, is not fatal to the proponent's motion for summary judgment (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]), the motion must still be supported by a "person having knowledge of the facts" or other "admissible proof". (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra). Neither attachment, however, properly establishes Third-Party Defendants' entitlement to judgment as a matter of law.

The Kelly Affidavit states that she is the executive vice president of All Metro Aids, Inc. (hereinafter "All Metro") and is familiar with the facts contained in the affidavit. Absent from her affidavit is any allegation that she was employed by All Metro, in any capacity, on or before December 18, 1998. Nor does she state that she has any personal knowledge of the facts and circumstances surrounding Mr. Patrick's injury or All Metro's employment relationship with Ms. Matthews. She states in conclusory fashion All Metro's general employment policy for employees placed at a facility. But does not state that such general policy was in effect on December 18, 1998 or that it was adhered to for Ms. Matthews. She states that All Metro has no documents relative to incidents of Ms. Matthews' alleged misconduct. However, she also states

that All Metro has a seven year record retention policy and fails to allege whether she conducted her search for “misconduct” records prior to the expiration of the seven years. Most importantly, she states that “no one[, which necessarily includes herself,] currently working at All Metro has any knowledge about the claims in this matter.” Because her affidavit is not based upon personal knowledge it cannot support Third-Party Defendants’ motion for summary judgment.

Likewise, the Third Party Plaintiff’s Investigation Report fails to properly support the Third-Party Defendants’ motion for summary judgment. Third-Party Defendants do not establish how those portions of the report they rely upon, which are replete with unsworn hearsay statements, constitute admissible proof. However, even assuming arguendo that the Investigation Report is admissible, it still fails to establish, as a matter of law, that Ms. Matthews was Third Party Plaintiff’s “special employee”. Reading the Investigation Report as a whole it refers to Ms. Matthews alternatively as an “outside contract worker”, “private duty staff”, “private duty attendant”, All Metro Health Care’s employee, “All-Metro Staff” and “contract staff”. Such language, in its context, is meant to describe Ms. Matthews’ as being employed by All Metro and not as a “special employee” of Third-Party Plaintiff. Moreover, the Investigation Report fails to establish, as a matter of law, that Third-Party Plaintiff controlled “the manner, details and ultimate result” of Ms. Matthew’s work. The Investigation Report shows that Third-Party Plaintiff did investigate the care being given to its resident. However, it does not conclusively establish that they were controlling how Ms. Matthews was performing her job, as it is silent on such issue. The Investigation Report does state that Third-Party Plaintiff instructed Ms. Matthews on how to move Mr. Patrick. However, it does not establish that such instruction was to the exclusion of any training she was receiving from All Metro or that she abided by such

instruction. In sum, this record fails to support Third-Party Defendants' motion for summary judgment.

Accordingly, the Court need not address the sufficiency of Third-Party Plaintiff's responding papers as Third-Party Defendants failed to establish a prima fascia entitlement to summary judgment and their motion is denied.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant/Third-Party Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: August 13, 2008
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated June 18, 2008; Affidavit in Support of Third-Party Defendants' Motion for Summary Judgment of Stanley J. Tartaglia, Jr., dated June 18, 2008, with attached Exhibits A-K; Memorandum of Law in Support of Motion for Summary Judgment of Stanley J. Tartaglia, Jr., dated June 18, 2008.
2. Affidavit of Latonya Matthews, dated July 16, 2008; Affidavit of Andrea Singleton, dated July 16, 2008; Affidavit in Opposition of William J. Decaire, dated July 18, 2008, with attached Exhibits A-C; Memorandum of Law of William J. Decaire, dated July 18, 2008.
3. Reply Affidavit in Support of Third-Party Defendants' Motion for Summary Judgment of Stanley J. Tartaglia, Jr., dated July 22, 2008.