

<b>DelManzo v Aramark Healthcare Support Servs., LLC</b>
2008 NY Slip Op 33426(U)
December 23, 2008
Supreme Court, Albany County
Docket Number: 5110-07
Judge: Joseph C. Teresi
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

MARTHA DELMANZO and  
DONALD DELMANZO,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 5110-07**  
**RJI NO. 01-08-093636**

ARAMARK HEALTHCARE SUPPORT  
SERVICES, LLC, ALBANY MEDICAL CENTER  
HOSPITAL and ALBANY MEDICAL COLLEGE,

Defendants.

---

Supreme Court Albany County All Purpose Term, December 12, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Hacker & Murphy, LLP  
John F. Harwick, Esq.  
*Attorney for Plaintiff*  
7 Airport Park Blvd.  
Latham, NY 12110-0104

Maynard, O'Connor, Smith & Catalinotto, LLP  
Anne-Jo Pennock McTague, Esq.  
*Attorneys for Defendants Albany Medical Center  
Hospital and Albany Medical College*  
6 Tower Place  
Albany, New York 12203

O'Connor, O'Connor, Bresee & First, PC  
Alexander Powhida, Esq.  
*Attorneys for Defendant ARAMARK  
Healthcare Support Services, LLC*  
20 Corporate Woods Boulevard  
Albany, New York 12211

**TERESI, J.:**

As set forth in this Court's Decision and Order, dated September 17, 2008, Ms.

Delmanzo commenced this action seeking to recover for the damages she sustained when she slipped and fell while walking in Albany Medical Center Hospital<sup>1</sup>. By such prior Decision and Order, defendant Albany Medical Center Hospital's motion for summary judgment was denied and Albany Medical College's motion for summary judgment was granted. Defendant ARAMARK Healthcare Support Services, LLC (hereinafter "Aramark") now moves for summary judgment dismissing plaintiff's complaint against it and dismissing defendant Albany Medical Center Hospital's cross-claim. Both plaintiff and Albany Medical Center Hospital oppose this summary judgment motion. Because Aramark failed to demonstrate its entitlement to judgment as a matter of law dismissing either plaintiff's complaint or Albany Medical Center Hospital's cross-claim, its motion is denied.

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]). While the submission of an attorney's affidavit, with attachments containing testimony of individuals with "personal knowledge", 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). 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 with "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or

---

<sup>1</sup>Ms. Delmanzo's husband, Donald Delmanzo, had previously been a named party herein claiming derivative damages. Donald Delmanzo's claims, however, were discontinued by a filed stipulation of the parties. Accordingly, Ms. Delmanzo will be referred to as "plaintiff" herein.

unsubstantiated allegations or assertions are insufficient.” (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

Aramark first seeks summary judgment dismissing plaintiff’s complaint against it arguing that it owes no “duty”, in this negligence action, to plaintiff. “Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party” (Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138 [2002]).

It is uncontested that Aramark was contractually obligated to supervise and manage the cleaning staff employed by Albany Medical Center Hospital at the time of plaintiff’s injury. Generally, a contractual obligation, such as Aramark’s obligation with Albany Medical Center Hospital, will impose no duty of care upon the contracting parties towards non-contracting third parties. However, a contractual obligation will give rise to a duty to non-contracting third parties in “three, limited situations: (1) where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk; (2) where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant’s continuing performance of a contractual obligation; and (3) when the promisor has entirely displaced the other party’s duty to safely maintain the premises”. Moran v. City of Schenectady, 47 AD3d 1001, 1002 [3d Dept. 2008][quoting Wyant v. Professional Furnishing & equip., Inc., 31 AD3d 952, 953 [2006]; see Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002]).

Focusing on the third exception set forth above, Aramark failed to demonstrate, as a matter of law, that their agreement did not entirely displace Albany Medical Center Hospital’s duty to safely maintain the premises. (Palka v. Servicemaster Management Services Corp., 83

NY2d 579 [1994]). Aramark's proof simply falls short of demonstrating that its contract with Albany Medical Center Hospital was not "comprehensive and exclusive". (Wyant v. Professional Furnishing and Equipment, Inc., 31 AD3d 952 [3d Dept. 2006]). Aramark submits no affidavits of its employees detailing the extent, and specifically the limitations of, their management contract with Albany Medical Center Hospital. Aramark has not submitted a copy of the agreement to demonstrate their lack of duty (although the contract was ultimately submitted by Albany Medical Center Hospital). The facts supporting Aramark's motion are set forth by the deposition testimony of two of its employees. Such testimony alleges that the cleaning staff at Albany Medical Center Hospital are "employed" by Albany Medical Center Hospital. However, the testimony demonstrates no further limitations on the scope of the services Aramark performs or the limitations on Aramark's control over such cleaning staff employees. The deposition testimony establishes that Aramark's contract with Albany Medical Center Hospital requires them to conduct inspections of the premises every day, perform quality assurance checks, institute programs for the cleaning staff, set the cleaning staff's procedures, establish work assignments and daily assignments, schedule days on and off, set up rosters, ensure appropriate staffing levels, tour the facility, communicate with the departments located within Albany Medical Center Hospital, supervise the cleaning staff and manage the cleaning staff. This record establishes Aramark's intimate involvement in the daily maintenance of Albany Medical Center Hospital and fails to demonstrate, as a matter of law, that they did not entirely displace Albany Medical Center Hospital's duty to safely maintain the premises. The mere "employment" of the cleaning staff by Albany Medical Center Hospital, without more, fails to demonstrate that the contract was not comprehensive and exclusive. Accordingly, that portion

of Aramark's motion for summary judgment premised upon their claimed lack of duty, is denied.

Similarly, Aramark failed to sufficiently support that portion of its motion for summary judgment claiming that no possible duty owed to plaintiff was breached. Aramark again relies upon the fact that Albany Medical Center Hospital "employed" the individual charged with cleaning the hallway where plaintiff was injured. However, Aramark sets forth no affirmative proof that demonstrates the scope of such "employment" or the limits of their control of the cleaning staff. Because Aramark failed to affirmatively demonstrate that it did not breach any possible duty owed to plaintiff, this portion of its motion is denied.

Aramark also moves for summary judgment claiming that it neither created nor had actual or constructive notice of the condition that caused plaintiff's fall. Here again, however, Aramark fails to affirmatively demonstrate their entitlement to judgment. On this record, Aramark shows that plaintiff's fall was caused by a substance difficult to visually detect. However, just as this Court found in its prior September 17, 2008 Decision and Order, Aramark failed to establish that the substance did not exist for a sufficient length of time prior to the accident to permit its discovery, because the last inspection of the area where plaintiff fell was a little less than twenty four hours prior to her fall. Cochetti v. Wal-Mart Stores, Inc., (24 AD3d 852 [3d Dept. 2005]), does not compel a different result and is wholly unpersuasive. In Cochetti there were "hourly safety sweeps" and the last inspection had occurred one half hour prior to that plaintiff's fall. Whereas here, an inspection of this hospital hallway's floor had not been conducted for almost twenty four hours prior to this plaintiff's fall. Because Aramark failed to establish, as a matter of law, the lack of constructive notice or that they are not the responsible party for maintaining the premises in a reasonably safe condition, their motion for summary judgment is denied.

(Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 [1986]).

Lastly, Aramark seeks summary judgment of Albany Medical Center Hospital's cross claims for indemnification or contribution against it. "One is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another." (Finch, Pruyn & Co. v Wilson Control Servs., 239 A.D.2d 814 [3d Dept. 1997], see also State of N.Y. Facilities Development Corp. v. Kallman & McKinnell, 121 AD2d 805 [3d Dept. 1986]). Again, Aramark has failed to fully develop the scope and limitations of their control over Albany Medical Center Hospital's cleaning staff. As such, Aramark has failed to demonstrate, as a matter of law, that Albany Medical Center Hospital will not be held vicariously liable for their own wrongdoing. Accordingly, Aramark's motion for summary judgment of Albany Medical Center Hospital's indemnification claim is denied.

"To sustain [a] claim for contribution, [Albany Medical Center Hospital must] show that [Aramark owed a duty to] plaintiff as an injured party and that a breach of this duty contributed to the alleged injuries." (Phillips v. Young Men's Christian Assn., 215 AD2d 825, 827 [3d Dept. 1995]). On this motion for summary judgment, Aramark has the initial burden to demonstrate, as a matter of law, they owe no such duty to plaintiff. As set forth above, however, Aramark has failed to demonstrate that they owe no duty to plaintiff. Accordingly, this portion of Aramark's motion is denied.

All papers, including this Decision and Order, are being returned to the attorney for the 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: December 23, 2008  
Albany, New York



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion for Summary Judgment, dated October 30, 2008, Affirmation in Support of Motion for Summary Judgment of Alexander Powhida, dated October 29, 2008, with Exhibits "A" - "N".
2. Affidavit in Opposition of Anne-Jo Pennock McTague, dated November 18, 2008, with Exhibits "A" - "D".
3. Affidavit in Opposition of John F. Harwick, dated December 10, 2008, with Exhibit "A".