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Short Form ~~Order~~

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PUBLISH

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MICHELLE MEEHAN,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY CHILD PROTECTION SERVICES (CPS), HARVEY BIRNBAUM and ROSLYN BIRNBAUM,

Defendants.

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INDEX NO.: 9281/2010
CALENDAR NO.: 201102136MV
MOTION DATE: 9/5/13
MOTION SEQ. NO.: 005 MG; 006 MD

PLAINTIFF'S ATTORNEY:
THE YANKOWITZ LAW FIRM, P.C.
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Great Neck, New York 11023

DEFENDANTS' ATTORNEYS:
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DENNIS M. BROWN
Suffolk County Attorney
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Upon the following papers numbered 1 to 26; 1-25 read on this motion for summary judgment and motion to amend pleadings : Notice of Motion/ Order to Show Cause and supporting papers 1-14; 1-8 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 15-24; 9-13; Replying Affidavits and supporting papers 25-16; 14-15; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants County of Suffolk and County of Suffolk i/s/h/a Suffolk County Child Protective Services (County) seeking an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted. The complaint and all cross claims asserted against the County of Suffolk defendants are hereby dismissed; and it is further

ORDERED that the motion by defendants Harvey Birnbaum and Roslyn Birnbaum seeking an order pursuant to CPLR 3025 & 3212: 1) granting leave to permit the defendants to assert a cross claim against the County defendants for breach of its contractual obligation to procure insurance coverage on behalf of defendant Roslyn Birnbaum; 2) granting summary judgment in favor of defendant Roslyn Birnbaum and against the County defendants with respect to the amended cross claim; and 3) dismissing the County defendants cross claim seeking contractual indemnification is denied without prejudice since the County defendants are no longer parties to this action; and it is further

ORDERED that the action is otherwise severed and continued against the remaining defendants.

On February 18, 2010 plaintiff Michelle Meehan (Meehan) was operating a motor vehicle which was involved in a collision with a vehicle driven by defendant Roslyn Birnbaum (Birnbaum) and owned by defendant Harvey Birnbaum. Meehan commenced a personal injury action against the

Birnbaums claiming that defendant Roslyn Birnbaum's negligent failure to properly operate the vehicle caused the two car collision. During the course of discovery plaintiff learned that Birnbaum had been employed by Suffolk County Child Protective Services (CPS) and was in the process of conducting a CPS field visit when the accident occurred. As a result Meehan commenced a second action against the County of Suffolk claiming that the County was vicariously liable for Birnbaum's alleged negligence. By short form order (Farneti, J.) dated March 16, 2012 the actions were consolidated under the original 2010 index number.

Roslyn Birnbaum had been employed by Suffolk County Child Protection Services as a senior caseworker until her retirement effective March 31, 2009. Birnbaum entered into two "Consultant/Personal Services Contracts" with Suffolk County executed by her in April, 2009 and March, 2010. The term of the first contract extended from May 1, 2009 until December 31, 2009; the term of the second contract extended from January 1, 2010 until December 31, 2010. The contracts designated Birnbaum as a consultant who was to be paid an hourly fee for services rendered to the County. Under the terms of the contracts Birnbaum submitted vouchers together with proof of the number of hours she had worked on behalf of the County, and the County made payment without withholding taxes.

Defendant County of Suffolk's motion seeks an order dismissing plaintiff Meehan's complaint claiming that the relevant, admissible evidence submitted proves that defendant Birnbaum was an independent contractor when the accident occurred and therefore the County is not responsible for the injuries sustained by Meehan in the two car accident. In support of the motion the County submits an affidavit from a CPS senior case worker and two affirmations of counsel and argues that on February 18, 2010 defendant Birnbaum was working as a consultant for the County under the terms of a "Consultant/Personal Services Contract" entered into between Birnbaum and the County. Defendant claims that Birnbaum retired from her position as a senior County caseworker effective March 31, 2009 and thereafter entered into two independent consultant contracts with the County extending through December 31, 2010. It is the defendant's position that the totality of the evidence submitted proves that Roslyn Birnbaum was a 1099 contractor and therefore the County is not vicariously liable for the claims asserted by the plaintiff.

In opposition to the County's motion plaintiff Meehan submits an attorney's affirmation reciting relevant portions of defendant Birnbaum's deposition testimony and claims that the evidence shows Birnbaum was a County employee on the date the accident occurred. Plaintiff argues that Birnbaum's testimony conclusively shows that despite her "retirement from County service" in March, 2009, Birnbaum continued full-time County employment performing the identical work she performed prior to her retirement. Plaintiff asserts that the only difference in her relationship with the County post-retirement was the method the County implemented to pay Birnbaum. It is the plaintiff's position that the totality of the evidence proves that the defendant was a County employee and therefore the County's summary judgment motion must be denied.

In support of the Birnbaum defendants' cross motion seeking leave to amend their answer to include a cross claim against the County and for judgment against the County on that cross claim, the defendants submit an affidavit from Roslyn Birnbaum and two affirmations of counsel and claim that the written agreement between the County and Birnbaum covering the period between January 1, 2010 through December 31, 2010 required that the County maintain insurance coverage for Birnbaum while she performed her consultant duties under the contract. Defendants contend that

under the circumstances leave to amend their cross claim and judgment in their favor against the County must be granted, since the undisputed proof shows that under the terms of the parties agreement the County breached the contractual requirement to provide liability coverage for Birnbaum with respect to the February 10, 2010 accident. Defendants argue that the fact that the amendment providing such coverage was executed by the parties after the accident had occurred is irrelevant to the issue of coverage since the County representative testified during her deposition that the County had agreed to provide such coverage for the entire year. Defendants also claim that a declaratory judgment action is unnecessary since the evidence submitted proves that the County was required to provide insurance coverage for Birnbaum.

In opposition the County submits an attorney's affirmation and claims that the County never consented to provide retroactive coverage for the February, 2010 accident; the anti-subrogation rule precludes such coverage; defendants' motion seeking leave to amend the cross claim is untimely; and the insurance coverage issue must be made in a separate declaratory judgment action which would necessarily involve Birnbaums' insurance carrier. The County claims that paragraph 10 of the County/Birnbaum consultant agreement requires that the contractor/consultant (Birnbaum) defend and indemnify the County for negligent acts and reimburse the County for reasonable attorneys fees incurred in an underlying action. The County also claims that it has no obligation to provide retroactive coverage since the paragraph containing the amended provision was agreed to by the County more than two months after the accident occurred and there is no evidence submitted to indicate that the agreement was intended to provide retroactive coverage. The County argues that the proposed amendment is untimely since the defendants were aware of the coverage provision at least since November, 2012 when the County's representative was deposed and maintains that the issue of insurance coverage obligations may only be determined by commencement of a declaratory judgment action naming all insurers and insureds as parties to the action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

The law is clear that a party who retains an independent contractor, as distinguished from an employee, has no liability for the independent contractor's negligent acts (*Bynog v. Cipriani Group*, 1 NY3d 193, 770 NYS2d 692 (2003); *Berger v. Dykstra*, 203 AD2d 754, 610 NYS2d 401 (2nd Dept., 1994); *Kleeman v. Rheingold*, 81 NY2d 270, 598 NYS2d 149 (1993)). The rationale for precluding liability rests upon the premise that a party who employs an independent contractor has no right to control the manner in which the work is to be done and therefore the risk of loss should be placed on the contractor (*see Hernandez v. Chefs Diet Delivery, LLC*, 81 AD3d 596, 915 NYS2d 623 (2nd Dept., 2011); *Akgul v. Prime Time Trans.*, 293 AD2d 631, 741 NYS2d 553 (2nd Dept., 2002)). The

determination of whether a contractual relationship creates an independent contractor relationship or an employer-employee relationship is based upon an analysis of the totality of circumstances which exist (*see Bhanti v. Brookhaven Memorial Hospital Medical Center*, 260 Ad2d 334, 687 NYS2d 667 (2nd Dept., 1999)). The critical inquiry in determining whether an employment relationship exists concerns primarily the degree of control exercised by the employer over the results produced and the means used to achieve the results (*Bynog v. Cipriani Group, supra.; Matter of Ted Is Back Corp. (Roberts)*, 64 NY2d 725, 485 NYS2d 742 (1984)). Among the factors to be considered in determining whether an employer-employee relationship exists are: 1) whether the worker worked at her own convenience; 2) whether the worker was free to engage in other employment; 3) whether the worker received fringe benefits; 4) whether the worker was listed on the employer's payroll; and 5) whether the worker was on a fixed schedule (*see Bynog v. Cipriani Group, supra.*, 1 NY3d @ 198).

Based upon a review of the evidence submitted the Court finds that defendant Birnbaum was an independent contractor and not an employee hired by the County. The proof indicates that defendant retired as a county employee and executed two independent contractor agreements which authorized her to continue to work as a consultant for the Department of Social Services. Although her duties as a consultant largely mirrored the work she performed while a county employee, the nature of the parties relationship changed significantly. Defendant Birnbaum was no longer subject to civil service oversight requirements in relation to time sheet entry, vacation and sick time accruals, and no longer paid union dues nor received union benefits. Moreover payment for her consultant services was made by vouchers she was required to submit verifying the work she performed: she no longer received a bi-weekly paycheck from the county and taxes were no longer withheld from payments made to her. Based upon consideration of the totality of circumstances involved in the parties working relationship, and particularly in view of the degree of autonomy Birnbaum acquired as a county consultant, this Court concludes that the defendant was in fact an independent contractor. The County is therefore not responsible for any of the claimed negligent acts committed by Birnbaum while she was engaged in her consultant duties and defendant County of Suffolk's motion seeking an order granting summary judgment dismissing plaintiff Meehan's complaint and all cross claims asserted against it must be granted.

With respect to the co-defendants' motion seeking leave to amend their answer to assert an additional cross claim against the County and upon such leave being granted, seeking judgment on the breach of contract claim, defendants' application is denied without prejudice to renewal in proper form since the County is no longer a party to this action.

Dated: January 31, 2014

J.S.C.
HON. PAUL J. BAISLEY JR.