IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

George Cumpston and Angel Cumpston, Individually and as Parent and Natural Guardian of Amber Kilkenny,	)	
Plaintiffs,	)	C.A. No. 06C-11-051-JRJ
v.	)	
Matthew McShane, Cluck-U Corp., and C.U.D., Inc.	)	
Defendants.	)	

Date Submitted: February 4, 2009
Date Decided: May 15, 2009
Date Amended: June 4, 2009

Upon Defendant C.U.D., Inc.'s Motion for Summary Judgment: **DENIED**

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Jurden, J.

I. INTRODUCTION

Before the Court is Defendant, C.U.D., Inc.'s ("C.U.D.") Motion for Summary Judgment. By its motion, C.U.D. argues that its relationship with Matthew McShane ("McShane") was not that of an employer/employee, but rather an owner/independent contractor. For the reasons discussed below, C.U.D.'s Motion for Summary Judgment is **DENIED**.

II. BACKGROUND

From February to March 2006, McShane worked part-time for C.U.D., which owned and operated a Cluck-U Chicken franchise in New Castle County, Delaware.[1] McShane did not fill out an application or sign an agreement/contract before he started working for C.U.D. C.U.D. compensated McShane for his work by paying him an hourly wage, plus tips.[2] All compensation was paid in cash. McShane did not complete any tax forms in conjunction with his work for C.U.D., nor did C.U.D. withhold any taxes.

McShane's responsibilities included making food deliveries, fielding orders from customers, using the cash register to process food orders, and

[1] The franchise is no longer in business in Delaware. From February to March 2006, while working for C.U.D., McShane was simultaneously enrolled as a full-time college or university student. Def. C.U.D.'s Requests for Admissions Directed to Def. McShane ("Interrogatories") at ¶14; Def. McShane's Answers to Request for Admissions ("Admissions") at ¶14.

[2] Pl.'s Resp. to C.U.D.'s Motion for Summary Judgment ("Pl.'s Reply Br.") at ¶9, Docket Item ("D.I.") 61; McShane's Dep. at 48-49, May 2, 2008.

cleaning the premises after every shift.[3] McShane was not issued, nor was he required to wear, a uniform, insignia, logo, or sign that indicated that he represented Cluck-U Chicken or C.U.D.[4] C.U.D. did not provide McShane with an automobile or automobile insurance coverage in order to make its food deliveries, nor did C.U.D. compensate McShane for any of his automobile-related expenses.[5] C.U.D. did not train McShane in regard to his ability to operate a motor vehicle, nor did C.U.D. instruct McShane to take a specific driving route when making food deliveries.[6] C.U.D. provided a map in the Cluck-U Chicken storefront for C.U.D.'s workers to reference before making food deliveries. McShane printed out driving directions from MapQuest on his home computer for his work-related deliveries.[7]

On March 11, 2006, at approximately 5:42 pm, George Cumpston ("Cumpston") was operating a motorcycle that allegedly collided with a vehicle driven by McShane ("the accident"). McShane's vehicle belonged to Timothy Stanton. McShane had borrowed the vehicle from Daniel Stanton, who was McShane's friend and the manager of C.U.D.[8] At the time of the accident, Amber Kilkenny ("Kilkenny") was a passenger on

[3] Pl.'s Reply Br. at ¶9.
[4] C.U.D.'s Mot. for Summ. J. at ¶6, D.I. 59.
[5] C.U.D.'s Mot. for Summ. J. at ¶3-4.
[6] Interrogatories at ¶22; Admissions at ¶22.
[7] McShane's Dep. at 24.
[8] Pl.'s Reply Br. at ¶7; McShane's Dep. at 18:18-24.

Cumpston's motorcycle (Cumpston and Kilkenny collectively referred to as "Plaintiffs"). Plaintiffs allege that McShane's negligence caused the collision and resulted in Plaintiffs "significant physical injuries."[9] Plaintiffs claim that C.U.D. is vicariously liable for McShane's alleged negligent conduct under the doctrine of *respondeat superior*.[10]

III. STANDARD

On a motion for summary judgment, the Court examines "all facts in a light most favorable to the non-moving party, and determine[s] whether there is a genuine issue of material fact requiring a trial."[11] "When a motion for summary judgment is supported by evidence showing no material issues of fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact requiring trial."[12] "If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted."[13]

[9] Pl.'s Reply Br. at ¶1; Compl. at ¶8.
[10] Pl.'s Reply Br. at ¶2.
[11] *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. 2006), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
[12] *Id.; see also In re Asbestos Litig. ("Helm")*, 2007 WL 1651968, at *15 (Del. Super. June 25, 2007) (setting forth the standard of review on a motion for summary judgment).
[13] *In re Asbestos Litig. ("Hudson")*, 2007 WL 2410879 *2 (Del. Super. Aug. 27, 2007) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)); *Kulp v. Mann-Beebe*, 2008 WL 4120041, at *4 (Del. Super. July 10, 2008).

IV. DISCUSSION

Whether C.U.D. may be vicariously liable for McShane's actions depends upon whether C.U.D. and McShane were in a master-servant or employer-employee relationship, and McShane was acting within the scope of that employment at the time of the accident.[14] Conversely, C.U.D. cannot be held vicariously liabile for McShane's actions if McShane was an independent contractor.[15] Delaware recognizes Section 220 of the Restatement (Second) of Agency as an authoritative source for defining the master-servant relationship.[16] The Restatement (Second) of Agency states that the following non-exclusive "matters of fact" are to be considered in deciding whether the actual tortfeasor is a servant or an independent contractor:

> (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;

[14] *Fisher v. Townsend, Inc.*, 695 A.2d 53, 58 (Del. 1997).
[15] *Id.*
[16] *Id.*

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.[17]

No single factor is definitive; however the extent of control a principal has over its agent is given the greatest weight.[18] "If the principal assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a master/servant type of agency relationship has been created."[19]

In the present case, genuine issues of material fact exist concerning McShane's agency relationship with C.U.D. For example, the Cluck-U Chicken "Staff Responsibilities" operations manual outlines specific duties and responsibilities for its delivery drivers.[20] This manual includes "Shift

[17] *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1999-1100 (Del. 2006) (citing RESTATEMENT (SECOND) OF AGENCY § 220 (1958)).
[18] *Kulp v. Mann-Beebe*, 2008 WL 4120041, at *3 (Del. Super. July 10, 2008).
[19] *Fisher*, 695 A.2d at 59; *Kulp*, 2008 WL 4120041, at *4.
[20] Pl.'s Reply Br., Ex. B at 6-8 (June 11, 2001 Ed.).

Specific Duties" for its drivers.[21] This evidence creates a genuine issue of material fact as to the extent of control that C.U.D. exercised over the details of McShane's work. Attached to the manual is an *unsigned* "Employee/Driver Agreement" that lists specific auto maintenance, driving, and safety requirements all applicants must meet and follow "[i]n order to gain employment as a driver for Cluck-U Chicken[.]"[22] It is unclear whether McShane was bound by the Agreement. The parties dispute the extent of control C.U.D. maintained over McShane, McShane's work schedule, and the intentions of the parties as to McShane's employment status.[23] These disputed facts are material to the determination of whether McShane was a servant/employee or an independent contractor.

V. CONCLUSION

Viewing the facts in the light most favorable to McShane and Cumpston, the non-moving parties, it is inappropriate for the Court to grant summary judgment at this time. Therefore, C.U.D.'s Motion for Summary Judgment is **DENIED**.

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[21] *Id.*

[22] Pl.'s Reply Br., Ex. B. According to the Agreement, applicants were required to maintain their vehicles and check them on a quarterly annual basis, obtain liability insurance coverage, obey traffic laws, "not eat or drink while driving[,] . . . place the hot box and drinks in the prescribed area of the vehicle[,]" among a host of other specifications.

[23] *See* Pl.'s Reply Br. at ¶5, 9-10; McShane's Dep. at 12.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary - Original