

JANE DOE

Plaintiff

V.

JOHN AND MARY ROE

Defendants.

SUPERIOR COURT OF NEW JERSEY
XXXXXX DIVISION
XXXXXX COUNTY
DOCKET NO. XXXXXX

CIVIL ACTION

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Plaintiff, Jane Doe for her answer to defendants Motion for Summary Judgment

says:

STATEMENT OF MATERIAL FACTS

1. Plaintiff testified that she was only going to care for defendant for two or three weeks. “... so she wanted me to stay there to take care of her for approximately two weeks.” (Doe Dep. page 38, lines 6-9, Exhibit A.) “Because I was to take care of her while her husband was in the hospital, because he would be in the hospital for about two or three weeks recuperating, and she needed someone to take care of her and she couldn’t walk.” (Doe Dep. page 40, line 25, page 41 lines 2-6, Exhibit A.)
2. Plaintiff testified that she did not care for defendant for money. “Q. And you did that for money? A. No, no. We were friends, and I was going to be there for a couple of weeks. I even brought some of my own food. This was like as a favor, because I wasn’t working and I would take care of her.” (Doe Dep. page 38, lines 10-15, Exhibit A.) “I know I never got paid, and who would give me \$500 to take care of them for two weeks? Her husband was supposed to be in the hospital for two, maybe three weeks, that’s why I was supposed to leave when I left.” (Doe Dep. page 104, lines 5-9, Exhibit A.)
3. Plaintiff testified that she had never taken care of a person in a similar circumstance to that of defendant. “Q. Did you from time to time help out other people in their homes who were disabled or who required help? A. Occasionally my girlfriend. I would baby-sit my girlfriend’s grandchild. Q. That would be what, for a few hours in the evening? A. During the day or if she would call me. Q. You would not stay overnight? A. No. (Doe Dep. page 38, lines 24-25, page 39 lines 2-9, Exhibit A.)
4. Plaintiff testified that she had never been employed to stay overnight to take care of someone. Q. You would not stay overnight? A. No. Q. Would you stay overnight in

anybody's home? A. No. have you ever? No.” (Doe Dep. page 39, lines 8-14, Exhibit A.)

5. Defendants never filed a 1099, W-2, or W-4 tax form naming plaintiff as their employee.¹

¹ On or about October 2, 2002 plaintiff filed and served defendants with her Supplemental Notice to Produce, which asked for “Copies of all 1099's W-2's and W-4's filed by defendant for the year of 1999.” (Paragraph 2, Exhibit B.) Defendants never responded to the notice. Plaintiff therefor assumes that such forms do not exist.

STATEMENT OF FACTS IN DISPUTE

1. Plaintiff admits the following numbered facts in defendants' Statement of Uncontested facts: Nos. 1, 2, 6, 7, 8, and 9.
2. Plaintiff disputes the following numbered facts in defendants' Statement of Uncontested facts: Nos. 3, 4, and 5.
3. Plaintiff disputes defendants' Uncontested Fact No. 3.: plaintiff testified that defendants did not pay her. Although her Complaint states she was "employed by defendant as a caretaker" (Complaint paragraph 1) plaintiff's testimony at her deposition was clear that she was not paid and cared for defendant Mary Roe as a favor. (See plaintiff's Statement of Material Facts No. 2.)
4. Plaintiff disputes defendants' Uncontested Fact No.4: plaintiff testified that defendants did not pay her. (See plaintiff's Statement of Material Facts No. 2.)

Plaintiff admits that she was to assist Mary Roe while Richard Roe was hospitalized for up to three weeks. She disputes that she was hired.
5. Plaintiff disputes defendants' Uncontested Fact No .5: plaintiff testified that she was not paid by defendants. (See plaintiff's Statement of Material Facts No. 2.)

LEGAL ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE NOT BARRED BY N.J.S.A. 34:15-8

Plaintiff was not defendants' employee at the time of the accident. Assuming, but not conceding that plaintiff was employed by defendants, her employment was casual and therefor her claims are not barred by N.J.S.A. 34:15-8.

Plaintiff does not dispute that N.J.S.A. 34:15-8 bars an employee from suing an employer for unintentional torts. See Millison v. E.I. du Pont de Nemours & Company, 101 N.J. 161, 501 A.2d 505 (1985). Plaintiff contends that defendants did not employ her. Whether plaintiff received compensation for staying at defendants' home is a disputed material issue of fact. In her Complaint plaintiff characterized defendants as her employer, however, during her deposition it became clear that plaintiff did not consider defendants her employers and that the defendants did not pay her. Doe Dep. page 38, lines 10-15, page 104, lines 5-9. Whether defendants paid plaintiff is clearly a material issue of fact to be decided by the jury.

If defendants employed plaintiff, her employment was a casual and therefor was not covered by the workman's compensation statute. See N.J.S.A. 34:15-36. The statute specifically excludes casual employment, which it defines as "if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring..." Id. As plaintiff was not on defendants' premises in connection with their business the issue is whether her "employment" was "regular,

periodic or recurring.” Id. Defendants in their Brief do not dispute that a casual employee can sue for unintentional torts.

If Jane Doe was employed by defendants, her employment was casual because her “employment” was not “regular, periodic or recurring.” Id. “[E]mployment is regular when it is steady and permanent for more than a single piece of work; recurring, when the work is to be performed at some future time by the same party, without further engagement; and periodic, when the work is to be performed at stated intervals, without further engagement.” DeMarco v. Bouchard, 274 N.J.Super. 197, 200, 643 A.2d 662, 663 (Law Div. 1994) citing Forrester v. Eckerson, 107 N.J.L. 156, 158, 151 A. 639, 640 (E. & A.) 1930). Defendants do not argue that plaintiff was employed for more than a single piece of work, that plaintiff was to be employed by them at any future time, or that her work was to be done at stated intervals. Plaintiff’s employment was not steady and it certainly wasn’t permanent. If plaintiff was employed by defendants, her employment was not regular, recurring, or periodic and was therefor casual. See N.J.S.A. 34:15-36.

Defendants cite three cases for the proposition that plaintiff was not a casual employee.² While Gordon v. New Hampshire Insurance Company, 89 N.J.Super. 246 214 A.2d 533 (App. Div. 1965) held that a domestic employee is covered under the Workman’s Compensation Act, the employee in Gordon was undisputed to be a domestic employee. 89 N.J.Super. at 248, 214 A.2d at 534. Moreover, as the issue was not disputed, Gordon is not helpful in determining whether plaintiff was a domestic employee of defendants. Plaintiff was clearly not a regular, periodic or recurring household servant of defendant.

Stillman v. Judges of Court of Common Pleas of Essex County, 6 N.J. Misc. 6, 139 A. 705 (1927) is similar to plaintiff's situation. However, the differences between this situation and Stillman outweigh the similarities. Unlike the plaintiff in Stillman Jane Doe was not regularly employed to perform the duties that defendants asked her to do. Compare 6 N.J. Misc. at 7, 139 A. at 706 ("Mrs. Reinhart had been accustomed to this sort of service, sometimes engaging for domestic work generally, and sometimes as a seamstress.") with Doe Dep. pages 38-39. Moreover, the plaintiff in Stillman was bound to continue her employment while plaintiff was helping defendant Mary Roe as a favor. See 10 N.J. Misc. at 7, 139 A. at 706. Lastly although both Doe and the plaintiff in Stillman were employed for two weeks, the plaintiff in Stillman's employment was for two weeks and "an indefinite period." Id. Even if plaintiff was paid for her favor, it was not something she was regularly employed to do, she was not bound to care for defendant, and was never to stay with defendants indefinitely.

The facts in Cantwell v. Delaney, 10 N.J. Misc. 783, 160 A. 679 (1932) affirmed 110 N.J.L. 554 (1933) are sparse. Plaintiff's circumstance, however, differs from the circumstances in that the plaintiff in Cantwell was employed "for at least three weeks and such further indefinite period as her services might be required." 10 N.J. Misc. at 784. 160 A. at 681. Jane Doe testified that she was to care for defendant Mary Roe for two or three weeks while defendant's husband was recuperating in the hospital. Doe Dep. page 40 line 9, page 41 lines 2-4. There is no evidence that plaintiff, unlike the plaintiff in Cantwell, would have been "employed" by defendant for an indefinite period of time.

² Defendants also cite Stewart v. Brant, 19 N.J. Misc. 37 (1940) for the proposition that an employee who works one-half day every week or two weeks is not a casual employee. As it is uncontested that plaintiff was not a recurring employee of defendants Stewart is irrelevant.

Plaintiff's "employment" was to cease when defendant Richard Roe returned from the hospital in two or three weeks.

Although Cantwell and Stillman are somewhat damaging to plaintiff's assertion that if employed by defendants she was a casual employee, neither case clearly holds that an employee in plaintiff's situation was not a casual one. In fact the courts been reluctant to define a precise test for what constitutes "regular periodic, or recurring employment."

The varying circumstances of employment outside the scope of employer's business are myriad when employment is tested for the statutory non-casual requirements--'regular, periodic or recurring.' No precise and practical definitions of compensable or casual employments under this provision of our statute suitable for all cases have been cited; and it is apparent that none can be composed. Each case must stand or fall upon its own facts tested by the fair meaning of the statutory standards of employment--'regular, periodic or recurring. Glidear v. Charles, 11 N.J.Super. 523, 526, 78 A.2d 588, 590 (App. Div.), aff'd 7 N.J. 345, 81 A.2d 758 (1951) cited in Herritt v. McKenna, 77 N.J.Super. 409, 414-15 186 A.2d 694, 698 (App. Div.) cert. denied 40 N.J. 213 191 A.2d 57 (N.J. 1963).

Herritt held that a previously hired babysitter who was hired to care for children while defendants were away for six days was a casual employee. The court distinguished Cantwell and Stillman because both of those cases involved the possibility that the employment would continue indefinitely. 77 N.J.Super. at 414, 186 A.2d at 697-98. It was clear from the arrangement between plaintiff and defendants that plaintiff was only to stay with Mrs. Roe for two or three weeks, when her husband would return. The employment was definite. It was defined as two or three weeks.

Lastly, defendants never filed a 1099, W-2, or W-4 tax form in 1999. This evidences either that defendants never paid Jane Doe for caring for Mary Roe or that plaintiff's employment was casual, since filing a 1099, W-2, or W-4 generally means that employment is not casual. Defendants' argument comes down to one simple statement:

“plaintiff having received compensation is barred from suing her employers in tort.”

Def.s’ Brief at 7. This grossly misstates the meaning of a casual employee under N.J.S.A.

34:15-8.

Plaintiff respectfully submits that she was not an employee of defendants and is not barred by N.J.S.A. 34:15-8 from suing them.

POINT II

DEFENDENTS BREACHED THEIR DUTY OF CARE TO PLAINTIFF

Defendants cannot show that no reasonable jury would find that defendants breached their duty to plaintiff.

Defendants concede that that a “property owner has a duty to inspect, maintain and repair the property under [their] control.” Def.’s Brief at 8. Plaintiff concedes that a property owner’s duty is not absolute. However, it is for a jury to decide whether defendants breached their duty as a property owner. Defendants analyze plaintiff’s relationship to defendants as a tenant, licensee, and a social guest. In each of these instances defendant admits that defendants would owe a duty to plaintiff, but argue that in each of these cases that defendants did not breach their duty. However, under each of these analyses the evidence clearly supports that defendants breached their duty to plaintiff.

A landlord has a common-law duty to maintain premises under its control. Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199 (1958). A landlord’s duty “requires the exercise of reasonable care to guard against foreseeable dangers arising from the use of the premises.” Anderson v. Sammy Redd & Associates, 278 N.J.Super. 50, 54, 650 A.2d 376, 377 (App. Div. 1994), cert. denied 139 N.J. 441 (1995) (citations omitted). While the existence of a duty is a question of law, the decision whether the landlord breached the duty, foreseeability and proximate cause are questions for the jury. Id. at 56, citing Hambright v. Yglesias, 200 N.J.Super. 392, 396, 491 A.2d 768 (App. Div. 1985). Defendants and plaintiff agree that a landlord has a duty to a tenant. The only questions are those of that are in the province of the jury: breach of duty, foreseeability,

and proximate cause. Therefore if plaintiff was defendants' tenant summary judgment should be denied.

If plaintiff is considered defendants' licensee, the decision of whether defendants breached their duty to plaintiff would still be one for the jury. See Snyder v. I. Jay Realty Co., 30 N.J. 303, 314 153 A.2d 1, 7 (1959) (holding that whether it was foreseeable that a lessee's invitee would find the dangerous platform was a question for the jury).

Hosts must exercise reasonable care for the protection of their guests. Cropanese v. Martinez, 35 N.J.Super. 118, 113 A.2d 433 (App. Div. 1955). A host who knows of any defective or dangerous condition must either exercise reasonable care to correct the condition or warn the guest of the danger. Berger v. Shapiro, 30 N.J. 89, 99, 152 A.2d 20, 26 (1959). Whether a host breached a duty to a social guest is a question for a jury. 30 N.J. at 100, 152 A.2d at 26 ("it was for the jury to determine whether or not a reasonable man would realize [a broken step] created a hazard"). Moreover, whether a host's failing to turn on a light for a guest is a breach of duty is a question for the jury. Campbell v. Hastings, 348 N.J.Super. 264, 791 A.2d 1081 (App. Div. 2002).

In their brief defendants cite several factors that mitigate their negligence when not properly lighting the stairwell where plaintiff fell and other factors that relate to plaintiff's contributory negligence. Whether these factors absolve defendants is a decision for a jury. Defendants could have warned plaintiff about the lighting by the step in their hallway. Defendants did not ensure that the stairwell was always properly lighted. Whether these facts constitute negligence is a question for the jury.

Regardless of whether plaintiff was defendants' tenant, licensee or social guest the decision whether defendants breached their duty to plaintiff is one that must be decided by a jury.

POINT III

SUMMARY JUDGMENT SHOULD BE DENIED

When deciding a motion for summary judgment a judge must examine the evidence in the light most favorable to the non-moving party. Brill v. Gaurdian Life Ins. Co. of America, 142 N.J. 520, 523, 666 A.2d 146, 147 (1995); Harabes v. Barkery, Inc., N.J.Super.L., 2001, 791 A.2d 1142, 1143 (N.J. Super Ct. 2001). Rule 4:46-2 provides that a court should grant summary judgment only when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged **and** that the moving party is entitled to a judgment or order as a matter of law.” (emphasis added), cited in 142 N.J. at 528-529, 666 A.2d at 150. Defendants are not entitled to summary judgment because there exists not only a material issue of fact, but also because the questions regarding defendants’ negligence are questions properly before the jury.

Defendants have the burden of proving that there are no material issues of fact. Judson v. People’s Bank & Trust Co. of Westfield, 17 N.J. 67, 75 110 A.2d 24, 27 (1954). Summary judgment is not proper when there exists any genuine material issue of fact. Warthen v. Toms River Community Memorial Hospital, 199 N.J.Super. 18, 22-23 488 A.2d 229, 231 (App. Div. 1985) (citations omitted). Where the evidence, viewed in a light most favorable to the party opposing the motion, “are sufficient to permit a rational factfinder to resolve disputed issues in favor of the party in opposition, summary judgment should not be granted.” Great Atlantic & Pacific Tea Co., Inc. v. Checchio, N.J.Super.A.D., 2000, 762 A.2d 1057, 1062 (App. Div. 2000), citing 142 N.J. at 540.

Plaintiff and defendants disagree on a material issue of fact. There is a disagreement about whether plaintiff was paid by defendants. Plaintiff testified that she was not paid by defendants. Doe Dep. pages 38, 104. Defendant Roe certified by affidavit that plaintiff was paid for staying with her. Roe Aff. Paragraph 5.

Additionally, defendants cannot be entitled to judgment as a matter of law because whether defendants were negligent and whether plaintiff's injuries were foreseeable are questions properly before the jury. 278 N.J.Super. at 56, 650 A.2d at 379 (citation omitted); 30 N.J. at 314, 153 at 7; 30 N.J. at 99, 152 A.2d at 26. In fact three of the four³ cases cited by defendants for the standard of proof in Point II of their brief held that summary judgment was improper because the defendants' negligence was not properly placed before a jury. Id.

Defendants have neither proven that there is no material issue of fact nor that they are entitled to summary judgment as a matter of law.

³ The fourth case Pearlstein v. Leeds, 52 N.J.Super. 450 (App. Div. 1958) cert. denied 29 N.J. 354 (1959) was not a summary judgment case.

CONCLUSION

For all the reasons expressed herein, plaintiff respectfully requests that summary judgment be denied.

Respectfully Submitted

By: _____

Dated: