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**SHORT FORM ORDER**  
**SUPREME COURT - STATE OF NEW YORK**

**Present: HON. JOHN P. DUNNE, Justice**

TRIAL/IAS, PART 8

**ROSLYN BREAD CO., INC.**  
**CARA MFG. CO., INC. and 151 CORP.**

**Index No. 016656/00**  
**Motion Seq. No. 3&4**  
**Motions for declaratory judgment**  
**Motion submission: 12/16/03**

Plaintiff,

**-against -**

**HARTFORD INSURANCE CO. of the MIDWEST**  
**Defendant**

**HARTFORD INSURANCE COMPANY of the**  
**MIDWEST,**  
**Third-Party Plaintiff**

**-against-**

**JOE CONSTRUCTION CORP., ADZ BAKERY**  
**EQUIPMENT, INC., STEVEN A. ELKIND, indiv.,**  
**ANNE LYNN ELKIND, indiv., STEVEN A. ELKIND\**  
**and ANNE LYNNE ELKIND d/b/a POWER-VAC**  
**CHIMNEY and AIR DUCT CLEANING and**  
**PAVAILLER, INC.**

Third-Party Defendants.

**JOE CONSTRUCTION CORP.**  
**Fourth-Party Plaintiff**

**-against-**

**POLYTECH BAKERY INSTALLATION CO. and**  
**CHRISTIAN PULSAR,**  
**Fourth-Party Defendants**

The following papers read on this motion:

Notice of Motion and Cross-Motion .....	XX
Answering Affidavits.....	X
Reply .....	X
Memo .....	X

Upon the foregoing papers, it is hereby ordered that the motion by third-party plaintiff Hartford Insurance Company of Midwest (hereinafter referred to as Hartford for an order declaring that fourth-party defendant Polytech Bakery Installation Company and Christian Pulsar (hereinafter collectively referred to as Polytech/Pozzar) were acting as agents of Pavailler, USA, Inc. s/h/a Pavailler, Inc. (hereinafter referred to as "Pavailler") when they performed the services at the Roslyn Bread Company is denied. Cross-motion by Pavailler for an order determining that both ADZ and Polytech/Pozzar were independent contractors and that any finding of negligence as against either ADZ or Polytech/Pozzar may not be imputed to Pavailler is likewise denied.

The first party action was commenced in connection with a fire that occurred on or about October 25, 1998 at Roslyn Bread Company Inc's (hereinafter referred to as "Roslyn Bread") bakery/restaurant located at 400 Willis Avenue, Roslyn Heights, New York. Roslyn Bread alleges that the bread baking oven located at the subject premises caught fire causing damage to the subject premises and the business personal

property contained therein. Roslyn Bread further asserts that it sustained losses of income and other economic losses.

The pertinent procedural history of these actions include as follows:

Hartford had issued a policy of insurance to Roslyn Bread under policy number 12SBALB0439, which insured against loss or damage to the building and business personal property located at the subject premises and the loss of business income. Said coverage was in effect from June 30, 1998 through June 30, 1999.

Subsequent to October 25, 1998, Roslyn Bread filed a claim with Hartford under the subject policy for damages sustained to the subject premises, business personal property, business interruption and loss of rents due to the fire.

Pursuant to its insurance contract, Hartford made payment to Roslyn Bread for the damages to the subject premises and business personal property in the sum of \$383,665.46.

On or about October 24, 2000, Roslyn Bread instituted an action against Hartford to recover under the policy for damages to business personal property in the amount of \$98,275.69, business interruption in an amount to be determined, but alleged to be in excess of \$517,275.00 and loss of rents in the amount of \$75,000.00, as a result of the fire.

On or about May 24, 2001, Hartford instituted a third-party action against third-

party defendants Joe Construction Corp., ADZ, Steven A. Elkind, individually, Anne Lynn Elkind, individually, Steven A. Elkind and Anne Lynn Elkind d/b/a Power-Vac Chimney and Air Duct Cleaning and Pavailler for subrogation and anticipatory subrogation.

In February, 2003, Joe Construction Corp. commenced a fourth-party action against Polytech/Pozzar.

In support of its motion, Hartford submits that it is undisputed that Pavailler hired Polytech/Pozzar to install the Farjas brick wood burning oven that was installed on June 24, 1996. Hartford further alleges that Gerard Durand, the President of Pavailler, also hired ADZ Bakery Equipment (hereinafter referred to as "ADZ") to perform repair work on Roslyn's Bread's oven on October 24, 1998. In sum, Hartford argues that Polytech/Pozzar & ADZ were acting as agents of Pavailler when they each performed their respective services at Roslyn Bread; Hartford's subrogor Roslyn Bread believed that such services were performed by Pavailler; and that Pavailler should, therefore, be held liable for these entities' actions.

In opposition and in support of its cross-motion, Pavailler asserts that: neither Polytech/Pozzar nor ADZ were acting as agents of Pavailler when they performed their respective work at Roslyn Bread; Pavailler did not direct or control the work being performed by such entities; Pavailler did not represent either actually or

impliedly that either of these two entities were agents or employees of Pavailler. In general, Paviller argues that these two entities were independent and distinct contractors in that they furnished their own tools, worked for Pavailler only on specific jobs and were paid accordingly.

Preliminarily, this court notes that Hartford & Pavailler both rely upon the deposition testimony of the following people to support their respective positions: 1) Gerard Durand, the President of Pavailler; 2) Christian Pozzar the President of Polytech/Pozzar; 3) Alvaro Daque-Zamora, the President of ADZ; and 4) Nancy Marcus, the owner of Roslyn Bread. As noted above, Hartford argues that these individuals were cloaked with authority and acted as agents of Pavailler whereas Pavailler alleges that such entities were independent contractors and no tort liability can be imposed upon Pavailler for their acts and/or omissions.

Upon the papers submitted, neither party has established their entitlement to declaratory relief.

The parties' competing allegations with respect to their interpretation of the aforementioned relevant deposition testimony have generated issues of fact as to the nature of the relationship between Pavailler, Polytech/ Pozzar & ADZ as well as the circumstances under which such entities were engaged. (*cf Conroy v Bevilacqua*, 179 AD2d 596).

In attempting to assess the status of the relationship between Pavailler and these two entities, conflicting evidence has been presented as to the issue of control and supervision exercised by Pavailler over their respective work. (*See Leeds v D.B.D. Services, Inc.* 309 AD2d 666). Significantly, and as evidenced by the invoices provided to this court, Pavailler was being paid by Roslyn Bread in connection with the work performed by Polytech/Pozzar and ADZ. No explanation has been proffered for Pavailler's compensation, and thus, the reason for Pavailler's involvement is unclear.

As a general rule, a principal is not liable for the acts of independent contractors since one who employs an independent contractor has no right to control the manner in which the work is to be performed. (*Chainani v Board of Educ. Of City of New York*, 87 NY2d 370; *Kleeman v Rheingold*, 81 NY2d 270). Control of the method and means by which the work is to be done becomes a critical factor in determining whether one is an independent contractor for the purposes of tort liability. (*Melbourne v New York Life Insurance Co.*, 271 AD2d 296; *Berger v Dykstra*, 203 AD2d 754 *lv to appeal dismissed* 84 NY2d 965; *Lazo v Mak's Trading Co.*, 84 NY2d 896).

Inasmuch as the evidence on the issue of control presents a conflict here, the matter may not be determined by the court as a matter of law. In this posture,

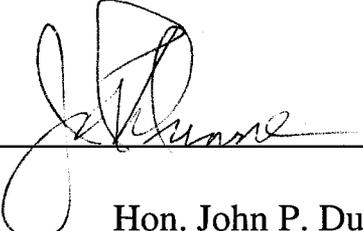
Pavailler does not deny that it recommended these two entities to Roslyn or that Roslyn Bread paid Pavailler directly for the services these “independent contractors” performed. The method of payment of compensation is just one of the factors to be considered in determining the right of control. (*see Matter of Morton*, 284 NY 167, 172; *Commissioners of State Ins. Fund v Lindenhurst Green & White Corp.*, 101 AD2d 730; *see also State Insurance Fund v Circus Man Ice Cream Corp.*, 186 Misc2d 907). Evidence has also been presented that these two entities had their own businesses, furnished their own tools and worked for Pavailler only on specific jobs. (*See generally Shapiro v Robinson*, 63 NY2d 896).

Under the circumstances at bar, this court may not determine as a matter of law that Pavailler should be held responsible for their actions. Accordingly, declaratory relief is inappropriate here.

In view of the foregoing, the motion and cross-motion are both denied.

It is, so Ordered.

Dated: 3-4-04

  
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Hon. John P. Dunne

**ENTERED**

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COUNTY CLERK'S OFFICE