

**Goodwin v Comcast Corp., Outdoor Life Network,
LLC.**

2006 NY Slip Op 30500(U)

September 25, 2006

Supreme Court, New York County

Docket Number: 108892/2004

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

KAREN SMITH

PART 44

Index Number : 108892200

GOODWIN, JOHN

vs.

COMCAST CORP.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 07/13/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

6 were read on this motion ^{and cross-motion} for Summary Judgment

Notice of Motion/ ^{of OLN/consent} ~~Order to Show Cause~~ — Affidavits — Exhibits Memoranda

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits of Plaintiff

3

~~Notice of Cross-Motion, Affidavits, Exhibits, etc. of Haller~~

4

~~Replying Affidavits etc. of Plaintiff in opposition to Haller's Cross-Motion~~

5

~~Affirmative etc. of OLN/comcast in opposition to Haller's Cross-Motion and Reply to Motion~~

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{and cross-motion are}

decided in accordance with the attached memorandum decision and order.

FILED

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Dated: 9/25/06

KAREN SMITH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----X
JOHN GOODWIN,

Plaintiff,
-against-

Index no.: 108892/2004
Motion seq.: 002
Motion date: 07/13/06

COMCAST CORPORATION, OUTDOOR
LIFE NETWORK, LLC. and SUSAN HELLER,

DECISION AND ORDER

Defendants.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

This motion for summary judgment, made by defendants, Comcast Corporation and Outdoor Life Network, L.L.C. (hereafter referred to as "Comcast" and "OLN", respectively), and this cross-motion for summary judgment and other relief, made by defendant Susan Heller (hereafter referred to as "Heller"), are both denied.

Plaintiff, John Goodwin (hereafter referred to as "Goodwin") brought this action to recover for personal injuries he allegedly sustained while acting a part in the filming of an opening sequence for a show expected to be aired on OLN's television network. During the filming, Goodwin was standing near the top edge of a rock ledge and was supposed to act as if he were falling from a height. While acting the part, Goodwin lost his balance and fell off the edge of the ledge. The ledge dropped off a substantial distance and, as a result of his fall, Goodwin suffered serious injuries including broken bones and other internal injuries.

Comcast and OLN contend that they were not involved in the filming of the opening sequence. Instead, they claim that Heller was engaged as an independent contractor to provide the completed opening sequence and that she was entirely responsible for the activities involved

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in the filming. Heller contends that OLN employed her to act as a creative consultant in developing the opening sequence and as the director to film the opening sequence. She further contends that OLN had substantial input and control over the creation and filming of the opening sequence. Moreover, Heller alleges that OLN hired Heller as an employee for this project and advised her she was covered by OLN's liability insurance but, after Goodwin's accident, OLN began taking the position that Heller was an independent contractor.

Defendants, Comcast and OLN, now move for summary judgment dismissing the complaint against them contending that Goodwin has; "...failed to establish a prima facie case of negligence against Comcast/OLN" (Affirmation in Support of Motion at Paragraph 2).

Co-Defendant, Heller, cross-moves for summary judgment dismissing Goodwin's complaint against Heller and dismissing Comcast's and OLN's cross-claims seeking indemnity by Heller for any liability Comcast and OLN may owe to Goodwin. Heller alleges that she and Goodwin were co-employees of OLN and that the accident occurred while they were engaged in OLN's business. Therefore Heller argues that OLN is responsible for Goodwin's injuries based upon the doctrine of *respondeat superior* and, since she was an employee of OLN, OLN may not seek indemnity against her. Further, Heller argues that §29(6) of the Workers' Compensation Law specifically precludes Goodwin from asserting any claims against her because she was Goodwin's co-employee at the time of the accident. Additionally, Heller moves to disqualify OLN's current legal counsel contending that OLN has committed a fraud against its insurance carrier by attempting to classify Heller as an independent contractor rather than an employee and, since OLN's current counsel has been engaged to represent OLN by OLN's insurance carrier, said counsel has a conflict of interest. Finally, Heller seeks to have this matter stricken from the

trial ready calendar to allow her counsel time to respond to Comcast/OLN's Notice to Admit sworn to March 10, 2006, contending that said Notice was never served upon Heller's counsel.

Goodwin opposes both the motion and the cross-motion. With respect to Comcast/OLN's motion, Goodwin argues that OLN was significantly involved in the project. Goodwin contends, among the indicia of OLN's control of the project, are the facts that; 1) Heller had to obtain OLN's approval of the script, production schedule, etc., 2) OLN chose the actors, arranged for them to attend the filming and arranged their compensation, 3) OLN arranged all the necessary materials and services for the filming and, 4) OLN had employees at the location who were involved in managing and controlling the actual work of the filming. With respect to Heller's motion, Goodwin argues he and Heller were not co-employees. Instead, Goodwin indicates he was asked by Greg Trager, (a former employee of OLN who became Comcast's employee when Comcast bought the network) to be an actor only for the filming of the opening sequence and that Greg Trager told Goodwin he would be paid a one time fee of \$150.00 for his services. Goodwin argues he never became an employee of OLN or Comcast and was therefore never Heller's co-employee, without opining as to Heller's employment status.

The proponent of a motion for summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidence in admissible form to demonstrate that no material issues of fact exist which require a trial (see *Alvarez v Prospect Hospital*, 68 NY 2d 320 [1987]). "Factual disputes are not amenable to resolution on a motion for summary judgment . . . The credibility of the parties is not an appropriate consideration for the courts" (*Curtis Properties Corp. v Greif Companies*, 212 AD 2d 259, 263 [1st Dept 1995], internal citations omitted). In the instant matter, neither of the moving parties has met their

burden of making a *prima facie* showing of their entitlement to judgment as a matter of law.

In their moving papers Comcast and OLN submit various invoices and business records, including tax reporting documents. They also submit the deposition transcripts of Goodwin, Heller and the deposition by Mr. Greg Trager, as an employee of Comcast/OLN. Comcast and OLN argue that Heller was in exclusive control of the events involved in the filming which lead to Goodwin's injuries and that Comcast's and OLN's employment records demonstrate Heller was an independent contractor. However, Comcast and OLN's reliance upon formalistic definitions of "employer", "employee" and "independent contractor" to define their obligations in this action is misplaced.

The decisive test in determining who is the employer of a particular employee who has caused an injury is not necessarily the payment of wages but who directs the movement of the employee. ... In determining whether the general master of a servant or one by whom the servant is borrowed or hired is responsible for the servant's acts, the person deemed the master is he who has the supreme choice, control, and direction of the servant and whose will the servant represents not merely in the ultimate result of his work, but in all its details. The criterion is not whether the borrowing employer in fact exercises control, but whether he has the right to exercise it.

(53 NY Jur Employment Relations §331 [West Group 2006]).

Thus the issue is not how the relationships between the parties were documented but who had the right to exercise supreme control and final direction of the details of the work being performed. The deposition testimony of both Heller and Mr. Trager indicates that OLN had the right to approve each aspect of that work. Heller also testified she obtained input and approval from OLN with respect to various aspects of the creation, development and actual filming of the sequence. Additionally, both Mr. Trager and Goodwin testified that Trager had engaged Goodwin as an actor for the sequence. Trager further testified that he was responsible for

arranging and providing the necessary equipment and personnel for the filming and, in fact, at least one of the other actors in the sequence was a Comcast/OLN employee. Finally, Trager's and Heller's deposition transcripts present differing accounts as to who picked and recommended the location for the filming of the sequence as well as who had the final authority to and actually made the choice of the location for filming. Thus, in spite of Comcast and OLN's arguments to the contrary, the deposition testimony is sufficient to raise questions of fact as to whether Comcast/OLN had the supreme choice, control and direction of the details of the performance of the work being completed on the opening sequence. The resolution of those questions will require a finder of fact to hear the potential witnesses and make an assessment of their credibility. Therefore, Comcast and OLN have failed to make a *prima facie* showing of their entitlement to judgment dismissing Goodwin's claims against them as a matter of law. Accordingly, their motion is denied.

In support of her motion, Heller refers to and relies upon the depositions offered by Comcast and OLN. Heller also submits additional documents, including information concerning OLN's control over the details of the project and parties involved in it. However, the additional information does not eliminate the disputes of fact established by the parties' deposition testimony. As with Comcast and OLN's claims, the determinations of whether two individuals are considered "co-employees" for purposes of conferring the immunity Heller seeks pursuant to §29(6) of the Workers Compensation Law is based upon the issues of who controlled and directed the activities of the "employees". Since Heller's motion papers have not provided any additional information to eliminate the disputed facts, the branches of her cross-motion seeking dismissal of Goodwin's complaint and Comcast and OLN's cross-claims against Heller must be

denied.

The branches of Heller's cross-motion seeking to disqualify Comcast and OLN's legal counsel and strike the note of issue filed in this matter are also denied. In view of the fact that the issues involved in this action relate to who controlled the details of the work being performed rather than how the parties documented their relationships, Heller's contention that Comcast and OLN's attempt to categorize Heller as an independent contractor rather than an employee creates a conflict of interest for Comcast and OLN's counsel is without merit. Similarly, there is no need to strike this matter from the trial calendar to allow Heller time to respond to Comcast and OLN's Notice to Admit. The parties are currently scheduled to appear in Mediation 2 on October 17, 2006. Since Heller's counsel now has the Notice to Admit, he is directed to respond to it on or before October 16, 2006. Accordingly, it is;

ORDERED that the motion and cross-motion for summary judgment are denied, and it is further;

ORDERED that Heller shall respond to the outstanding Notice to Admit on or before October 16, 2006.

The foregoing constitutes the decision and order of this court.

Dated: September 25, 2006

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Hon. Karen S. Smith, J.S.C.