

**Wilks v Levkoff**

2009 NY Slip Op 31444(U)

June 29, 2009

Supreme Court, New York County

Docket Number: 116295/07

Judge: Paul Wooten

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

PRESENT: Paul Wooten  
J.S.C.  
*Justice*

PART 22

Index Number : 116295/2007

WILKS, SELWIN

INDEX NO. \_\_\_\_\_

vs

LEVKOFF, SUSAN R.

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DISMISS

MOTION CAL. NO. \_\_\_\_\_

*CALL # 150*

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*Motion is resolved as per attached  
order.*

**FILED**  
JUL 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6-29-09

*[Handwritten Signature]*  
Paul Wooten  
J.S.C.

JUN 29 2009

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 — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

Selwin Wilks and Mary Clark,  
Plaintiffs,

- v -

Susan R. Levkoff, Standard Folding Company,  
Robert L. Blondi and AFI Food Services,  
Defendants.

INDEX NO. 116295/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. 150

The following papers, numbered 1 to 3, were read on this motion by defendants Robert L. Blondi and AFI Food Service Dist. for summary judgment on this "special employee" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>

**FILED**  
 JUL 02 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Cross-Motion:  Yes  No

On October 24, 2007, a two car collision occurred between a vehicle operated by Susan Lefkoff, and registered to Standard Folding Company, and another vehicle operated by Robert L. Blondi, and registered to AFI Food Services. Both cars were traveling westbound on East 63<sup>rd</sup> Street in Manhattan. Plaintiff Selwin Wilks was a passenger in the AFI vehicle. Both Blondi and Wilks were doing delivery work on behalf of AFI. Blondi was a permanent employee of AFI. Wilks was from Tuttle Specialty Staffing, a temporary staffing agency which provided personnel for AFI. On the date of the accident, none of the occupants of the vehicles claimed to be injured. Wilks now claims to have been seriously injured. On or about November 6, 2007, Wilks commenced this action, to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties are completing discovery. A Note of Issue has not yet been filed. Defendants Blondi and AFI now move for an order, pursuant to

CPLR 3211 and 3212, dismissing the complaint granting summary judgment to them on the ground that Wilks was a special employee of AFI and, as such, is only entitled to relief from them in the form of workers' compensation.

### Summary Judgment

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by demonstrating the absence of any triable issues of fact (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[A] motion for summary judgment shall be supported by an affidavit, by a copy of the pleadings, and by any other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts. Failure to make such a prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing paper” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The absence of a specific contract between the special employee and the special employer, or, the payment of workers' compensation by the general employer, need not negate the issue of the existence of a special employer-employee relationship (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 559-560 [1991]). Whether a person is a special employee is ordinarily a question of fact, but the issue may be decided wherever “the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*see Hintze v Brookhaven National Laboratory*, 278 AD2d 456, 718 NYS2D 406 [2d Dept 2000] quoting from *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558).

### Workers' Compensation Benefits

It is undisputed that an employee injured on the job is entitled to compensation for

injuries under the Workers' Compensation law.

Pursuant to Insurance Law § 5102 (b), "first party benefits" means payments to reimburse a person for basic economic loss due to personal injury arising out of use or operation of a motor vehicle, less ... "[a]mounts recoverable on account of such injury under ... Workers' Compensation benefits, or disability benefits under article nine of the Workers' Compensation Law. 11 NYCRR 65-3.16 (a) (9) provides that pursuant to Insurance Law, § 5102 (b), "when the applicant is entitled to Workers' Compensation benefits due to the same accident, the Workers' Compensation carrier shall be the sole source of reimbursement for medical expenses"

(see *Jing Huo Lac v American Transit Insurance Company*, 19 Misc 3d 1146 [A] 2008 NY Slip Op 51177 [U] [2008] \*2).

First-party benefits paid by a no-fault insurer to reimburse a person for basic economic loss on account of personal injury are to be offset by any amounts recovered on account of workers' compensation benefits, rather than the reverse (see Insurance Law § 5102 [b] [2]; *Arvatz v. Empire Mut. Ins. Co.*, 171 AD2d 262, 268, 575 NYS2d 836 [1st Dept.1991]).

The Workmen's Compensation Law provides that the exclusive remedy of an employee injured by the negligence of another employee is his right to compensation or benefits under New York Workers' Compensation Law §§ 11 and 29 [6], and these provision have been construed so as to bar actions by employees against fellow employees for injuries resulting from the latter's negligence (see *Seebeck v Finetta*, 179 AD2d 805, 580 NYS2d 756 [2d Dept 1992]). It has been held that a plaintiff's personal injury action against a defendant, arising from a three-vehicle accident in which plaintiff was riding as a passenger in the vehicle driven by defendant, was barred by the exclusivity provision of the Workers' Compensation Law under New York Workers Compensation Law § 29 (6) (see *Augustine v. Sugrue*, 37 AD3d 386, 831 NYS2d 424 [2d Dept 2007]).

### Special Employee Status

A special employee is described as one who is transferred for a limited time of whatever duration to the service of another” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557).

[A]n employee, although generally employed by one employer, may be specially employed by another employer, and that special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment. “General employment is, however, presumed to continue, and special employment will not be found absent a ‘clear demonstration of surrender of control by the general employer and assumption of control by the special employer”

(*Bellamy v. Columbia University*, 50 AD3d 160, 161, 851 NYS2d 406 [1st Dept.2008], quoting from *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557; see also *Broadus v City of New York*, 20 Misc 3d 1122 [A] 2008 NY Slip Op 51519 [U] [2008]).

In considering whether the defendant has met its burden of demonstrating the surrender of control by the general employer, the question of who controls and directs the manner and details of the employee's work emerges as “a significant and weighty feature” (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 558; see also *Martin v. Baldwin Union Free School District.*, 271 AD2d 579, 706 NYS2d 412 [2d Dept., 2000]).

“Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amenable to resolution on summary judgment. Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over ‘the manner, details and ultimate result of the employee's work' is summary adjudication of special employment status and consequent dismissal of any action proper.” (*Bellamy v. Columbia University*, 50 AD3d at 161-162 [cites omitted]). Summary judgment in cases involving temporary employment may be awarded “upon a finding that a special employment relationship was made out as a matter of

law,” and upon a determination that “the defendant's direct control over the plaintiff's work was essentially admitted” (*id.*, at 162; *see also Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155, 829 NYS2d 459 [1<sup>st</sup> Dept 2007]; *Suarez v Food Emporium, Inc.*, 16 AD3d 152, 792 NYS2d 384 [1<sup>st</sup> Dept 2005]). “Plaintiff of course has no burden to establish the precise nature of his relationship to the defendant; it [is] rather the defendant's burden to establish that plaintiff was, in essence, its employee” (*Bellamy v. Columbia University, supra*, 50 AD3d at 164, n. 3).

To be entitled to summary judgment, a defendant must make a clear demonstration of surrender of control by the general employer and assumption of control by the special employer through the submission of sufficient competent evidence to overcome the presumption of the continuation of the employee's general employment (*Sherman v. Reynolds Metals Co.*, 295 AD2d 843, 744 NYS2d 553 [3d Dept.2002]).

#### Discussion

AFI's position is that Wilks was a special employee. Co-defendants Levkoff and SFI suggest that Wilks was an independent contractor<sup>1</sup> (*see* October 15, 2008 Affirmation in Opposition, ¶¶ 31-37). Wilks's position is that, at the time of the accident, he was employed as a delivery man for Tuttle. He had started working for Tuttle in June 2007. Though he admitted in his deposition that he had been physically present in the Tuttle office only twice during his employment there, he stated that he reported on a regular basis to another “Robert,” a Tuttle supervisor, to receive his daily assignments (*see* Affirmation in Opposition, Exhibit E, Wilks

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<sup>1</sup>The court notes that the responsibility for determining the issue of whether a plaintiff is an employee or an independent contractor has been placed with the Workers' compensation board (*see Arvatz v. Empire Mut. Ins. Co.*, 171 A.D.2d at 267).

deposition at 16, 17, 18, 21 and 22). He received his assignments from Tuttle by phone and handed time sheets, which had been signed by Biondi, to another Tuttle staff person who waited outside the Tuttle office on the corner of 42<sup>nd</sup> Street and Madison Avenue each morning around 4:00 am. Wilks stated that each morning he did not go directly to AFI but first went to Tuttle at 42<sup>nd</sup> and Madison. Wilks had previously been assigned to another delivery assignment in Connecticut. He was first assigned to AFI in August 2007. After working for AFI, he had requested other assignments to work there because he enjoyed that assignment. His basic job was to assist Biondi with food deliveries. Biondi picked Wilks up at that location each morning around 4:00 am. The AFI truck would be loaded up at an AFI facility prior to Wilks's being picked up by Biondi. He stated that he and Biondi thereafter made deliveries from the truck together and separately to the various purchasers.

Biondi's statements, in both his affidavit and his deposition testimony, support Wilks's narration. Biondi states that AFI would call up Tuttle in the morning for additional staff. Biondi had picked Wilks from a group of temps hired by AFI from Tuttle. He kept working with Wilks up to the time of the accident because "[Wilks] was good to work with."

A document entitled "Work Injury Procedures for Tuttle Employees" reflects that it was signed on August 14, 2007 by Wilks (*see* August 21, 2008 Notice of Motion, Exhibit E). That document required a Tuttle temporary employee, upon being injured, to stop the activity, notify a "site manager," then notify a Tuttle Specialty Staffing manager for emergency and non-emergency medical facility listings, seek first aid and fill out a medical report with the site manager. That document does not define "site manager."

Attached as part of that exhibit are additional documents identified as PFG/AFI "Contractor Safety Procedures" dated December 5, 2006. "While employers certainly may

contract as between themselves to define their business relationships and accomplish their business objectives, an agreement between the employers may not be determinative of the issue of special employment.” (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d at 559-560). Those documents identify AFI as the “host responsible for the safety of any contractor or repairman,” and Tuttle as the “contractor” whose duty it was to educate Tuttle associates who are working at AFI sites about the AFI safety policies (id., ¶ f). AFI retained the authority to remove any non-compliant contractors regarding the failure to follow AFI’s safety policies. According to those documents, Tuttle was also “responsible for providing Certificates of Insurance for their company and any subcontractors involved to demonstrate their insurance coverage for workers’ compensation, errors and omissions (professional liability) and a signed Release of Liability statement (id., ¶ j). AFI makes reference to paragraph sixteen of a document entitled “Workers Compensation Liability Insurance” supposedly attached as part of Exhibit E. It is not attached. It cites the following from this paragraph the following in support of its position that Wilks is a special employee:

[The] company shall provide workers’ compensation insurance coverage for the temporary employees. The client retains the right to direct and control the work of the temporary employees. The parties agree to immediately notify each other of any injury or accidents or any claim for workers compensation benefits involving their temporary employees assigned to client’s facility.

Co-defendants AFI and Biondi submitted two affidavits in support of their argument that Wilks was a special employee of AFI and is thus, entitled only to workmens’ compensation benefits as a result of his injury. One affidavit is from Hamid Sarmadi, the Safety Claims manager for AFI, who states that AFI contracted with Tuttle to secure the services of Wilks who was hired to assist Biondi. Sarmadi states that Biondi directed Wilks in all of his daily activities on behalf of AFI, and, as such, he was a special employee and is entitled to relief only under the

Workmen's Compensation Law (*see* Notice of Motion, Exhibit F). The other affidavit from Biondi, referred to *supra*, states that Wilks was a temporary employee hired from Tuttle to work for AFI, and that Wilks worked every day with him from August 2007 until the date of the accident. Biondi reiterates that Wilks worked as his helper to deliver food on the truck that Biondi drove for AFI. He states that he gave directions to Wilks in regard to his work duties, the manner in which he should do his work and when the work day ended; that he instructed Wilks about what tasks to do, what to deliver, when to deliver; and that he confirmed the hours that Wilks worked by signing a time sheet on his behalf (*see* Reply Affirmation, Exhibit A).

The deposition testimonies reflect that, even though Wilks consistently worked with Biondi from August until October, his working with Biondi was on a day to day basis. A question of fact exists as to whether or not AFI maintained the degree of control over Wilks on a daily or long term basis so as to establish there was a special employer-employee relationship between Wilks and AFI.

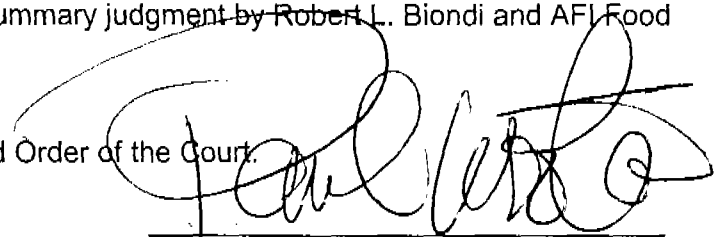
Accordingly, for these reasons and upon the foregoing papers, it is,

ORDERED that the motion for summary judgment by Robert L. Biondi and AFI Food Service, Inc. is denied.

This constitutes the Decision and Order of the Court.

Dated: 6-29-09

JUN 29 2009



Paul Wooten  
Paul Wooten, S.G.S.C.

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