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FILED
AND ENTERED
ON 8/2 2012
WESTCHESTER
COUNTY CLERK

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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WALTER SANABRIA,

Plaintiff,

FILED
AUG 02 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION AND ORDER
Index No.: 19689/08

-against-

GUSTAVO AGUERO-BORGES and BIG CITY NEW ROCHELLE,

Defendants.

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LOEHR, J.

The following papers numbered 1-3 were read on the motion of Defendant Big City New Rochelle ("Big City") for summary judgment dismissing the Complaint and all cross claims[1] and for sanctions.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, Big City sells auto parts and hires drivers to deliver same. The drivers are hired pursuant to an Operator Agreement For Delivery Services (the

[1] The Court is not aware of any cross claims.

"Agreement"). Under the Agreement, a driver is hired by Big City as an "independent contractor" – and not an employee – to deliver Big City's products to Big City's customers. The driver uses his own vehicle, which he must insure and maintain at his or her own expense. Drivers receive a fixed fee per delivery. Delivery routes are determined by the driver who is permitted to work any hours he/she chooses to work. Taxes are not withheld from the fees earned but, rather, the driver receives a 1099 at the end of the year. The only requirements on the driver is that he/she "provide a clean, efficient vehicle for the transportation of product to customers" and maintain insurance for the vehicle. The Agreement provides that it is terminable by either party on ten days written notice.

Defendant Gustavo Aguero-Borges ("Gustavo") was hired as a driver by Big City under such Agreement. On July 24, 2008, Gustavo was working making deliveries for Big City. The evidence is that drivers could sign in as early as 8:00 am and would be given parts for delivery, on a first come, first served basis, until 6:00 pm. Gustavo made deliveries until about 3:00 pm. Gustavo and his wife owned two vehicles: a Camry and a van. That morning Gustavo was driving the Camry. The van needed to have its antenna replaced. Expecting that he could have it done quickly, Gustavo arranged to have his wife meet him at 3:00 pm at the gas station that was adjacent to Big City. There he transferred auto parts – transmission rings – from the Camry to the van and pulled out of the gas station. The brakes on the van immediately failed and Gustavo struck Plaintiff, a pedestrian, on the sidewalk.[2] Big City now timely moves for summary judgment dismissing the Complaint as against it on the grounds that Gustavo was an independent contractor and not an employee and, even if he were an employee, he was not acting in the scope of his employment when he struck the Plaintiff.

Ordinarily, a principal is not liable for the acts of independent contractors in that, unlike the master-servant relationship, principals cannot control the manner in which the independent contractor's work is performed (*Wecker v Crossland Group,* 92 AD3d 870, 871 [2d Dept 2012]).

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[2] Plaintiff first commenced this action against only Gustavo. Plaintiff later commenced a second action against Big City on the theory that Gustavo was an employee of Big City acting within the scope of his employment at the time of the accident. By Decision and Order dated May 20, 2011, the two actions were consolidated under the above index number. At about the same time, Plaintiff moved for summary judgment on the issue of liability against Gustavo. By Decision and Order dated August 10, 2011, the motion was denied based on the evidence that the accident was cause by an unanticipated brake failure.

The mere fact that the Agreement designated Gustavo as an independent contractor, while admissible, is not disposative of the issue (*Shah v Lokhandwala,* 265 AD2d 396 [2d Dpt 1999]). The determination of whether one is an employee or an independent contractor requires examination of all aspects of the arrangement between the parties, although the critical inquiry pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results (*Wecker v Crossland Group,* 92 AD3d 870, 871 [2d Dept 2012]).

Here, Big City established it prima facie entitlement to summary judgment as a matter of law by submitting the Agreement (*id*; *see also Chainani v Board of Educ. of City of N.Y.,* 87 NY2d 370 [1995]). In response, Plaintiff submitted evidence, albeit disputed, that drivers where subject to termination if they did not meet a certain level of productivity; that many of the drivers wore t-shirts identifying themselves as Big City drivers when they made deliveries; that Big City issued nextel phones to the drivers so that it could be in contact with them during the day as they made deliveries; and that Big City provided some type of workers' compensation insurance for the drivers. This raises a question of fact for trial as to whether Gustavo was an employee or an independent contractor (*Carrion v Orbit Messenger, Inc.,* 82 NY2d 742 [1993]; *Christ v Ongori,* 82 AD3d 1031, 1032 [2d Dept 2011]; *Excelsior Insurance Co. v Antretter Contracting Corp.,* 262 AD2d 124, 128 [1st Dept 1999]). Accordingly, the motion to dismiss on the basis that Gustavo was not an employee of big City is denied.

In the alternative, Big City moves for summary judgment on the basis that Gustavo was not acting within the scope of his employment at the time of the accident because he was going to get the antenna on his van fixed. Generally, the issue whether an employee is acting within the scope of his or her employment is one of fact (*Margolis v Volkswagen of America, Inc.,* 77 AD3d 1317, 1319 [4th Dept 2010]). Even if there has been a departure from the designated activity, consideration is to be given to the foreseeability of the occurrence arising from the deviation and employer responsibility in this area is broad particularly where employee activity may be regarded as incidental to the furtherance of the employer's interest (*id.*). Here, the issue turns on whether the transmission rings Gutavo transferred to the van were Big City parts to be delivered by Gustavo to a Big City customer that afternoon or parts that Gustavo had purchased for his own vehicle. Clearly, if the rings were Big City parts for delivery that afternoon, when Gustavo pulled out of the gas station, he was acting within the scope of his employment for Big City

whether or not he intended to make a detour in order to have his antenna fixed (*id.*). On the other hand, if the parts were his own, he was not setting off to make a delivery for Big City but was engaged in his own business. Although Gustavo was deposed twice and asked numerous times whose parts they were and why they were in his vehicle, he repeatedly gave contradictory answers to this question.[3] Moreover, Big City, who presumably could have definitely answered whether the parts were theirs and scheduled for delivery, failed to do so, raising the inference that they were. Accordingly, the motion for summary judgment is denied, as is the motion for sanctions.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
August 2, 2012

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Acting J.S.C.

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[3] From the transcripts, it appears that this resulted from Gustavo's confusion, due perhaps to the language barrier, as to what was being asked of him.