

92 A.D.3d 870, 939 N.Y.S.2d 481, 76 UCC Rep.Serv.2d 872, 2012 N.Y. Slip Op. 01455  
(Cite as: 92 A.D.3d 870, 939 N.Y.S.2d 481)



Supreme Court, Appellate Division, Second Department, New York.  
Kenneth WECKER, respondent,  
v.  
CROSSLAND GROUP, INC., appellant, et al., defendants.

Feb. 21, 2012.

**Background:** Vehicle owner brought action against secured creditor, company hired by creditor to effectuate repossession of owner's vehicle, and towing service retained by company to physically repossess and deliver vehicle, seeking to recover damages for personal injuries that he allegedly sustained during repossession of vehicle and for conversion. The Supreme Court, Kings County, [Kramer](#), J., denied company's motion for summary judgment dismissing complaint insofar as asserted against it. Company appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) company was not liable on claims predicated upon conduct of towing service or service's employee;
- (2) company was not liable to owner for service's alleged torts pursuant to exception to general rule of nonliability for torts of independent contractor; and
- (3) company was not entitled to summary judgment on conversion claim.

Affirmed as modified.

West Headnotes

[\[1\] Labor and Employment 231H](#) [3125](#)

[231H](#) Labor and Employment

[231HXVIII](#) Rights and Liabilities as to Third Parties

[231HXVIII\(C\)](#) Work of Independent Contractor

[231Hk3125](#) k. In general. [Most Cited Cases](#)

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 contractors' work is performed.

[\[2\] Labor and Employment 231H](#) [29](#)

[231H](#) Labor and Employment

[231HI](#) In General

[231Hk28](#) Independent Contractors and Their Employees

[231Hk29](#) k. In general. [Most Cited Cases](#)

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.

[\[3\] Labor and Employment 231H](#) [3137](#)

[231H](#) Labor and Employment

[231HXVIII](#) Rights and Liabilities as to Third Parties

[231HXVIII\(C\)](#) Work of Independent Contractor

[231Hk3136](#) Determination of Status in General

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[231Hk3137](#) k. In general. [Most Cited Cases](#)

Company hired by secured creditor to effectuate vehicle repossession established that towing service which it retained to physically repossess and deliver vehicle was independent contractor, precluding company's liability to vehicle owner on personal injury and conversion claims predicated upon conduct of service or service's employee; company submitted independent contractor agreement which indicated that service would invoice company weekly, would not deduct or withhold taxes or similar withholdings, and would not be entitled to any benefits, and also submitted affidavit of its vice president averring that company did not control manner in which service carried out repossession, which service accomplished using its own vehicles and employees.

#### **[4] Secured Transactions 349A** **228**

[349A](#) Secured Transactions

[349AVII](#) Default and Enforcement

[349Ak228](#) k. Possession by secured party.

[Most Cited Cases](#)

#### **Secured Transactions 349A** **242.1**

[349A](#) Secured Transactions

[349AVII](#) Default and Enforcement

[349Ak242](#) Wrongful Enforcement

[349Ak242.1](#) k. In general. [Most Cited Cases](#)

Any nondelegable duty to ensure that repossession of vehicle occurred without breach of the peace imposed under New York's version of Uniform Commercial Code (UCC) did not apply to company that was retained by secured creditor to effectuate repossession, in the absence of agency relationship between creditor and company, since company was not itself a "secured party," precluding company's liability to vehicle owner for alleged torts of its inde-

pendent contractor pursuant to exception to general rule of nonliability for torts of independent contractor applicable where statute imposed nondelegable duty upon principal. [McKinney's Uniform Commercial Code § 9-609\(b\)\(2\)](#).

#### **[5] Labor and Employment 231H** **3134**

[231H](#) Labor and Employment

[231HXVIII](#) Rights and Liabilities as to Third Parties

[231HXVIII\(C\)](#) Work of Independent Contractor

[231Hk3133](#) Non-Delegable Duty

[231Hk3134](#) k. In general. [Most Cited Cases](#)

Exception exists to the general rule of principal's nonliability for torts of independent contractor, applicable where nondelegable duty has been imposed upon principal by statute.

#### **[6] Judgment 228** **185.3(15)**

[228](#) Judgment

[228V](#) On Motion or Summary Proceeding

[228k182](#) Motion or Other Application

[228k185.3](#) Evidence and Affidavits in Particular Cases

[228k185.3\(15\)](#) k. Liens and mortgages.

[Most Cited Cases](#)

Summary judgment showing, by company retained by secured creditor to effectuate repossession of vehicle, that towing company hired by company to physically repossess vehicle was independent contractor did not demonstrate company's prima facie entitlement to judgment as a matter of law on vehicle owner's conversion claim, which alleged tortious conduct committed directly by company.

\*\***482** [Rodney Drake](#), Bohemia, N.Y., for appellant.

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[Joseph M. Palmiotto](#), New York, N.Y., for respondent.

[PETER B. SKELOS](#), J.P., [JOHN M. LEVENTHAL](#),  
[PLUMMER E. LOTT](#), and [ROBERT J. MILLER](#), JJ.

\*870 In an action, inter alia, to recover damages for personal injuries and conversion, the defendant Crossland Group, Inc., appeals from an order of the Supreme Court, Kings County (Kramer, J.), dated July 14, 2011, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying those branches of the motion of the defendant Crossland Group, Inc., which were for summary judgment dismissing the first, third, and fourth causes of action insofar as asserted against it, and substituting therefor a provision\*871 granting those branches of the motion; as so modified, the order is affirmed, with costs payable by the plaintiff to the defendant Crossland Group, Inc.

The defendant Crossland Group, Inc. (hereinafter Crossland), was hired by the defendant HSBC Auto Finance, Inc. (hereinafter HSBC), to effectuate repossession of an automobile in which HSBC owned a security interest. Crossland, in turn, hired the defendant Gadid Towing and Recovery, Inc. (hereinafter Gadid), to physically repossess the vehicle, and deliver it to Crossland. The plaintiff, the owner of the vehicle, commenced this action, inter alia, to recover damages for personal injuries he allegedly sustained during the repossession of the vehicle, and for conversion. Crossland moved for summary judgment dismissing the complaint insofar \*\*483 as asserted against it, and the Supreme Court denied the motion.

[1][2] “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 contractors' work is performed” (*Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d 370, 380–381, 639 N.Y.S.2d 971, 663 N.E.2d 283; see *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273–274, 598 N.Y.S.2d 149, 614 N.E.2d 712). “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’ ” (*Araneo v. Town Bd. for Town of Clarkstown*, 55 A.D.3d 516, 518–519, 865 N.Y.S.2d 281 [citation omitted], quoting *Bynog v. Cipriani Group*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 802 N.E.2d 1090).

[3] Here, Crossland demonstrated its prima facie entitlement to judgment as a matter of law dismissing the first, third, and fourth causes of action insofar as asserted against it, which were predicated upon the conduct of Gadid or Gadid's employee. In support of the motion, Crossland submitted, inter alia, an “Independent Contractor Agreement” between it and Gadid, which, among other things, indicated that Gadid would invoice Crossland weekly, would not deduct or withhold any taxes or FICA, and would not be entitled to any benefits. Crossland also submitted the affidavit of its vice president, averring that Crossland did not control the manner in which Gadid carried out the repossession, which Gadid accomplished using its own vehicles and employees. Based upon these submissions, Crossland established, prima facie, that Gadid was an independent contractor (see *Barak v. Chen*, 87 A.D.3d 955, 957, 929 N.Y.S.2d 315; *Gfeller v. Russo*, 45 A.D.3d 1301, 1302–1303, 846 N.Y.S.2d 501). In opposition, the \*872 plaintiff failed to raise a triable issue of fact as to whether Gadid was an employee of Crossland, as the evidence it offered in this regard showed only minimal or incidental control insufficient to render Gadid an employee of Crossland (see *Barak v. Chen*, 87 A.D.3d at 957, 929 N.Y.S.2d

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[315; \*Holcomb v. TWR Express, Inc.\*, 11 A.D.3d 513, 782 N.Y.S.2d 840\).](#)

[4][5] We also reject the plaintiff's contention that Crossland was liable for Gadid's alleged torts under an exception to the general rule of nonliability for the torts of an independent contractor, applicable where a nondelegable duty has been imposed upon a principal by statute (see [Chainani v. Board of Educ. of City of N.Y.](#), 87 N.Y.2d at 381, 639 N.Y.S.2d 971, 663 N.E.2d 283; [Kleeman v. Rheingold](#), 81 N.Y.2d at 274, 598 N.Y.S.2d 149, 614 N.E.2d 712). Specifically, the plaintiff claimed that [UCC 9-609](#), pertaining to a "secured party's" right to take possession of property after default, imposed a nondelegable duty upon Crossland to ensure that the repossession was carried out without a breach of the peace. However, due to the absence of any evidence of an agency relationship between HSBC and Crossland (see [Teer v. Queens-Long Is. Med. Group](#), 303 A.D.2d 488, 490, 755 N.Y.S.2d 430; [E.B.A. Wholesale Corp. v. S.B. Mechanical Corp.](#), 127 A.D.2d 737, 739, 512 N.Y.S.2d 130; [Lomax v. Henry](#), 119 A.D.2d 638, 639, 501 N.Y.S.2d 84), the plaintiff could not raise a triable issue of fact as to whether any nondelegable duty that might be imposed by [UCC 9-609](#) would apply to Crossland, which is not a "secured party" ([UCC 9-609\[b\]\[2\]](#)).

Accordingly, those branches of Crossland's motion which were for summary judgment dismissing the first, third, and fourth causes of action insofar as asserted against it should have been granted.

[6] However, the Supreme Court properly denied that branch of Crossland's motion which was for summary judgment dismissing the second cause of action to recover damages for conversion insofar as asserted against it. The conversion cause of action alleged tortious conduct committed directly by Crossland, and, therefore, Crossland's showing that Gadid was an independent contractor did not demonstrate Crossland's prima facie entitlement to judgment

as a matter of law on that cause of action.

N.Y.A.D. 2 Dept., 2012.

*Wecker v. Crossland Group, Inc.*

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