

Ceja v Posillico Civ., Inc.
2022 NY Slip Op 31460(U)
May 4, 2022
Supreme Court, New York County
Docket Number: Index No. 158010/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

JOSE CEJA, REINA CAPRILE,

Plaintiff,

INDEX NO. 158010/2018

MOTION DATE 02/16/2022

MOTION SEQ. NO. 002

- v -

POSILLICO CIVIL, INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

POSILLICO CIVIL, INC.

Third-Party
Index No. 595621/2019

Plaintiff,

-against-

MORLEY MECHANICAL, INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77 were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Jose Ceja (Ceja) commenced this action seeking damages for alleged serious injuries as a result of a fall that took place on April 11, 2016, while was working on repairing a gas leak in the roadway in front of 3 Lark Avenue, White Plains, New York. On that day, Ceja was employed by Morley for whom he had worked from approximately October or November 2015 until April 12, 2016.

PENDING MOTION

On October 14, 2021, Posillico Civil, Inc. (Posillico) moved for summary judgment and dismissal of the complaint on the basis that Plaintiff was a special employee of Posillico at the time of the accident and that Plaintiff's claims are therefore barred by the exclusivity provisions of New York Workers Compensation Law §§ 10, 11 and 29(6).

On February 15, 2022, the motion was fully briefed and marked submitted.

Recently, the action was assigned to this court and the pending motion referred to this court for determination.

For the reasons set forth below, the motion is denied without prejudice to renewal after the completion of all discovery in this action.

DISCUSSION

Summary judgment is a drastic remedy and must be denied if there is any doubt as to the existence of a triable issue of fact or even where the issues raised are arguable. *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623 (1997); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 61 A.D.2d 141 (1st Dep't 1978);

When considering such motions, the task of the court is not to resolve factual or credibility issues but merely to decide whether they exist. *See Barr v. Cnty. of Alb.*, 50 N.Y.2d 247 (1980). The movant must establish its entitlement to judgment as a matter of law through submission of admissible evidence. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). If the movant fails to do so, the motion must be denied regardless of the sufficiency of the opposing papers. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The court must draw all facts and reasonable inferences in the light most favorable to the opponent of the motion. *Frutarom, Ltd. v.*

Flavormatic Indus., 237 A.D.2d 487 (2d Dep't 1997); *Menzel v. Plotnick*, 202 A.D.2d 558 (2d Dep't 1994).

As held by the Court of Appeals:

We have consistently found as a general proposition that a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits (*Stone v Bigley Bros.*, 309 NY 132; *Irwin v Klein*, 271 NY 477; *Murray v Union Ry. Co.*, 229 NY 110, 112-113; *Matter of Schweitzer v Thompson & Norris Co.*, 229 NY 97, 99; see also, *Cameli v Pace Univ.*, 131 AD2d 419, 420). A special employee is described as one who is transferred for a limited time of whatever duration to the service of another (*Brooks v Chemical Leaman Tank Lines*, 71 AD2d 405, 407). General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer (*Stone v Bigley Bros.*, *supra*, at 140-143 [and cases cited therein]; *Sweet v Board of Educ.*, 290 NY 73, 76-77; *Irwin v Klein*, *supra*, at 484-485; *Ramsey v New York Cent. R. R. Co.*, 269 NY 219, 224).

The Court of Appeals has also held that “ ... a person's categorization as a special employee is usually a question of fact.” *Id.* (see also *Singh v. Metro. Constr. Corp.*, 244 A.D.2d 328, 329 (2d Dep't 1997); *Fitzgerald v. N.Y. City Transit Auth.*, 243 A.D.2d 606 (2d Dep't 1997).

Plaintiffs opposition asserts it has had insufficient discovery to address the motion.

Moreover, where no witness from Posillico, Con Ed or Morely has testified with knowledge of the employment relationship between Plaintiff, Morley and Posillico, Plaintiff has established that further discovery would shed light on the issue of his employment. N.Y.

C.P.L.R. 3212(f); *Baron v. Freeport* 143 A.D.2d 792, 793 (2d Dep't 1988).

Based on the foregoing, the motion is denied without prejudice to renewal after the completion of discovery.

CONCLUSION

WHEREFORE it is hereby:

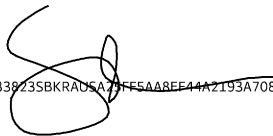
ORDERED that defendant’s motion for summary judgment is denied without prejudice to renewal after the completion of all discovery in this action; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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5/4/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE