

Eisner v Posillico Civ., Inc.

2024 NY Slip Op 34931(U)

July 15, 2024

Supreme Court, Bronx County

Docket Number: Index No. 21449/2020E

Judge: Myrna Socorro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9**

-----X

JOHN EISNER,

Plaintiff,

-against-

**POSILLICO CIVIL, INC., STV INCORPORATED
and POSILLICO CIVIL/STV, INC. JV,**

Defendants.

-----X

POSILLICO CIVIL, INC.,

Third-Party Plaintiff,

-against-

NORTHEAST STRUCTURAL STEEL, INC.,

Third-Party Defendant.

-----X

Index №. 21449/2020E

Motion seq #5 and #6

DECISION & ORDER

Hon. Myrna Socorro, J.S.C,

The following papers were read on the motion by the plaintiff (Seq. No. 5) for **summary judgment** noticed for February 13, 2023, and submitted on March 6, 2024, and on the motion by defendant/third-party plaintiff Posillico Civil, Inc. (Seq. No. 6) for **summary judgment** noticed for March 23, 2023, and submitted on March 6, 2024.

Papers	NYSCEF Doc. No.
Motion seq #5	
Notice of Motion by Plaintiff – Affirmation in Support, Memorandum of Law in Support and Exhibits	# 102-112, 213, 215
Defendant/Third-Party Plaintiff Posillico Civil, Inc.’s Affirmation in Opposition and Exhibits	# 149-158, 216
Plaintiff’s Reply Affirmation and Exhibits	# 182-185
Motion seq #6	
Notice of Motion by Defendant/Third-Party Plaintiff Posillico Civil, Inc. – Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, and Exhibits	# 126-148

Third-Party Defendant Northeast Structural Steel, Inc.’s Affirmation # 163-165 in Opposition, Memorandum of Law in Opposition, and Response to Statement of Material Facts
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Defendant/Third-Party Plaintiff Posillico Civil, Inc.’s Reply # 169-170 Affirmation
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Motion by the plaintiff (Mot. Seq. No. 5), for an order pursuant to CPLR §3212, granting judgment on the Labor Law §240(1) and §241(6) claims against the defendant/third-party plaintiff Posillico Civil, Inc. (“Posillico”)¹, and motion by defendant/third-party plaintiff Posillico (Mot. Seq. No. 6), for an order pursuant to CPLR §3211 and/or §3212², granting judgment on its third-party claims against third-party defendant Northeast Structural Steel, Inc. (“Northeast”) “for defense, indemnification and insurance procurement,” are decided as follows:

According to the plaintiff, on the day of the accident, he was employed by third-party defendant Northeast as an apprentice ironworker at a project at the high bridge interchange in Bronx County. Northeast was retained by general contractor, Posillico, to perform iron work at the project. The plaintiff testified that he worked at the project for about 4 (four) months before the accident occurred. He testified that he received instructions and was assigned tasks from various Northeast workers. He testified that he was at the job site every day. The plaintiff would arrive at the job site with a hard hat and safety vest but he was provided a safety harness by his employer. On the date of the accident, the plaintiff was instructed to be the fire safety on the job whereby he was “[w]orking on the grounds, standing underneath the guys that are either grinding or cutting, just making sure that there are no fires breaking out.” At the time of the accident, the plaintiff was relieved of fire safety duties and instructed by a foreman to move equipment. Specifically, the plaintiff was told to move a wrench and a safety vest to an ironworker at the top of a ladder. The

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This action is discontinued against defendant STV Incorporated pursuant to a stipulation of discontinuance, dated January 21, 2022 [NYSCEF Doc No. 26] and against defendant Posillico Civil/STV, Inc. JV per the stipulation of discontinuance, dated July 27, 2020 [NYSCEF Doc No. 11].

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Although defendant/third-party plaintiff Posillico moved for an order pursuant to CPLR §3211 and/or §3212, a review of the papers indicate that said movant fashioned its papers as one for summary judgment and will be addressed as such herein.

plaintiff testified that he tucked the wrench and the safety vest in his tool belt that he wore at the time of the accident. He testified that the accident occurred as he ascended an extension ladder that measured about 20 to 25 feet long, and it was the first time he went up the ladder that day. The plaintiff described the ladder to be a straight up ladder composed of metal rungs. He stated that the top of the ladder ended at the safe span or metal shielding underneath the bridge. The bottom of the subject ladder rested on “slanted compacted gravel.” The plaintiff testified that no nobody held the ladder as he was going up and also did not observe any ropes at the bottom of the ladder securing the bottom to anything. He testified that he intended to ascend the ladder and get onto the safe span. He observed only the left vertical side tied off with rope. As he was going up the ladder using both hands to climb, the ladder moved back and he lost his grip on the ladder and fell to the ground resulting in injury. The plaintiff testified that he wore a harness at the time of the accident but there were no tie-off points to attach his harness. He also testified that he brought equipment up the subject ladder to other Northeast workers on prior occasions before the accident occurred. The plaintiff never complained about the ladder before the accident occurred. He also made sure the ladder was secure before attempting to ascend it.

In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, photographs of the ladder and deposition testimonies of the plaintiff, John Sottnik (Posillico project manager), who oversaw all major capital improvements and major repairs to the subject building, Paul Orso (“Orso”) (Northeast project manager), who ran the job for Northeast at the Highbridge project and testified that Northeast did not supply any ladders or scaffolds to job but that it did supply man lifts or aerial lifts to the job site. Orso also testified that Northeast had a protocol to tie off a harness while being in a lift, not for a ladder. The plaintiff contends that defendant/third-party plaintiff Posillico, as the general contractor of the subject project, failed to provide him with adequate safety devices and/or proper fall protection during the performance of his work at elevation. The plaintiff therefore argues that Posillico violated Labor Law §240(1) as the extension ladder provided did not prevent him from falling and that no safety device was furnished, other than the subject ladder. Plaintiff further contends that Posillico is liable under Labor Law §241(6) by violating Industrial Codes 12 NYCRR §§ 23-1.7(f), 23-1.21(b)(1), 23-1.21(b)(4)(I), (b)(4)(ii), and (b)(4)(v).

In opposition, Posillico submitted, *inter alia*, the sworn affidavit of expert engineer, Bernard P. Lorenz, P.E., and the sworn affidavit of John Sottnik (Posillico project manager), who avers that a Posillico foreman would have overseen the placement of the subject ladder to ensure it was safe to use. Posillico argues that it did not violate Labor Law §240(1) where the plaintiff was provided a proper safety device to access the upper work level or safespan from the ground level; that the ladder was securely placed; and that the ladder was not defective and in a safe working condition. It further contends that the plaintiff failed to demonstrate its *prima facie* entitlement to judgment on his Labor Law §241(6) claim by citing Industrial Code provisions that were not violated or not applicable to the present facts.

In support of its motion for summary judgment on its third-party claims for defense, indemnification, and insurance procurement, defendant/third-party plaintiff Posillico submits, *inter alia*, the Posillico-Northeast subcontract, certificates of insurance for Northeast, and insurance tender letters. Pursuant to the Posillico-Northeast subcontract, Posillico argues that Northeast is required to indemnify and hold harmless Posillico as the plaintiff's accident arose out of Northeast's work on the project. Posillico further contends that Northeast breached its insurance procurement obligations under the subcontract.

In opposition, third-party defendant Northeast submits an affirmation of counsel, a memorandum of law in opposition, and a counter statement of material facts. Northeast argues that Posillico's request for summary judgment on its third-party claim against it for contractual indemnification should be denied since the indemnification provision in the subcontract contains no savings clause and violates the General Obligations Law § 5-322.1 by requiring Northeast to indemnify Posillico for its negligence. It claims that Posillico failed to demonstrate its *prima facie* entitlement to judgment when it fails to present any admissible evidence that Posillico was not negligent for the happening of the accident. Northeast further contends that there are triable issues of fact as to Posillico's negligence that warrants denial of Posillico's motion with respect to contractual indemnity. Furthermore, Northeast argues that Posillico failed to demonstrate that Northeast breached its obligation to procure insurance pursuant to the subcontract.

Summary Judgment

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci*

v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

This Court finds the plaintiff established his *prima facie* burden of a Labor Law §240(1) violation as he demonstrated through his testimony that Posillico failed to properly secure the subject ladder, to ensure that it remained steady and erect while being used, which served as a proximate cause of the accident. See *Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650 [1st Dept 2021]; *Merino v Continental Towers Condominium*, 159 AD3d 471 [1st Dept 2018]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999]. “It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker.” *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]]. The plaintiff testified there were no lifts available at the time of the accident as “they were all being used to conduct work.” [NYSCEF Doc No. 107, plaintiff’s TR- 97, L- 15-18]. He also testified that there were no tie-off points even while wearing a safety harness. See *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015].

In opposition, Posillico failed to raise triable issues of fact. Here, “[n]othing in the record controverts [plaintiff’s] account of the accident or calls his credibility into question.” *Pinzon v Royal Charter Props., Inc.*, 211 AD3d 442 [1st Dept 2022], quoting *Rroku v West Rac Contr. Corp.*, 164 AD3d 1176, 1177 [1st Dept 2018]. Any sole proximate cause argument fails if Posillico’s statutory violation served as a proximate cause for the accident, thus, plaintiff cannot be solely to blame for it. See *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]; see also *Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept. 2013]. Under a “falling worker” theory, strict liability here is imposed upon Posillico for its failure to provide an adequate safety device to shield the plaintiff from a gravity-related fall. See *Plaku v 1622 Van Buren LLC*, 198 AD3d 431 [1st Dept 2021]. Moreover, the plaintiff is not required to demonstrate that the subject ladder was defective in order to satisfy his burden as to the Labor Law 240(1) claim. See *Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574 [1st Dept 2019]; see also *Hill v City of New York*, 140 AD3d 568 [1st Dept 2016].

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §§ 23-1.7(f) (Protection from general hazards; Vertical passage), 23-1.21(b)(1) (General requirements for ladders; strength), and 23-1.21(b)(4)(I), (b)(4)(ii), (b)(4)(v) (General requirements for ladders; Installation and use), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Since the plaintiff is entitled to summary judgment as to liability on his Labor Law §240(1) claim, the Court need not address the Labor Law §241(6) claim. However, were the Court to reach this claim, insofar as the Labor Law §241(6) claim is predicated on a violation of 12 NYCRR § 23-1.7(f), the plaintiff establishes *prima facie* that a violation of § 23-1.7(f) was a proximate cause of his accident because the ladder, which was alleged to be unsafe, provided a means of access to different working levels. *See Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept. 2008].

Under Industrial Code 12 NYCRR § 23-1.21(b)(1), a ladder "shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon." Where the plaintiff testified that he inspected the subject ladder and ensured it was secure before using it, the plaintiff cannot sufficiently demonstrate his entitlement

to judgment on his Labor Law §241(6) claim under this predicate. There is also no evidence that any component of the extension ladder broke, dislodged, or loosened or that it was incapable of supporting four times the maximum load as intended. *See Croussett v Chen*, 102 AD3d 448 [1st Dept 2013].

Industrial Codes 12 NYCRR §§ 23-1.21(b)(4)(I) and (ii) are sufficiently specific to maintain a Labor Law §241(6) cause of action. *See Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]. 12 NYCRR § 23-1.21(b)(4)(I) requires any portable ladder that is used as a regular means of access between floors or other levels in a building to be “securely fastened in place.” Here, the extension ladder was being used as a means of access between levels at the project. As the means available to the plaintiff to reach the upper level at the time of the accident, the subject ladder was not securely fastened.

Industrial Code § 23-1.21(b)(4)(ii) requires that ladder footings be firm. The plaintiff in this case testified that the area on the ground around the ladder was composed of “compacted gravel” and uneven. In opposition, defendant Posillico’s expert engineer (Lorenz) opined that “compacted gravel” is a stable and slip resistant working surface thereby, raising a triable issue of fact as to whether the ladder’s footings were firm.

Therefore, the plaintiff is entitled to summary judgment on the Labor Law §241(6) claim against defendant Posillico based on a violation of Industrial Codes 12 NYCRR §§ 23-1.21(b)(4)(I).

Finally, Industrial Code 12 NYCRR § 23-1.21(b)(4)(v) requires the upper end of a ladder that leans against a slipper surface to be mechanically secured while work is being performed. Here, this provision does not apply since there is no claim that the upper end of the ladder was leaning against a slippery surface.

Posillico’s Third-Party Claim for Contractual Indemnity Against Northeast

Posillico moves for contractual indemnification against Northeast pursuant to the indemnification provision in the subcontract agreement between both parties, which provides as follows:

4.6 INDEMNIFICATION

4.6.1 – Subcontractor [Northeast] agrees to indemnify, defend and hold harmless Contractor, Owner,...from and against any and all claims, damages, liens, judgments, losses, disputes, costs, expenses, attorneys' fees, actions, proceedings, demands and liabilities (including statutory liability), foreseeable and unforeseeable, related to and/or arising directly or indirectly from or out of (I) the subcontractor's work, and/or (ii) any act or omission of Subcontractor...The Subcontractor's foregoing obligation to indemnify, defend and hold harmless the Indemnitees (x) is intended to be as broad as permitted by law...

(NYSCEF Doc No. 140 at 10).

Posillico contends that Northeast must indemnify it as the plaintiff's accident arose out of the performance of his work for Northeast. According to Posillico, the deposition of the parties demonstrate that the plaintiff was an employee of Northeast at the time of the accident and was performing work on behalf of Northeast when he was attempting to bring materials up a ladder to the upper level of the project.

In opposition, Northeast argues that Posillico failed to demonstrate its freedom from negligence to trigger the indemnity provision in the subcontract. It further contends that Posillico has not demonstrated that the indemnity provision does not violate the General Obligations Law § 5-322.1.

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987].

Pursuant to General Obligations Law § 5-322.1, a clause in a construction, repair or maintenance contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy. *See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]. However, an indemnification agreement that authorizes partial indemnification “to the fullest extent permitted by law” is enforceable. *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]. Furthermore, even if the clause does not contain this savings language, it may nevertheless be enforced where the party to be indemnified

is found to be free of any negligence. *See Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990].

Here, Northeast must indemnify Posillico from and against any claims, actions, proceedings, or liabilities, including statutory liability arising out of Northeast's work or any act or omission by Northeast. The subject indemnity clause was triggered based on evidence in the record demonstrating that the accident arose out of Northeast's work. The indemnification provision also sufficiently contains language limiting indemnification to damages arising out of Northeast's work to avoid violation of General Obligations Law § 5-322.1. Accordingly, Posillico demonstrated its entitlement to conditional summary judgment on its contractual indemnification against Northeast. *See Devlin v AECOM*, __ AD3d __, 2024 NY Slip Op 00673 [1st Dept 2024].

Posillico's Third-Party Claim for Common-Law Indemnity and Contribution Against Northeast

To the extent that Posillico's summary judgment motion seeks judgment on its third-party claim sounding in common-law indemnity and contribution against Northeast, plaintiff's employer, Posillico failed to demonstrate a *prima facie* entitlement to said claims as they are barred by Workers Compensation Law § 11 since the plaintiff's injuries are not "grave" within the meaning of the statute. *See Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 [1st Dept 2019]. There are also triable issues of fact as to Posillico's negligence in causing or contributing to the plaintiff's accident.

Posillico's Third-Party Claim for Breach of Contract for Failure to Procure Insurance Against Northeast

A party moving for summary judgment on its claim for breach of contract for failure to procure insurance establishes its *prima facie* entitlement by demonstrating that a contract provision requiring procurement of insurance was not complied with. *See Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]. The burden then shifts to the opposing party to "raise an issue of fact by tendering the procured insurance policy in opposition to the motion." *Id.* at 506. Here, Posillico submitted a certificate of insurance that indicates a primary layer of coverage of \$2 million dollars and the excess layer of coverage of \$4 million was issued to Northeast but the tender letter it also submitted in support of its motion indicates that the \$6 million in umbrella coverage was not to be applied as "primary and noncontributory" in contravention to the contract terms for insurance procurement.

In opposition, Northeast failed to raise a triable issue of fact by tendering admissible evidence in opposition demonstrating it complied with its contractual obligation to procure insurance, i.e., appending a copy of its commercial general liability and excess policies effective on the date of the accident. *See id.*

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that the summary judgment motion by the plaintiff (Mot. Seq. No. 5) seeking judgment on the Labor Law §240(1) and §241(6) claims as against defendant/third-party plaintiff Posillico, is **GRANTED IN PART**; and it is further

ORDERED, that the plaintiff is awarded judgment as to liability with respect to the Labor Law 240(1) claim as against defendant/third-party plaintiff Posillico; and it is further

ORDERED, that the plaintiff is awarded judgment as to liability with respect to the Labor Law §241(6) claim as predicated on violations of Industrial Code 12 NYCRR §§ 23-1.7(f) and 23-1.21(b)(4)(I), is **granted**; and it is further

ORDERED, that the plaintiff's request for judgment on the Labor Law 241(6) claim as predicated on a violation of Industrial Code 12 NYCRR §§ 23-1.21(b)(1), 23-1.21(b)(4)(ii), and 23-1.21(b)(4)(v), is **denied**; and it is further

ORDERED, that the summary judgment motion by defendant/third-party plaintiff Posillico (Mot. Seq. No. 6) seeking judgment on its third-party claims for defense, indemnification and insurance procurement is, **GRANTED IN PART**; and it is further

ORDERED, that the defendant/third-party plaintiff Posillico is awarded conditional summary judgment on its third-party claim for contractual indemnification against third-party defendant Northeast; and it is further

ORDERED, that the defendant/third-party plaintiff Posillico’s request for judgment on its third-party claim for breach of contract for failure to procure insurance against third-party defendant Northeast, is **granted**; and it is further

ORDERED, that the defendant/third-party plaintiff Posillico’s request for judgment on its third-party claim for common-law indemnification and contribution, is **denied**; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED, the movants of each motion shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: July 15, 2024



HON. MYRNA SOCORRO

HON. MYRNA SOCORRO, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. PLAINTIFF’S MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. DEFENDANT/THIRD-PARTY PLAINTIFF POSILLICO’S MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 4. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT