SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARIEL D. CHESLER** **PART** **62M**

Justice

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JESUS MENDEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, RAILROAD CONSTRUCTION COMPANY, INC.,TULLY CONSTRUCTION CO. INC.,DNA CONTRACTING LLC,CONSOLIDATED EDISON, INC.,CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,D'ONOFRIO GENERAL CONTRACTORS CORP.,

Defendant.

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INDEX NO. 150550/2022

MOTION DATE 04/07/2025

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 138, 139, 140, 141, 142, 143, 148

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this proceeding, defendant D'Onofrio General Contractors Corporation ("movant"), seeks an Order pursuant to CPLR 3211 (5) dismissing plaintiff's Supplemental Complaint with prejudice, as the statute of limitations has expired by the time of filing. Plaintiff opposes the motion.

This action arises out of personal injuries allegedly sustained by plaintiff on October 23, 2020, when, at the intersection of Barclay Street on West Broadway, plaintiff's bicycle allegedly struck a pothole, causing him to lose control and suffer injury. On January 18, 2022, plaintiff served defendants the City of New York, New York City Department of Transportation, Railroad Construction Company, Inc., Tully Construction Co. Inc., and SNA Contracting LLC, with a Summons and Complaint. On August 7, 2024, plaintiff filed a motion to amend their caption to

include movant herein as a defendant. On September 9, 2024, an Order was filed granting plaintiff's unopposed motion to amend the caption to include movant.

Movant asserts that the Amended Complaint should be dismissed because the Summons and Complaint was not timely served. Movant argues that as it was not served until nearly four years after the alleged accident, plaintiff's causes of action against it cannot be maintained. Movant acknowledges that there is an exception to the above mentioned rule where an untimely summons and complaint will be deemed properly served when (1) both claims arise out of the same transaction; (2) the new party is united in interest with the original defendant such that their respective defenses are the same and they stand or fall together; and (3) the new party knew or should have known that but for a mistake of plaintiff failing to identify all proper parties, the action would have been brought against him. In light of this, movant argues that it made a prima facie showing that it was an independent contractor working for the Consolidated Edison Company of New York ("Con Ed"), and as such there is no unity of interest and plaintiff is not entitled to the benefits of the relation-back doctrine. In addition, movant argues that it had no notice, actual or constructive, of the instant lawsuit.

Plaintiff argues that adding movant in August 2024 was timely and satisfied the applicable statute of limitations considering Executive Oder ("EO") No. 202.8 that was signed by Governor Cuomo in response to the COVID-19 pandemic. Plaintiff also argues this claim against the movant arises from the same transaction, and that movant is "clearly united in interest" for being hired by defendant Con Ed. Additionally, plaintiff argues that movant knew or should have been aware of plaintiff's accident and that it was likely an action was to be brought against them. In support of this argument plaintiff points to a correspondence which denied

coverage in connection with this instant suit, that as sent to movant via email dated March 19, 2024.

CPLR 3211 (a)(5) allows a cause of action to be dismissed for breach of statute of limitations. Pursuant to CPLR 214(5), the applicable statute of limitations for claims to recover damages for personal injuries is three years. The moving party acknowledges Governor Cuomo's Executive Order No. 202.8 "tolled" any "specific time limit for the commencement, filing, or service of any legal action… until April 19, 2020" (9 NYCRR 8.202.8) and was extended until November 3, 2020. The date of the alleged incident was October 2023, 2020, and the Statute of Limitations was extended to November 3, 2020. Plaintiff would have had three years from then to timely commence an action against movant, however, the Amended Complaint was filed on September 10, 2024, and was thus untimely.

An exception to the above rule, codified by CPLR 203(b) and (c), states an otherwise untimely summons and complaint will be deemed served under certain circumstances if all elements of the relation-back doctrine are met (*Mondello v New York Blood Ctr*. 80 NY2d 219, 226 [1992]). A three-part test is adopted, requiring that (1) both claims arise out of the same transaction; (2) the new party is united in interest with the original defendant such that their respective defenses are the same and they stand or fall together; and (3) the new party knew or should have known that but for the mistake of the plaintiff in failing to identify all proper parties, the action would have been brought against him (*Mondello,*80 NY2d at 226) . In negligence matters, parties are united in interest when the defenses available for each defendant is identical, and thus, each is vicariously liable for the acts of the other (*Weckbecker v Skanska USA Civil Ne., Inc.*, 173 AD3d 936, 937 [2d Dept 2019]).

It is the plaintiff's burden to establish the applicability of the relation-back doctrine (*Garcia v. New York-Presbyterian Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]). Here, plaintiff makes little to no effort to clearly explain how the present case satisfies all required elements of the relation-back doctrine.

The general rule is that an employer who hires an independent contractor is not liable for the negligent acts of the independent contractor (*Rosenberg v. Equitable Life Assur. Soc. Of U.S.*, 79 NY2d 663, 668 [1992]; *Goodwin v. Comcast Corporation*, 42 AD3d 322 [1st Dept 2007]). The test for determining unity of interest of the parties in the subject-matter is such that they "stand or fall together and that judgement against one will similarly affect the other" (*Quine v. Burkhard Bros*., 167 AD2d 683, 684 [1990]). This unity of interest fails where the new defendant has a defense unapplicable to the original defendants (*Spates v The City of New York*, 144 AD3d 511, 513 [1st Dept 2016]). Additionally, where evidence shows the movant has only one contractual relationship with any of the original defendants, and that relationship was that of an independent contractor, such a relationship is insufficient to satisfy the united in interest test (*Kitson v. Atl. Ref. & Mktg. Corp*., 227 AD2d 971, 972 [4th Dept 1996]). Here, Mr. Leone's Affidavit (*see* NYSCEF Doc. 109) establishes Con Ed hired movant as an independent contractor and denies, apart from duties as an independent contractor, any legal relationship with any of the defendants. Additionally, none of movant's employees were issued W-2s by Con Ed. Therefore, the parties are not united in interest.

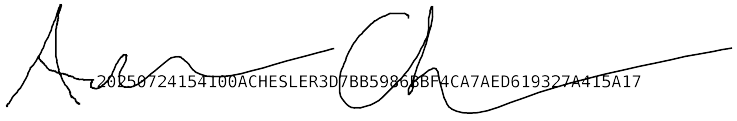
Movant has demonstrated *prima facie* that there are no genuine issues of fact regarding its status as an independent contractor at the time of the alleged incident. Additionally, movant asserts there is no jural relationship between movant and any of the defendants herein which would give rise to vicarious liability, and, therefore, the relation-back doctrine is inapplicable for

lack of unity in interest. The third prong is not met as well for movant had no notice of the instant lawsuit (*Mignone v Nyack Hosp.*, 212 AD3d 802, 803 [2nd Dept 2022] ["The linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period"]). The correspondence that plaintiff argues provided notice to movant is dated March 19, 2024, well after the November 3, 2023, date necessary to satisfy the statute of limitations.

Accordingly, it is hereby

ORDERED, that the motion by defendant D'Onofrio General Contracts Corp., to dismiss the Amended Complaint as against it is granted and the Amended Complaint is hereby dismissed in its entirety as to the defendant.

This constitutes the Decision and Order of the Court.



7/24/2025
DATE

ARIEL D. CHESLER, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**	☐	**DENIED**	☐	**GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐	**SETTLE ORDER**			☐	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**			☐	**FIDUCIARY APPOINTMENT**	☐ **REFERENCE**