

<b>Perez v Better Paving Co., Inc.</b>
2018 NY Slip Op 33953(U)
December 18, 2018
Supreme Court, Dutchess County
Docket Number: 2018-52095
Judge: Christi J. Acker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for 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 DUTCHESS**

-----X  
MAURICIO SIBAJA PEREZ,

Plaintiff,

-against-

A BETTER PAVING CO., INC., BRIGGS  
PAVING, INC. and BETTER WELDING, LLC.,

Defendants.  
-----X

**DECISION AND ORDER**

Index No.: 2018-52095

The following papers, numbered 1 to 7, were read on Defendants' motion pursuant to CPLR 3211(a)(1), (3), (5) and (7) to dismiss all claims against Defendants A Better Paving Co., Inc. ("Defendant Better Paving"), Briggs Paving, Inc. ("Defendant Briggs Paving") and Better Welding, LLC. ("Defendant Better Welding"):

Notice of Motion-Affirmation of Thomas M. Gambino, Esq.-Exhibits A-D-  
Affidavit in Support of Jenna Briggs ..... 1-7

Plaintiff Mauricio Sibaja Perez (hereinafter "Plaintiff") commenced this personal injury action on or about July 16, 2018 against Defendants claiming that he was injured on or about July 15, 2015 at the premises of 211 Van Wagner Road, Poughkeepsie, New York at approximately 6:15 pm. Plaintiff alleges that he was present on the premises in the course and scope of his employment and was engaged in construction, rehabilitation, work, excavation and/or demolition at said premises. The Complaint contains separate allegations that Plaintiff was employed by

each of the three Defendants. See ¶31, ¶69, ¶70, ¶107 and ¶108, Complaint, Exhibit A to Gambino Affirmation.

Defendants move to dismiss Plaintiff's Complaint based upon the exclusivity of Workers' Compensation on the grounds of documentary evidence (CPLR 3211(a)(1)), lack of capacity to sue (CPLR 3211(a)(3)) and for failure to state a cause of action (CPLR 3211(a)(7)). Defendants also move to dismiss the action as time barred (CPLR 3211(a)(5)).

In support of their motion, Defendants submit the Affidavit of Jenna Briggs (a manager of the Defendants), the Summons and Complaint, pay stubs for Plaintiff from Briggs Paving and Workers Compensation records apparently related to the accident at issue herein. Plaintiff has not opposed the instant motion.

To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), it must be shown that the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law. *XXXX, L.P. v 363 Prospect Place, LLC*, 153 AD3d 588 [2d Dept 2017]; *Torres v City of New York*, 153 AD3d 647 [2d Dept 2017]; *Wilson v Poughkeepsie City School Dist.*, 147 AD3d 1112 [2d Dept 2017]. The documentary evidence submitted by Defendants demonstrates that Plaintiff is currently employed by Defendant Briggs Paving and was employed by said Defendant at the time of the accident. Further, Exhibit D to the Gambino Affirmation demonstrates that Plaintiff received Workers Compensation benefits as an employee of Defendant Briggs Paving for an accident that occurred on July 15, 2015.

"In general, workers' compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the

course of employment.” *Derosas v. Rosmarins Land Holdings, LLC*, 148 AD3d 988, 989 [2d Dept. 2017]. Given Plaintiff’s allegation in the Complaint that he was an employee of Defendant Briggs Paving and the documentary evidence provided by Defendants supports this conclusion, Defendant Briggs Paving has demonstrated that Workers’ Compensation is the exclusive remedy Plaintiff has against said Defendant. As such, Plaintiff’s Complaint as to Defendant Briggs Paving is dismissed.

Notably, Defendants appear to argue that Plaintiff is not entitled to pursue the instant action against any of the Defendants as he has pursued his claim through Workers’ Compensation. However, there is no evidence before this Court that Plaintiff was employed by Defendants Better Paving or Better Welding. Indeed, the evidence provided by Defendants establishes that at the time of the accident at issue herein, Plaintiff was employed only by Defendant Briggs Paving. Therefore, Defendants Better Paving and Better Welding are not entitled to have this action dismissed based on the exclusivity of Workers’ Compensation and their motion on that basis is denied.

Defendants also move pursuant to CPLR 3211(a)(5) to dismiss this action as time barred. Pursuant to CPLR §214(5), the applicable statute of limitations for an action to recover damages for personal injuries is three (3) years. The incident underlying this action occurred on July 15, 2015. Accordingly, in order to be timely, this action was required to be commenced within three (3) years of July 15, 2015. Based on that date, Defendants argue that this action was required to be commenced on or before July 15, 2018 and because it was not commenced until July 16, 2018, the action is untimely and should be dismissed. However, a review of the 2018 calendar demonstrates that July 15, 2018 was a Sunday.

Pursuant to N.Y. Gen. Constr. Law § 25-a, “[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a . . . Sunday. . . , such act may be done on the next succeeding business day.” As acknowledged by Defendants, the final day to commence this action fell on July 15, 2018, which was a Sunday. Therefore, Plaintiff had until the next succeeding business day, Monday, July 16, 2018, to commence said action. As Plaintiff did so, the action was timely commenced and Defendants’ motion to dismiss pursuant to CPLR 3211(a)(5) is denied.

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

As such, it is hereby

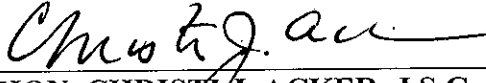
ORDERED that Defendants’ motion to dismiss is GRANTED as to Defendant Briggs Paving only; and it is further

ORDERED that the Defendants’ motion as to Defendants Better Paving and Better Welding is DENIED; and it is further

ORDERED that the remaining parties are directed to appear on **January 31, 2019** at 9:30 am for a Preliminary Conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
December 18, 2018

  
HON. CHRISTY J. ACKER, J.S.C.

To: All parties via ECF