

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX

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DINACO CONTRACTING CORP.,

Plaintiff,

- against -

**MAURICE REALTY, INC., 1604 RAFFEALLA LLC,
 AND SALVATORE MAURICE,**

Defendant.

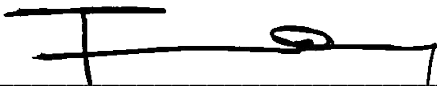
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The following papers numbered 1 to 5, Read on this is motion and cross-motion noticed on 11/5/21 and 12/2/21, respectively and duly submitted as no. 1 on the Motion Calendar of 2/1/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4-5	
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion and defendants' cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 2/2/2022


 Hon. FIDEL E. GOMEZ, AJSC

- | | | |
|---------------------------|---|---|
| 1. CHECK ONE | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| 2. MOTION/CROSS-MOTION IS | <input type="checkbox"/> GRANTED | |
| | <input checked="" type="checkbox"/> DENIED | |
| 3. CHECK IF APPROPRIATE. | <input type="checkbox"/> GRANTED IN PART | |
| | <input type="checkbox"/> OTHER | |
| | <input type="checkbox"/> SETTLE ORDER | |
| | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> DO NOT POST | |
| | <input type="checkbox"/> FIDUCIARY APPOINTMENT | |
| | <input type="checkbox"/> REFEREE APPOINTMENT | |
| | <input type="checkbox"/> NEXT APPEARANCE DATE _____ | |

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Defendant(s).

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DECISION AND ORDER

Index No: 30787/19E

In this action for, *inter alia*, breach of contract, plaintiff moves seeking an order for partial summary judgment. Saliently, plaintiff seeks summary judgment on the fourth and fifth causes of action asserted in its amended complaint on grounds that the property involved in this action was conveyed by defendants MAURICE REALTY, INC. (MR) and SALVATORE MAURICE (Maurice) to defendant 1604 RAFFEALLA LLC (Raffealla) without consideration, in violation of Debtor Creditor Law §§ 275 and 279, and in order to defraud plaintiff in violation of Debtor Creditor Law §§ 276, 279, and 276-a. Defendants oppose the instant motion asserting that questions of fact regarding the conveyance of the instant property preclude summary judgment. Defendants also cross-move for an order granting them summary judgment on grounds that the contract upon which this action is premised never existed and because the instant property was properly and legally conveyed. Plaintiff opposes defendants' cross-motion for the same reasons it seeks summary judgment in its

favor.

For the reasons that follow hereinafter, the motion and cross-motion are denied.

The instant action is for breach of contract, account stated, quantum meruit, and violations of Debtor Creditor Law §§ 275, 276, and 276-a, and 279. The complaint alleges that in 2016 plaintiff provided construction related services to MR and Maurice in connection with construction of a medical facility located at 1604 Williamsbridge Road, Bronx, NY (1604). Specifically, plaintiff's work included, *inter alia*, the initiation and development of the project. Plaintiff performed the foregoing work upon representations by Maurice that MR and plaintiff would ultimately enter into a written contract in connection with the project and that plaintiff would be paid for its work. On December 5, 2018, plaintiff and MR entered into a contract, whereby it was agreed, *inter alia*, that MR would pay plaintiff \$1,299,762 for plaintiff's work on the project. Plaintiff submitted a payment application on December 14, 2018, seeking \$129,999 and has never been paid. On July 26, 2019, MR conveyed 1604 to Raffealla. Based on the foregoing, plaintiff asserts five causes of action seeking money damages and a declaratory judgment nullifying the conveyance of 1604 to Raffealla.

Plaintiff's motion and defendants' cross-motion are denied as untimely. Significantly, the instant motion and cross-motion were made on or about November 5, 2021 and December 2, 2021, respectively, more than 120 days after plaintiff filed its Note of Issue.

CPLR § 3212(a) prescribes the time within which summary judgement motions may be made and states that

the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, a court cannot consider such a motion on the merits and must instead decline to hear the motion outright (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 727 [2004]; *Glasser v Ibramovitz*, 37 AD3d 194, 194 [1st Dept 2007]; *Rocky Point Drive-In, L.P. v Town of Brookhaven*, 37 AD3d 805, 808 [2d Dept 2007]). Accordingly, whether a motion has merit, the cause of action is meritless, summary judgment is in the interest of judicial economy, or that the opponent will not be prejudiced by the court's consideration of the motion, the foregoing shall not,

absent a showing of good cause, be sufficient grounds for the court to hear a belated motion for summary judgment (*Brill* at 653). This is because "statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously" (*Miceli* at 727).

For purposes of CPLR § 3212, good cause means a good excuse for the delay in filing the motion, meaning a satisfactory explanation for the delay (*Brill* at 652). More specifically,

[g]ood cause is written expression or explanation by the party or his legal representative evincing a viable, credible reason for the delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement

(*Bruno Surace v Diane Lostrappo*, 176 Misc2d 408, 410 [Supreme Court, Nassau County 1998]). Ultimately, what constitutes good cause has less to do with the merits of the actual motion and more to do with reason for the untimeliness (*Luciano v Apple Maintenance & Services, Inc.*, 289 AD2d 90, 91 [1st Dept 2001]). Thus, provided that good cause is shown, a court is always within its discretion to hear a motion for summary judgment regardless of the delay in making the same (*id.*).

It is well settled that law office failure, or ignorance, does not constitute good cause warranting consideration of a belated motion for summary judgment (*Giudice v Green 292 Madison, LLC*, 50

AD3d 506, 506 [1st Dept 2008] ["Nor are we persuaded by USADATA's argument, raised for the first time on appeal, that good cause existed by reason of the ambiguity created by the court's preliminary compliance order and compliance conference orders. USADATA's failure to appreciate that its motion was due within 45 days after the filing of the note of issue is no more satisfactory than a perfunctory claim of law office failure" (internal quotation marks omitted).]; *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008] [Defendant's motion for summary judgment was denied as untimely because court held that defendant's failure to learn that new note of issue had been filed, which started the clock on the time within which to make such motion, constituted law office failure and was, thus, not tantamount to good cause.]; *Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 286 [1st Dept 2007] [Defendant's motion for summary judgment denied when made after the deadline set by the court. Court held that defendant's failure to be aware that the court had shortened the time to make motion was tantamount to law office failure, which does not constitute good cause], *revd on other grounds* 11 NY3d 810 [2008]; *Farkas v Farkas*, 40 AD3d 207, 211 [1st Dept 2007] [Court held that plaintiff's failure to abide by statutory time frame due to oversight was tantamount to law office failure, which does not amount to good cause], *revd on other grounds* 11 NY3d 300 [2008]; *Breiding v Giladi*, 15 AD3d 435, 435 [2d Dept 2005] [Court held that clerical inadvertence and reassignment

of counsel were not tantamount to good cause so as to warrant consideration of a belated motion for summary judgment.)).

It is well settled that the time within which to make a motion for summary judgment is measured from the time the Note of Issue is filed and not when it is served (*Group IX, Inc. v Next Print. & Design Inc.*, 77 AD3d 530 [1st Dept 2010] ["CPLR 2103(b)(2), which provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period," is inapplicable to the making of a summary judgment motion, for which the period prescribed by CPLR 3212(a) is measured not by the service of a paper but by the filing of the note of issue."]; *Mohen v Stepanov*, 59 AD3d 502, 503 [2d Dept 2009]; *Coty v County of Clinton*, 42 AD3d 612, 614 [3d Dept 2007])).

Here, a review of the Court's file, which is available on the New York State Courts Electronic Filing website (NYSCEF), evinces that on May 24, 2021, plaintiff filed its Note Issue. Subsequently, on June 7, 2021, defendants filed a Jury Demand. A review of the motion and cross-motion evinces that neither party filed affidavits of service. However, plaintiff's motion is dated November 5, 2021 and was filed with NYSCEF on November 5, 2021. Similarly, defendants' cross-motion is dated December 2, 2021 and was filed with NYSCEF on December 3, 2021.

Based on the foregoing, plaintiff's motion must be denied as untimely because it was made more than 120 days¹ after plaintiff filed its Note of Issue. Pursuant to CPLR § 2211, "[a] motion on notice is made when a notice of the motion or an order to show cause is served" (*Ageel v Tony Casale, Inc.*, 44 AD3d 572, 572 [1st Dept 2007]; *Gazes v Bennett*, 38 AD3d 287, 288 [1st Dept 2007]). Here, while the record is bereft of any evidence of service of the motion, motions must ordinarily be served when they are filed with the Court. As such, here, the instant motion is presumed to have been made on November 5, 2021. Insofar as plaintiff filed its Note of Issue on May 24, 2021, the instant motion was made 165 days after plaintiff filed its Note of Issue. Accordingly, the instant motion is untimely and plaintiff fails to move for leave to have the Court consider the same, let alone proffer good cause for the failure to timely move.

The same is true for defendants' cross-motion. To the extent that defendants' cross-motion was filed on December 3, 2021, the Court presumes that it was served on that same day. Accordingly, defendants' cross-motion was made 193 after plaintiff filed its Note of Issue. As such, the instant cross-motion is untimely and defendants fail to move for leave to have the Court consider the

¹ When the instant applications were made, the Court (McShan, J.) had no rule at the time truncating the the time to make motions for summary judgment as permitted by CPLR § 3212(a).

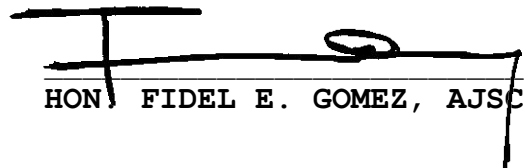
same, let alone proffer good cause for the failure to timely move.

To the extent that it could be argued that defendants' Jury Notice constitutes a Note of Issue, the date from whose filing the time to make the instant applications should be measured, it would not avail the parties. To be sure, the additional 13 days such proposition would accord the parties still renders the instant applications untimely. It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendants within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 2, 2022
Bronx, New York


HON. FIDEL E. GOMEZ, AJSC