To commence the 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, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MELISSA BURG, as Administratrix of the Estate of ELEANOR ROTHSCHILD,

Plaintiff,

-against-

DECISION and ORDER
Index No. 722/04

PERSONAL TOUCH HOME CARE, INC., PTS OF WESTCHESTER, INC., PERSONAL TOUCH HOME AIDES OF NEW YORK, INC., PERSONAL TOUCH HOME CARE OF WESTCHESTER, INC., UNITED HEBREW GERIATRIC CENTER, UNITED HEBREW GERIATRIC LTHHCP (LONG TERM HOME HEALTH CARE PROGRAM),

Defendants.

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LIPPMAN, J.

The following papers numbered 1 to 36 were read on this motion by defendant, United Hebrew Nursing Home for the Aged, Inc., sued herein as and d/b/a United Hebrew Geriatric Center ("United"), for an order pursuant to CPLR 2221 granting renewal and/or reargument of its prior motion for summary judgment, and upon renewal and/or reargument, granting summary judgment pursuant to CPLR 3212:

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support/ Exhibits A-I	1-11
Hyman Affirmation in Opposition/Exhibits A-D	12-16
Mandell Reply Affirmation/ Exhibit 1, A-Q, 2	17-36

Upon the foregoing papers, it is ordered that this motion is decided as follows:

FACTUAL BACKGROUND

Pursuant to the trial readiness order issued on December 1, 2005 by the Honorable J. Emmett Murphy in this action, summary judgment motions were to be made within 60 days after the filing of the note of issue. The note of issue was filed on December 28, 2005. Defendant United served its motion for summary judgment on March 8, 2006, after the expiration of the 60-day period.

By decision and order of this Court dated May 31, 2006 and filed on June 1, 2006, United 's motion was denied as untimely. United now moves for renewal and/or reargument, and upon renewal and reargument, granting summary judgment in favor of this defendant.

In its motion, United argues that on February 23, 2006, at a settlement conference before the Honorable Adolph Orlando, a Judicial hearing officer ("JHO"), United was granted leave to file a late summary judgment motion. United offers the affidavit of Peter Iannace, Esq., who was associated with the law firm representing United until March 9, 2006, in furtherance of its claim. Mr. Iannace avers in his affidavit that during the settlement conference, he informed JHO Orlando that United had prepared and was about to serve a motion for summary judgment (Iannace Affirmation, Exhibit "F" to motion papers, ¶3). Mr. Iannace explicitly states that Judge Orlando directed the parties to appear for a conference on March 8, 2006 and "further directed me to file UNITED'S motion on March 8, 2006" (Iannace Affirmation, Exhibit "F" to motion papers, ¶3). Mr. Iannace asserts that he "obeyed Judge Orlando's instructions" and served and filed the motion on March 8, 2006 (Iannace Affirmation, Exhibit F to motion papers, ¶4).

Finally, Mr. Iannace explains that,

> "Based on the foregoing, it was my understanding that UNITED'S motion for summary judgment was timely served and filed as of March 8, 2006. Judge Orlando ordered me to serve and file the motion on that date and I followed his instructions. I respectfully submit that UNITED should be entitled to renewal and reargument of its summary judgment motion because I acted in good faith in serving and filing the motion in accordance with Judge Orlando's instructions"

(Iannace Affirmation, Exhibit F to motion papers, ¶5).

Plaintiff's counsel, Robert A. Hyman, Esq., disputes United's contention that Judicial hearing officer Orlando authorized the late filing of the motion. In his reply affirmation, Mr. Hyman states as follows:

> "Defendant's only excuse for the late filing of the motion has no basis. At the pre-trial conference before Hon. Adolph C. Orlando, J.H.O. which was held on February 23, 2006, defendant attorney told Hon. Adolph C. Orlando, J.H.O. that defendant was not yet ready to discuss settlement beyond the initial offer of $10,000, as he had been thinking of filing a motion for summary judgement. Under no circumstances did defense counsel ask for, nor receive permission to file a late motion. Hon. Adolph C. Orlando, J.H.O. adjourned the conference to March 8, 2006 to pursue settlement discussions and/or set down a trial date. I don' t believe the Hon. Adolph C. Orlando J.H.O. could issue an Order. In addition, had he ordered the motion be served before March 8, 2006, why would he schedule a conference for that date? In any case, we appeared on March 8 and defendant's attorney handed me the motion for summary judgment. We agreed at the conference to adjourn the return date from March 30, 2006 to April 21, 2006 so I could read the papers and react appropriately. No permission for late service was asked for and none given. We respectfully request an Order denying
>
> defendant's motion (Hyman Affirmation, ¶2).

In response to plaintiff's opposition, United reasons that Mr. Iannace "was under the impression, whether correctly or incorrectly, that during the conference held before him on February 23, 2006, just days before the expiration of the 60-day period for filing motions for summary judgment, Justice Orlando had instructed this office to serve and file its motion for summary judgment on March 8, 2006" (Mandell Reply Affirmation, ¶4). United also argues that plaintiff never raised the timeliness of the motion in its opposition papers on the motion, "thereby implying that it was likewise his impression that the motion was in fact submitted in accordance with the Court's instructions" (Mandell Reply Affirmation, ¶4).

LEGAL DISCUSSION

As a preliminary matter, United has failed to demonstrate that there are any new facts

that were unavailable when it made its motion for summary judgment, and therefore, that part of United's motion which seeks renewal must be denied (*see* CPLR 2221[e]; *McNeil v Dixon*, 9 AD3d 481 [2004]). United's application is properly denominated as a motion for reargument only, as it is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, e.g., the alleged directive of the Judicial hearing officer (*see* CPLR 2221(d)(2); *Inzerillo v City of New York*, 287 AD2d 599 [2001]). While the matters raised by United in the instant application were not in the record before this Court on United's prior application, under the unusual circumstances presented in this case, this Court finds that United has established sufficient grounds for reargument of its motion.

Upon reargument, there remain questions to be resolved on United's application before this Court may address the purported merits of the summary judgment motion. CPLR 3212 (a) provides that "any party may move for summary judgment in any action, after issue has been joined; provided however, 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."

The first inquiry is whether United has established that it obtained leave of court on good cause shown for its delay in making the motion for summary judgment. If not, a second issue must be addressed - assuming United's good faith but erroneous belief that it had obtained leave of court to file the untimely motion, whether such a misconception, in and of itself, establishes good cause to permit the untimely motion. Without either showing, United's untimely motion cannot be considered and the motion must be denied (*see Brill v City of New York*, 2 NY3d 648 [2004]*; Milano v George*, 17 AD3d 644 [2005]).

Whether United did in fact obtain leave of court to make the untimely motion for

summary judgment is critical to the first inquiry. The Court of Appeals has made clear that " statutory time frames - - like court ordered time frames - - are not options, they are requirements, to be taken seriously by the parties" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]; citation omitted). Here, it is uncontroverted that the court-ordered 60- day period within which to make a summary judgment motion was not extended by any order of Justice Murphy. There is also no letter or other writing of Justice Murphy, or JHO Orlando, evidencing an extension of time to move for summary judgment. There is no evidence that JHO Orlando intended to grant an extension and supercede or modify Judge Murphy's order. While United relies on its former attorney's affirmation, there is insufficient proof in the record before this Court that JHO Orlando expressly requested that United delay making its motion for summary judgment until after the court-ordered time frame had expired (*cf, Sarigul v New York Telephone Co.*, 4 AD3d 168 [2004]).

Further, assuming JHO Orlando orally instructed counsel to file the summary judgment motion after the expiration of the 60-day period established by Justice Murphy, the directive would be in excess of his authority as a Judicial hearing officer and would be of no effect. Judicial hearing officers do not "stand in the shoes" of the assigned judge for purposes of extending a time frame imposed by the judge pursuant to statutory authority. The JHO's limited authority under the CPLR can in no way be interpreted to supercede an order by the judge under CPLR 3212(a). To hold otherwise would be contrary to the purpose of that statute to provide a date certain beyond which a summary judgment motion could not be made, absent "leave of court for good cause shown." In this context, the Judicial hearing officer is a quasi-judicial officer and not the "court."

JHO calendars are regularly used in courts throughout the state operationally to foster

effective case resolution.[1] Such calendars, however, are for limited case management purposes and do not change or expand the fundamental nature and powers of a JHO under the CPLR.[2] Accordingly, United has failed to demonstrate that it obtained leave of the court to file the untimely motion.

Moreover, while United maintains that it was instructed to file the motion on March 8, 2006, it has not demonstrated that good cause existed at the time delaying the motion. As held by the Court of Appeals in *Brill*, "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness rather than simply permitting meritorious filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d 648, 652 [2004]; *see also Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2005]). Here, United did not present any explanation for its delay in making the motion. Admittedly, the motion had been prepared prior to the February 23, 2006 conference. There was no outstanding discovery that would constitute a basis for a finding of good cause (*see Kunz v Gleeson*, 9 AD 3d 480 [2004]). Therefore, there was no reason to delay the making of the motion. Assuming *arguendo* that JHO Orlando had granted leave to make the untimely motion for summary judgment, there is no indication that he made a determination as to good cause, or that United was excused from making such a showing at that time.

Finally, as to the second issue raised by this application, notwithstanding the *de minimus* delay, United's misconception or mistaken assumption that it had obtained an extension within which to make the motion for summary judgment does not, standing alone, constitute good cause (*see Dettmann v Page*, 18 AD3d 422,[2005]; *cf, Certified Elec. Contracting Corp. v City of New York Dept of Transportation*, 23 AD3d 596 [2005]).

The fact that Plaintiff did not object or otherwise raise the issue of the untimeliness of the

motion in its opposition papers to the prior motion or was also under the impression that the motion was timely is of no consequence. "In the absence of a 'good cause' showing, a court has no discretion to entertain even a meritorious, non-prejudicial summary judgment motion" (*Hesse v Rockland County Legislature*, 18 AD3d 614 [2005], *quoting Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Thompson v New York City Bd of Educ.*, 10 AD 3d 650, 651 [2004]). As a result, United's motion for summary judgment is hereby denied, and the parties are directed to proceed to trial.

Dated: White Plains, New York
September 6, 2006

/S/

HON. JONATHAN LIPPMAN, J.S.C.

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[1]The Judicial hearing officer program was developed by the Office of Court Administration in 1983 to remove calendar congestion (L.1983, Ch. 840; 1983 Legislative Annual, Memorandum of the Office of Court Administration, Chapter 840, p. 362). The 1983 statute added Article 22 to the Judiciary Law relating to Judicial hearing officers and a number of the provisions of the CPLR were amended with regard to the use of Judicial hearing officers in civil proceedings.

Judiciary Law § 850 describes the process for appointment as a Judicial hearing officer. To qualify, a Judicial hearing officer must be a former judge or justice of a court of record of the Unified Court System or of a city court which is not a court of record. Judicial hearing officers

are designated by the chief administrator upon a determination by the chief administrator that (a) the former judge has the mental and physical capacity to perform the duties of such office and (b) the services of that former judge are necessary to expedite the business of the courts.

[2]Judiciary Law §853 provides that Judicial hearing officers have such powers as may be provided by law. CPLR §§4301 through 4321 relate to a trial or hearing before a Judicial hearing officer. CPLR §4301 provides that the term referee shall be deemed to include a Judicial hearing officer." Generally, in civil actions, Judicial hearing officers possess the same powers and authority as referees (*see Schanback v Schanback*, 130 AD2d 332 [1987]).