

**Drucker v New York City Tr. Auth.**

2007 NY Slip Op 32644(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0109324/2005

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

DRUCKER, MINA,

Petitioner,

-v-

NEW YORK CITY TRANSIT AUTHORITY,  
Defendant.

INDEX NO. 109324/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**  
2+3

AUG 23 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8-16-07

*Donna M. Mills*  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 21

-----X

MINA DRUCKER and JAY DRUCKER,

Plaintiffs,

Index No.  
109324/05

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

**FILED**  
AUG 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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DONNA MILLS, J.:

Defendant New York City Transit Authority moves for summary judgment dismissing the complaint.

This is an action for personal injuries sustained by plaintiff Mina Drucker (plaintiff Mina) on September 21, 2004, when she was caused to fall on the floor of the "A" train on which she was a passenger, due to the sudden movement of the train at the 14th Street station in Manhattan. Plaintiff Jay Drucker also asserts a claim for loss of consortium as her spouse.

Defendant now moves for summary judgment dismissing the complaint. Before addressing defendant's application, this court shall consider plaintiffs' argument that defendant's motion is untimely. CPLR 3212 (a) provides that a motion for summary judgment shall be made no later than 120 days after the filing of the note of issue unless the court sets an earlier date. This

court notes that plaintiff relies on the original language of Rule 17 of the Rules of the Justices of the New York State Supreme Court, NY County, Civil Branch ("Local Rule 17") to demonstrate that defendant's application was untimely. While Local Rule 17 initially provided that summary judgment motion be made within 60 days after the filing of the note of issue (Local Rule 17, effective 8/7/00), it was later revised in February 2006 to require that such motion be made no later than 120 days after the filing of the note of issue (Local Rule 17, effective April 17, 2006). Thus, the Local Rule is now consistent with the time limitation provided in CPLR 3212 (a).

Since the note of issue in this action was filed on October 9, 2006, and the instant motion was filed approximately 135 days thereafter, i.e., on February 21, 2007, in accordance with CPLR 3212 (a) and the current Local Rule 17, defendant's motion for summary judgment is untimely.

A party moving for summary judgment outside the statutory (CPLR 3212 [a]) or court-imposed time limit must show good cause for the delay (Pena v Women's Outreach Network, Inc., 35 AD3d 104 [1st Dept 2006]). "A motion court's exercise of discretion in determining that the moving party has established good cause for the delay will be overturned only if there has

[\* 4 ]  
been an improvident exercise of discretion" (id. at 108). Good cause requires a satisfactory explanation for the untimeliness (Brill v City of New York, 2 NY3d 648 [2004]).

In its supporting papers, defendant fails to submit any reason for failing to bring its summary judgment motion within the 120-day period. However, in opposition to plaintiffs' argument that the instant motion was untimely, defendant admits that its application is untimely, and maintains that there is good cause for its failure to timely file the instant summary judgment motion. Defendant acknowledges that, in November 2006, it brought a motion to vacate the note of issue seeking the additional relief of a 60-day extension of time within which to move for summary judgment, but claims that it "mistakenly" withdrew the motion after it received the requested discovery without obtaining an order extending its time to move for summary judgment. Defendant contends that this mistake consists of law office failure, requests that this court consider this mistake, and exercise its discretion, under CPLR 2004 and 2005, to excuse its untimeliness and hear the motion.

CPLR 2004 gives courts discretion to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just upon good cause shown" (see Grant v City of

New York, 17 AD3d 215 [1st Dept 2005]). As argued by defendant, law office failure may be accepted as an excuse under CPLR 2004 (Tewari v Tsoutsouras, 75 NY2d 1 [1989]). However, the courts recently have been taking a strict approach to the enforcement of deadlines (see Farkas v Farkas, 40 AD3d 207 [1st Dept 2007]), "necessarily impl[ying] that law office failure cannot generally be deemed to constitute 'good cause'..." (id. at 213), particularly regarding untimely summary judgment motions (see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; see also Brill v City of New York, 2 NY2d 648, supra).

Here, this court finds that defendant's excuse of law office failure does not constitute good cause for its late filing.

Defendant also relies on CPLR 2005 in support of its argument that its untimeliness should be excused. CPLR 2005, which provides that courts may exercise their discretion "to excuse delay or default resulting from law office failure," applies, by its express terms, only to applications to extend time to appear or plead under CPLR 3012 (d) and to motions for relief from a judgment or order under CPLR 5015 (a) (Farkas v Farkas, 40 AD3d 207, supra). Since neither application is at issue here, CPLR 2005 is not applicable.

However, even if this court, in its discretion, determined that good cause for the delay could be found, defendant's motion for summary judgment would, nevertheless, be denied, inasmuch as there are triable issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]), including whether the force of the stop that caused plaintiff Mina Drucker to sustain personal injuries was "unusual and violent" (see Urquhart v New York City Tr. Auth., 85 NY2d 828 [1995]). Plaintiff's testimony, that, inter alia, prior to her fall, the train stopped, and she stood up, and suddenly there was a violent thrust, which caused her to be thrown about at least four feet to her right onto the floor of the subway (Plaintiffs' Exhibit C, Deposition taken of Mina Drucker on 8/6/06, at 12-15), was sufficient to raise a triable issue of fact (id.).

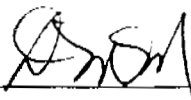
Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

Dated: 8-16-07

**FILED**  
AUG 23 2007  
NEW YORK  
COUNTY CLERKS OFFICE

ENTER:



J. S. C.

CONNOR M. MILLER, CLERK