

**Rosario v 674 Holding Ltd.**

2007 NY Slip Op 32837(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 0106055/2005

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ARACELIS ROSARIO and NAYIBERTO LOPEZ,  
Individually and as Natural Guardians of  
BRIAN LOPEZ AND ARANCI LOPEZ, Infants,  
Plaintiffs,

- v -

674 HOLDING LTD.,

Defendant.

Index No.: 106055/05

Motion Date: 06/06/07

Motion Seq. No.: 02

Motion Cal. No.: 85

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

**FILED**  
SEP 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall deny defendant's motion for summary judgment and the related motion for an extension of time to file dispositive motions (Motion Sequence No. 1) because defendant failed to bring the motion within 60 days after the note of issue was filed and served pursuant to this court's Preliminary Conference Order dated December 16, 2005, and no good cause has been shown for the tardy application.

The Court of Appeals has held that tardy summary judgment motions are not to be considered on their merits if not filed in

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

accordance with the time limits stated in CPLR 3212 (a) setting forth the policy that "as a result of the courts' refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that 'good cause' means good cause for the delay, and because movants will develop a habit of compliance with the statutory deadlines for summary judgment motions rather than delay until trial looms." Brill v City of New York, 2 NY3d 648, 653-654 (2004). The First Department has held that it is the date of service of the note of issue upon the parties to the action which starts the clock running on the time to serve the dispositive motion. McFadden v 530 Fifth Ave, RPS III Associates, LP, 28 AD3d 202, 203 (1<sup>st</sup> Dept 2006).

The Preliminary Conference Order of December 16, 2005, set forth a 60 day time limit for filing dispositive motions after the filing of the note of issue. It is uncontested here that the plaintiffs served and filed the note of issue on January 18, 2007. Defendant served its summary judgment motion upon plaintiffs on May 16, 2007, and filed it on May 17, 2007. Defendant's motion is therefore untimely.

Defendant's reliance upon the Third Department's decision in Rossi v Arnot Ogden Medical Center (252 AD2d 778, 779 [3d Dept 1998] ["Supreme Court also did not abuse its discretion in allowing [defendant] to serve a late motion for summary

judgment" is misplaced. The Court in Brill not only cited Rossi but expressly overruled its holding stating "[i]f, on the other hand, the statute is applied as written and intended, an anomaly may result, in that a meritorious summary judgment motion may be denied, burdening the litigants and trial calendar with a case that in fact leaves nothing to try. Indeed, the statute should not 'provide a safe haven for frivolous or meritless lawsuits' (Rossi v Arnot Ogden Med. Ctr., 252 AD2d 778, 779 [3d Dept 1998] [Graffeo, J.]), which is precisely why practitioners should move for summary judgment within the prescribed time period or offer a legitimate reason for the delay." Brill, 2 NY3d at 653 (emphasis added).

Defendant's sole excuse for failing to comply with the Preliminary Conference Order is that current defense counsel was not present on the preliminary conference and therefore was unaware of the 60 day time period. Defendant cites a decision of a term of this court stating that such an excuse constitutes "good cause." In Koloski v Metropolitan Life Ins. Co. (5 Misc3d 1028, 2004 NY Slip Op 51596[U] [Sup Ct, NY County, Nov 3, 2004, Madden, J.]) the court stated that "while the court, in its discretion, may require that a motion be made in less than the 120-day period (see, Fainberg v Dalton Kent Securities Group, Inc., 268 AD2d 247 [1st Dept 2000]), the error of defendants'

attorneys under the circumstances here, when the delay was minimal, is sufficient to constitute good cause."

However, more recent authority makes clear that the Court of Appeals holding in Brill is not to be lightly circumvented.

The Court of Appeals has recently made it 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], following Brill v City of New York, 2 NY3d 648 [2004]). Thus, where a statute or court rule prescribes a limited time frame in which to take a procedural step in litigation, and states that a party's failure to act within that time frame will be excused only upon a showing of "good cause," such a showing requires demonstrating, as the dissent puts it, "more . . . than [the] merit . . . [of] the underlying application and a lack of prejudice to the other party."

Farkas v Farkas, 40 AD3d 207 (1<sup>st</sup> Dept 2007). The Court in another case involving the application of the "good cause" calculus stated

While defendant did demonstrate good cause for its delay in the aftermath of 9/11 until June 2002, counsel offered no explanation for defendant's failure to move within the three months between the two settlement conferences in June and September 2002. Thus, by virtue of the clear intent and unequivocal language in Brill and Miceli, the motion court should not have considered prejudice and judicial economy, and it should have held defendant accountable for its unexplained delay.

Perini Corp. v City of New York, 16 AD3d 37, 40 (1<sup>st</sup> Dept 2005).

In this case the parties appeared before Mediation Part-1 on April 16, 2007, and a trial date was set for July 11, 2007, before Part 40. The very actions taken by defendant in this case in delaying the filing of this motion are wholly contrary to the

purposes of the statutory limitations as articulated by the Court of Appeals. Acceptance of defendant's excuse that defense counsel was unaware of this court's discovery orders as satisfying a "good cause" showing would encourage counsel to ignore discovery orders and the deadlines set forth therein. Accordingly, defense counsel's failure to review the publicly available court orders entered in this action cannot and does not establish good cause for failure to timely file a summary judgment motion.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is DENIED for failure to comply with CPLR 3212 (a); and it is further

ORDERED that the parties are directed to attend a pre-trial conference on October 2, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set a trial date in accordance with 22 NYCRR 202.26 (Rule 202.26 of the Uniform Civil Rules for the Supreme Court and County Court).

This is the decision and order of the court.

Dated: September 5, 2007

ENTER:

**FILED**  
SEP 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Debra A. James  
**DEBRA A. JAMES**  
J.S.C.  
J.S.C.