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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

ARISTIDIS ALEXANDRIDIS and MICHAEL FOSTER,
Plaintiffs,

- v -

SUEDE NIGHT CLUB, CARLOS GALVIS, HANNELORE GALVIS, "JOHN DOE," and "ABC CORPORATION," (the last two being fictitious designations),
Defendants.

Index No.: 105452/04
Motion Date: 05/01/07
Motion Seq. No.: 03
Motion Cal. No.: _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendants move for summary judgment dismissing the complaint in this action seeking damages for injuries suffered by plaintiffs in an assault by other patrons at defendants' bar/restaurant. Plaintiffs oppose the motion. The court shall deny the motion.

The plaintiffs for the first time at the oral argument of this motion raised the issue of the motion's untimeliness under CPLR 3212 (a). Plaintiffs argue that under the Court of Appeals decision in Brill v City of New York (2 NY3d 648 [2004]) and its

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

progeny interpreting CPLR 3212 (a), this court cannot hear defendants' motion because it is brought more than 60 days after the note of issue was filed as set forth in this court's Order. Plaintiffs assert that although this argument was not raised in their papers, the court can, and should, sua sponte dismiss the motion under Brill. The court disagrees with plaintiffs' argument.

This court is unaware of any authority for the proposition that a court may sua sponte dismiss a motion for summary judgment based upon the failure of a movant or cross-movant to comply with CPLR 3212 (a). The courts that have dismissed cases for failure to comply with the time requirements of CPLR 3212 (a) have done so upon application by a party raising that issue. In this case, plaintiffs concede that they fully briefed the motion and failed to raise this issue in its opposition papers. Contrary to plaintiffs' argument, the failure to raise timeliness in their papers is fatal to their application and this court is not empowered to insert itself into the litigation in view of plaintiffs' waiver.

CPLR 3212 (a) does not provide that the failure to timely file a summary judgment motion is fatal to the application. Instead the dilatory party is entitled to establish that there is "good cause" for the delay. The fact that a party may establish that there is good cause for any alleged delay implies that a

party must be furnished the opportunity to present that justification in papers submitted to the court. Obviously, any non-moving party is also afforded the opportunity to challenge a proffered good cause showing.

Simply put, in order to find that a summary judgment motion is inexcusably late under CPLR 3212 (a) a court must make two factual determinations. The first factual determination is that the motion was made beyond the statutory deadline. The second determination is that there is an absence of good cause for the delay. These factual determinations can only be made on evidence that the parties place before the court. While the court can take judicial notice of the filing date of a note of issue by reviewing the Clerk's docket, the First Department has held that it is not the date of filing of the note of issue which starts the clock running on the time to serve the dispositive motion, but the date of service of the note of issue upon the parties to the action. As stated by the Court

> While CPLR 3212 (a) and the applicable local rule specify the date of filing of the note of issue as the triggering date for the time within which to bring a summary judgment motion, and do not mention service of the note of issue, an opponent's failure to serve a note of issue constitutes good cause for a late summary judgment motion (see Cibener v City of New York, 268 AD2d 334 [2000]). A contrary rule would permit a party to unilaterally shorten an opponent's time to make a summary judgment motion. We further note that, at least for purposes of placing a case on the trial calendar, a note of issue is filed "within ten days after service, with proof of such service" (CPLR 3402 [a] [emphasis added]).

McFadden v 530 Fifth Ave. RPS III Associates, LP, 28 AD3d 202, 203 (1st Dept 2006).

The Court in McFadden held that where there was a failure to serve a note of issue, the non-filing parties had a right to raise such non-service as a good cause defense to the time limits imposed by CPLR 3212 (a). Such a good cause showing could only be made, or challenged, on papers submitted in support of a summary judgment motion where there is notice to all parties as to a claim of untimeliness.

The facts in this case illustrate the concerns raised by the Court in McFadden. The court was only made aware of plaintiffs' belated claim of untimeliness because this court schedules oral argument on contested, submitted motions. At the motion argument, plaintiffs' counsel requested sua sponte dismissal. Plaintiffs however did not submit any copy of the note of issue with proof of service thereof to demonstrate the untimeliness of the motion and did not assert that the note of issue had ever been served upon the defendants. Defendants were deprived of the opportunity to raise a "good cause" defense based upon McFadden or any other valid grounds because of the plaintiffs' "ambush." As is McFadden, countenancing such practice would encourage parties not to raise CPLR 3212 (a) timeliness objections in their papers opposing the motion so as to deprive their adversaries of

the chance to assert the timeliness of a motion for summary judgment. That is not the policy behind Brill.

Instead, Brill contemplates that the threshold issue of timeliness will be presented to the court on full papers so that the court can make the necessary factual determinations as to timeliness. A full record having been made in the trial court, the parties would then be free to appeal such a determination to the appellate tribunal which would have a complete record to review.

Accordingly, the court denies plaintiffs' oral, post-submission, application to deny defendants' motion as untimely and will rule upon the merits of the motion.

On the merits, the defendants' motion must be denied. When plaintiff Alexandridis was questioned as to actions the defendants' security guard took during the altercation, he stated "the first action was he jumped right in and I mean - seemed to me he was involved in the fight. That's initially what I thought. Somebody had started a fight with him, you know, and then I say another one run over and I just saw many fists being thrown. Couldn't tell you who they were, but definitely the bouncer was obviously - was fighting with somebody." The First Department has held on similar facts that such testimony raises an issue of fact meriting denial of summary judgment. The Court stated that

> The record contains evidence sufficient to raise triable factual issues as to whether defendants knew or should have known of a likelihood that third persons might endanger the safety of those lawfully on the premises (see Florman v City of New York, 293 AD2d 120, 124 [2002]), and whether defendants satisfied the duty, if any, to offer protection against such criminal activity on the premises (see Todorovich v Columbia Univ., 245 AD2d 45 [1997], lv denied 92 NY2d 805 [1998]). Foreseeability is thus an important element of liability in these circumstances. In light of the deposition testimony of plaintiffs Gibson and Roberts that employees of defendant Crab House took some affirmative action to halt the fights that eventually led to plaintiffs' injuries, questions of fact exist with respect to whether those employees assumed a legal duty to act, and whether that duty was subsequently breached (see Flynn v Niagara Univ., 198 AD2d 262, 264 [1993]).

Lee v Piers, 11 AD3d 257 (1st Dept 2004).

The key distinction between this case as set forth on this motion, and the precedents cited by defendants (see Maheshwari v. City of New York, 2 NY3d 288 [2004]; Petras v Saci, Inc., 18 AD3d 848 [2d Dept 2005]) is that in this case as in Lee, there is evidence that agents of the defendants were implicated in the altercation. Such evidence is sufficient to raise an issue of contested fact as to whether the defendants breached their duty.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is DENIED; 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 IAS 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 7, 2007 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.