

**Rogers v Broadwall Mgt. Corp.**

2008 NY Slip Op 30416(U)

February 11, 2008

Supreme Court, New York County

Docket Number: 0107963/2004

Judge: Barbara Kapnick

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

PRESENT:

**BARBARA R. KAPNICK**  
J.S.C.

PART 12

Index Number : 107963/2004

ROGERS, JASON A.

INDEX NO.

107963/04

vs

BROADWALL MANAGEMENT CORP.

NOTION DATE

Sequence Number : 005

NOTION SEQ. NO.

005

SUMMARY JUDGMENT

NOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are *decided in accordance with the accompanying memorandum decision.*

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

**FILED**

FEB 14 2008

NEW YORK COUNTY

Dated: 2/11/08



J.S.C.

Check one:  FINAL DISPOSITION  DO NOT POST

**BARBARA R. KAPNICK**  
 NON-FINAL DISPOSITION J.S.C.

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
JASON ROGERS and DANIELLE ROGERS,

Plaintiffs,

-against-

BROADWALL MANAGEMENT CORPORATION,  
JEFFREY MANAGEMENT CORPORATION, and  
GCS SERVICE, INC.,

Defendants.

-----X  
BROADWALL MANAGEMENT CORPORATION and  
JEFFREY MANAGEMENT CORPORATION,

Third-Party Plaintiffs,

-against-

MORTON'S OF CHICAGO,

Third-Party Defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 107963/04  
Motion Seq. No. 005

**FILED**  
FEB 14 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Jason Rogers on June 21, 2003 while working as a sous chef in the kitchen of Morton's Steakhouse at 551 Fifth Avenue in Manhattan. Plaintiff claims that he received an electric shock after he touched a preparation table and oven which were allegedly improperly repaired.

Defendant/third-party plaintiff Jeffrey Management Corporation ("Jeffrey Management") was the managing agent of the building where the restaurant was located at the time of plaintiff's accident.

The Complaint alleges that defendant/third-party plaintiff Broadwall Management Corporation ("Broadwall") also managed the property, but Broadwall denies that it had any management or ownership role at the premises prior to plaintiff's accident.<sup>1</sup>

Defendant GCS Service, Inc. ("GCS") allegedly maintained and/or repaired the commercial kitchen equipment, pursuant to a Product and Services Supply Agreement ("the agreement") with Morton's Restaurant Group.

Defendant/third-party plaintiff Jeffrey Management has asserted cross-claims against defendant GCS for contribution and contractual and common law indemnification, and Broadwall and Jeffrey Management have asserted third-party claims against plaintiff's employer, third-party defendant Morton's of Chicago ("Morton's"), for defense and indemnification pursuant to Article 44.01 of the Rider to its Lease.

Defendant GCS now moves for summary judgment dismissing plaintiffs' Complaint and all third-party and/or cross-claims against it, on the grounds that: (i) it did not owe a duty of care

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<sup>1</sup> A prior cross-motion for summary judgment dismissing plaintiff's Complaint against defendant Broadwall was denied as premature by Decision/Order of this Court dated February 3, 2005.

[\*4]  
either to plaintiff or Jeffrey Management; and (ii) GCS did not have actual or constructive notice of the alleged defect prior to plaintiff's accident.

Defendants Broadwall and Jeffrey Management cross-move for an order:

(1) granting summary judgment dismissing plaintiffs' Complaint and all cross-claims against them on the grounds that (a) Broadwall had no involvement whatsoever with Morton's and/or plaintiff's work; and (b) neither Broadwall nor Jeffrey Management was responsible for repair and/or maintenance of the kitchen equipment;

(2) granting them summary judgment on their third-party claims against Morton's and on their cross-claims against co-defendant GCS; or, in the alternative,

(3) compelling further discovery from plaintiffs and staying the trial of this action (which was originally scheduled to commence on September 19, 2007) pending the completion of said discovery.

At the oral argument held on November 7, 2007, all parties agreed to discontinue their claims against defendant Broadwall with prejudice. Accordingly, that portion of the cross-motion relating to Broadwall is granted and the action is discontinued as to

defendant Broadwall with prejudice and without costs or disbursements.

The Clerk may enter judgment accordingly.

Plaintiffs, however, oppose defendant GCS' motion for summary judgment and that portion of the cross-motion seeking summary judgment on behalf of defendant Jeffrey Management on the ground that the motion and cross-motion were not made within 120 days of the filing of the Note of Issue, as required by CPLR § 3212(a),<sup>2</sup> and neither party has sought nor obtained an extension of the statutory deadline upon "good cause shown". See, Miceli v. State Farm Mutual Automobile Insur. Co., 3 N.Y.3d 725 (2004); Brill v. City of New York, 2 N.Y.3d 648 (2004); Rahman v. Domber, 45 A.D.3d 497 (1<sup>st</sup> Dep't 2007); Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280 (1<sup>st</sup> Dep't 2006); Perini v. City of New York, 16 A.D.3d 37 (1<sup>st</sup> Dep't 2005).

GCS contends that it required additional time to properly assess the grounds for summary judgment, including medical causation, because plaintiff first designated two experts, an

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<sup>2</sup> The Note of Issue was filed on January 5, 2007. The Notice of Motion dated May 7, 2007 was not filed until May 9, 2007.

6]  
economist and a neuropsychologist, on February 9, 2007, more than 30 days after the Note of Issue was filed.

However, these disclosures related solely to the issue of damages and thus do not demonstrate "good cause" for GCS' delay in bringing the instant motion for summary judgment on the issue of liability. Nor may GCS rely on the purported merits of its defense to extricate itself from failing to show "good cause" for its delay. Perini Corp. v. City of New York, supra at 38.

While it is true that GCS filed its motion only two days past the statutory deadline, the Appellate Division, First Department, has held that even a few days delay "does not eliminate the requirement that good cause be demonstrated" and that the Court is "not free, for the sake of judicial economy, to consider an untimely summary judgment motion in the absence of a showing of good cause." Crawford v. Liz Claiborne, Inc., 45 A.D.3d 284 (1<sup>st</sup> Dep't 2007).

Accordingly, this Court is constrained from reaching the merits of either the motion or cross-motion. Both the motion and cross-motion are, therefore, denied, except as specifically noted above.

[\*7]

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 5, 2008 at 9:30 a.m. Jeffrey Management's request for additional discovery on the issue of damages, including a vocational rehabilitation examination and an authorization for plaintiff's current employment records, shall be addressed on that date.

This constitutes the decision and order of this Court.

Date: February 11, 2008



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
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