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SCANNED ON 5/15/2008

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

PRESENT: GISCHE Justice PART 10

INDEX NO. 101297/03

FRANK PETERS

-v-

TRAMMEL CROW COMPANY

MOTION DATE

MOTION SEQ. NO. 5

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for 3212 JP

	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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

MAY 08 2008

Dated: _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Frank Peters and Bonnie Peters,

Plaintiff

-against-

Trammel[1] Crow Company,
D.P. Facilities, Inc.,
Triangle Services, Inc., and
ARI Products, Inc.,

Defendants.

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DECISION/ORDER
Index No.: 101297/03
Seq. No.: 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def DP's OSC §3212 w/JVW affirm, exhs	1
Pltff's x/m §3212 w/MLT affirm, exhs	2
Def TCC opp to DP's motion w/JB affirm	3
DP reply w/JVW affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries that plaintiff Frank Peters claims to have sustained when a handrail broke, causing him to fall. In connection with prior motions and cross motions brought by defendants Trammel Crow Company, Triangle Services, Inc., and ARI Products, Inc. ("Trammel Crow," "Triangle," and "ARI"), the court found that there were triable issues of fact, and denied these defendants respective motions for summary judgment. Order, Gische J., 4/27/07.

[1]The court notes that this is the spelling used in the complaint, but in certain pleadings, and in connection with this motion, the defendant's name is spelled "Trammell." The court adheres to the spelling used in the complaint.

Trammel Crowe, ARI and Triangle appealed this court's decision. On appeal, the Appellate Division reversed this court, and granted Triangle and ARI summary judgment, dismissing all claims against them. Peters v. Trammel Crow Co., et al., 47 AD3d 419 (1st Dept 2008).

DP now brings this motion for summary judgment. Although it opposed the earlier motions by the moving defendants, DP did not itself previously move for summary judgment. DP argues that although more than 120 days passed since the note of issue was filed, its motion is meritorious and should be considered, despite not being in compliance with the time requirements of CPLR § 3212. DP reasons that because the Appellate Division has granted ARI motion, and it stands in the same legal stance as DP because of their contractual relationship, this court should now dismiss the claims against DP, for consistency.

Plaintiff opposes DP's motion in all respects as being brought untimely. Plaintiff has also cross moved for an order restoring this case to the trial calendar and amending the caption to reflect that ARI and Triangle are now out of the case. Trammel Crow separately opposes DP's motion as well.

Discussion

In connection with the underlying motions and cross motions, each moving defendant had argued that the other was negligent. The court categorized the defendants as those who were involved with the building during the 1994-1995 renovation, and those involved with the building thereafter. DP was the construction manager on the renovation project and ARI its subcontractor. ARI's motion revolved around whether it or DP had installed the handrail. Though ARI moved for summary

judgment, DP did not. DP did, however, oppose ARI's motion. DP (and plaintiff) were respondents on the appeal.

DP now argues that the Appellate Division's decision is a turn of events that should lead this court to dismiss all claims against DP and award it summary judgment, rather than forcing it to undergo the expense of preparing for a needless trial. DP contends that the following language in the decision on appeal is particularly germane, and the law of this case:

> "While there may be questions of fact as to whether ARI originally installed the handrail, there is no question that it had nothing to do with the two subsequent repairs, including the repair of "significant" damages to the handrail after it had broken in two in 1999. The building's maintenance staff having made the repair rather than looking to the general contractor or subcontractor to repair or replace the broken handrail on either occasion, such repairs must be deemed, as a matter of law, to have constituted an intervening act so far removed from ARI's alleged conduct as to constitute a superseding action breaking any causal nexus."

Although DP does not dispute that it brought this motion well after the time limitations set forth in CPLR section 3212 (i.e. in excess of 120 days after the filing of the note of issue), DP nonetheless contends that its motion for summary judgment should be decided because it has merit. DP argues that if its subcontractor cannot be held legally responsible for plaintiff's accident, then it too should be exonerated. DP contends that the Appellate Division's decision, that superceding acts after the handrail was installed broke the causal connection or nexus between any alleged negligence on ARI's part, and the happening of plaintiff's accident, also applies to DP because it and its subcontractor stand in the same shoes. DP contends that because any trial court will be bound by the Appellate Division's decision, it should not have to prepare for a

pointless trial since it (DP) will prevail at trial anyway. Alternatively, DP argues that there is the potential for the jury to be confused, or the trial court to get it wrong, possibly resulting in further appeals; therefore this court should be proactive and grant it summary judgment now to avoid that problem.

Plaintiff argues that not only is DP's motion untimely, they are wrong on the law. Further, plaintiff contends it is ready to try this case, and this is nothing more than a further delay in this case. Plaintiff has cross moved to put this case on the trial calendar and to have the caption amended to reflect the current status of the case.

The arguments DP has made are indistinguishable to those made before, and decided by, the Court of Appeals in Brill v. City of New York [2 N.Y. 3d 648 (2004)] ("Brill")] and other courts in the First Department following the decision in Brill [Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) (Sup Ct 2005)].

The deadlines set forth in section 3212 of the CPLR are not discretionary, but clear cut mandates enacted by the legislature: "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 . . ." (emphasis added). The merits of a summary judgment motion made after 120 days does not satisfy the requirement of having to show "good cause." Brill v. City of New York, 2 NY3d at 653. Rather the "good cause" component of this statute requires an explanation for why the motion was not made timely. Id.

DP could have moved or cross moved when the other defendants brought their motions for summary judgment. DP, however, made a tactical decision not to do so, instead opting to oppose the motion by the other defendants, including its own

subcontractor. The fact that ARI, on appeal, succeeded in having the claims against it dismissed is not "good cause" for the court to consider DP's late motion. If, as it contends, DP stands in the same shoes as ARI, then DP can make these arguments at trial, at the appropriate time. This court cannot, nor will it, disregard the precatory language of CPLR § 3212, or the significant body of law that has developed since Brill. DP's argument that requiring it to proceed to trial will confuse the jury is makeweight and derogates the role of the trial court.

Therefore, the court will not consider DP's motion for summary judgment because it was brought more than 120 days after the Note of Issue was filed and DP has not set forth good cause why it did not move timely.

The court agrees with plaintiff that this case is ready for trial. The court will, however, direct that plaintiff provide the defendants with updated authorizations so they can serve their trial subpoenas. These authorizations shall be provided within Ten (10) Days of the decision hereof. Plaintiff shall at the time also provide authorizations for the health care providers who treated him/ saw him in January and February 2008, as identified in Trammel Crowe's opposition papers.

Plaintiff's motion, to have the caption of this case amended to reflect the remaining defendants is granted as well. The caption, however, proposed by plaintiff is identical to what it is presently, and it contains the spelling of Trammel Crowe's name that comports with the complaint, but differs from what it legally is. Thus, the court will require that plaintiff settle an order on notice, as to this branch of the court's decision only. Such proposed order shall contain a corrected caption.

Plaintiff shall serve a copy of this court's decision/order on the Office of Trial

Support so this case can be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 8, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.