

Madison Third Bldg. Cos., LLC v Berkey
2008 NY Slip Op 32007(U)
July 14, 2008
Supreme Court, New York County
Docket Number: 0603999/2004
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT:

Index Number : 603999/2004

PART 17

MADISON THIRD BUILDINGS

vs

BERKEY, DAVID

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as attached

FOR THE FOLLOWING REASON(S):

FILED

JUL 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/14/08

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
EMILY JANE GOODMAN
S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
MADISON THIRD BUILDING COMPANIES,
LLC, A New York Limited Liability Company,

Plaintiffs,

-against-

Index No.: 603999/04

DAVID BERKEY, LAURENCE BRIODY, CB
RICHARD ELLIS, INC., a Delaware Corporation
doing business in the State of New York, and CB
RICHARD ELLIS REAL ESTATE SERVICE,
INC., a Delaware Corporation doing business in
the State of New York,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

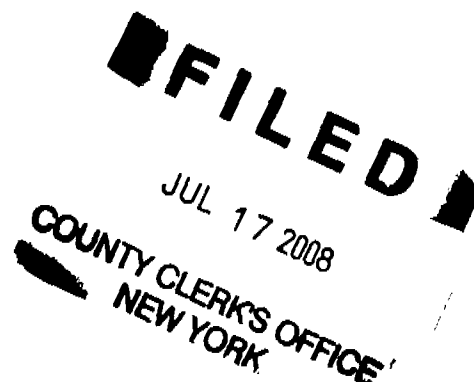
Plaintiff seeks to recover from defendants for their purported interference with a contract.

Defendants move, pursuant to CPLR 3212, for summary judgment.

The court's preliminary conference order, dated December 1, 2005, and its scheduling order, dated August 10, 2006, provide for the making of post-note of issue dispositive motions within 45 days after the filing of the note of issue. The note of issue was filed on February 8, 2007. Defendants served their summary judgment motion on June 8, 2007.¹

As the motion was untimely, a threshold issue here is whether defendants have demonstrated "good cause" for the delay in making the motion. In *Brill v City of New York* (2 NY3d 648 [2004]), the Court of Appeals reversed the grant of summary judgment to the City, holding that CPLR 3212 (a) "requires a showing of good cause for the delay in making the

¹A motion on notice is made when it is served (CPLR 2211).



motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings” (*id.* at 652). In *Miceli v State Farm Mut. Auto. Ins. Co.* (3 NY3d 725, 727 [2004]), the Court stressed that “statutory time frames – like court-ordered time frames – are not options, they are requirements, to be taken seriously by the parties.” These two cases make clear that neither the merits of the motion nor prejudice are factors in determining whether “good cause” has been shown.

The “good cause” requirement is not dispensed with where a party misses a court-imposed deadline that is less than 120 days (*Giudice v Green 292 Madison, LLC*, 50 AD3d 506 [1st Dept 2008]; *Glasser v Abramovitz*, 37 AD3d 194 [1st Dept 2007]), or even where a motion is only a few days late (*Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 287 [1st Dept 2007]). Furthermore, courts have determined that a perfunctory claim of law office failure does not constitute “good cause” (*see Giudice*, 50 AD3d at 506 [“failure to appreciate that its motion was due within 45 days after the filing of the note of issue ‘is no more satisfactory than a perfunctory claim of law office failure’” [internal citations omitted]; *Azcona v Salem*, 49 AD3d 343 [1st Dept 2008]).

In *Crawford* (45 AD3d 284), counsel claimed that a preliminary conference order was ambiguous and believed that she had 120 rather than 60 days to make a dispositive motion. The preliminary conference order, dated April 11, 2005, provided that dispositive motions were to be made in accordance with Local Rule 17. On the date of the conference order, the local rule provided that dispositive motions were to be made within 60 days from filing the note of issue. The Justice’s rules were also available online. The local rule was subsequently changed and, apparently at the time the motion was made, provided that dispositive motions were to be made

within 120 days, unless a shorter time was provided by the court. The trial court, accepting counsel's excuse, considered the merits of the motion and granted it. Despite the fact that the motion was made just a few days past the 60-day deadline in the court's preliminary conference order, the First Department reversed the lower court, stating that defendants had tacitly conceded that a 60-day period applied and that their explanation for the delay amounted to a perfunctory claim of law office failure.²

Defendants' counsel claims that she and plaintiff's counsel attended a court conference on February 8, 2007, immediately prior to which plaintiff had filed its note of issue. At the conference, in response to her inquiry about a schedule for the briefing of the motion, defendants' counsel recalls that she was informed by a court attorney, who did not there mention a 45-day rule, that "the motion should be made in accordance with the CPLR" (Def. Mov. Aff., at 9). Plaintiff's counsel does not dispute defendants' counsel's assertions, which are accepted by the court as true. Defendants' counsel states that she understood the court attorney's statement to mean that the court had no specific rules governing the making of dispositive motions upon the completion of discovery, that any further procedural guidance concerning defendants' motion should come from the CPLR, and that she was being instructed by the court to comply with CPLR deadlines for making the motion (*id.*).

Defendants' counsel states that she relied on the court attorney's statement, consulted the CPLR, and the Supreme Court New York County Civil Term's Rules of Justices, which was

²The Court of Appeals is scheduled to hear the appeal in *Crawford* on September 10, 2008. Although the Court of Appeals may reverse the Appellate Division, based on the reasoned dissent in that case, this court's decision is not strictly based on the holding in *Crawford*, but rather, on the reasonableness of the excuse proffered here.

silent as to a 45-day rule, and proceeded under the belief that she had 120 days to make the motion, ordering deposition transcripts, requesting certifications of same by each deponent, and otherwise organizing her workload accordingly. Defendants' counsel also states that the parties had engaged in so much scheduling and rescheduling of deposition dates that she believed they had already fully complied with all of the court's orders by their compliance with two so-ordered stipulations dated October 26, 2006 and December 20, 2006.

Defendants argue that they should be able to rely on the statement from an attorney from this court, notwithstanding prior written orders containing specific deadlines. They further argue that their counsel's conclusion that the court was directing that she had 120 days to make the motion was not unjustified. In response, plaintiff cites to *Brill* (2 NY3d 648), and argues that the merits of the summary judgment motion should not be considered because counsel for both parties signed the August 10, 2006 scheduling order and defendants have not demonstrated good cause for the delay in making the motion.

The CPLR section to which defendants' counsel apparently assumed the court attorney was referring states that:

"the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, 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"

(CPLR 3212 [a]).

Accordingly, CPLR 3212 (a) refers to two different time lines, depending on whether the court has set a date within which to make the motion, or not. The preliminary conference order and the August 10, 2006 order both provide for the making of dispositive motions within 45 days

after the filing of the note of issue.³ Even assuming that counsel's contention is that the court attorney orally modified the 45-day deadline set in the prior conference orders, the purported response that "the motion should be made in accordance with the CPLR" could not be reasonably relied upon by counsel as entitling her to 120 days. Counsel asked about a briefing schedule for the motion, to which the court attorney responded. Particularly since the prior written orders would be controlling as a matter of construction and because CPLR 3212 (a) does not automatically entitle litigants to 120 days, counsel should have, but did not, inquire further, nor did she seek leave for additional time based on good cause.

As instructed by the Court of Appeals in *Brill* (2 NY3d 648), prejudice is not to be weighed in making the "good cause" determination, and absent good cause, the court has no discretion to consider the merits (*see also Anderson v Kantares*, __ AD3d __, 857 NYS2d 511, 512 [2d Dept 2008] [where good cause is not demonstrated, reaching the merits of the motion is error]). Despite the professionalism and fine reputation of their distinguished counsel, the court is constrained to deny defendants' motion.

Accordingly, it is

ORDERED that the motion by defendants for summary judgment is denied; and it is further

ORDERED that jury selection is scheduled for October 20, 2008, with the trial

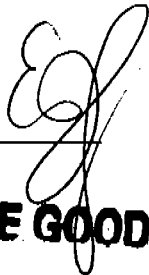
³Defendants' counsel's name is on the preliminary conference order and the August 10, 2006 scheduling order as the attorney who appeared at the conferences. The October 26, 2006 and December 20, 2006 so-ordered stipulations address only deposition, discovery conference and note of issue dates, and not post-note of issue motions.

commencing immediately thereafter.

This Constitutes the Decision and Order of the Court.

Dated: July 14, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK