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

PRESENT: Edmead Justice PART 35

Reiner

-v-

George Frank Living Trust, Et al

INDEX NO. 113963/07

MOTION DATE 9/29/09

MOTION SEQ. NO. 002

MOTION 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants George Frank Living Trust, Benjamin Ohebshalom, Sky Management Corp., and Sheila Hyman for an order, pursuant to CPLR §3212, for summary judgment, dismissing the Complaint of plaintiff Jaimee E. Reiner is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
NOV 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/16/09

J.S.C.
HON. CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JAIMEE E. REINER,

Index No. 113963/07

Plaintiff,

-against-

DECISION/ORDER

GEORGE FRANK LIVING TRUST, BENJAMIN OHEBSHALOM, SKY MANAGEMENT CORP., and SHEILA HYMAN,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Jaimee E. Reiner ("plaintiff") seeks to recover against defendants George Frank Living Trust (the "Trust"), Benjamin Ohebshalom ("Mr. Ohebshalom"), Sky Management Corp. ("Sky Management"), and Sheila Hyman ("Ms. Hyman") (collectively "defendants") for negligence.

Defendants now move for an order, pursuant to CPLR §3212, granting them summary judgment and dismissing plaintiff's Complaint in its entirety.

Background[1]

The Trust and Mr. Ohebshalom own the building at 511 East 86th Street, New York, New York (the "Building"). Mr. Ohebshalom also is the president of Sky Management, which manages the Building. Ms. Hyman, Mr. Ohebshalom's sister, leases Apartment 3B in the Building (the "Apartment"), and plaintiff is the sublessee of the Apartment.

Plaintiff contends that on June 20, 2006 at approximately 5:00 p.m. she was trying to

[1]Information is taken from plaintiff's Complaint and Verified Bill of Particulars and defendants' motion.

open a window in the Apartment when the glass pane broke, causing her serious injuries.

Plaintiff's Complaint contains two causes of action. In her first cause of action, plaintiff alleges that defendants were negligent, *inter alia*, in failing to properly fix the window latch, allowing paint to prevent the window from opening, failing to inspect and maintain the window, and failing to warn of a dangerous and hazardous condition with respect to the window. She also alleges that defendants had actual and constructive notice of the dangerous condition. In the second cause of action, plaintiff alleges that the Apartment constituted a nuisance, trap and dangerous condition.

Parties' Contentions

As the Court's decision rests on the threshold determination of the motion's timeliness, the Court will provide only a brief summary of the parties' contentions.

In their motion, defendants first argue that plaintiff cannot demonstrate that defendants either created the allegedly hazardous condition or had actual or constructive notice of it and failed to correct it. In particular, there is no proof that defendants painted the window closed. Second, defendants argue that plaintiff cannot establish that any alleged negligence on defendants' part was a proximate cause of plaintiff's injuries, because plaintiff's unforeseeable, intervening conduct in attempting to open the window by exerting upward pressure on the glass pane with the palms of her hands was the superseding cause of her injuries.

In opposition, plaintiff argues that defendants' motion is untimely and should not be considered by this Court. Plaintiff contends that a Preliminary Conference Order was entered into on June 11, 2008 wherein this Court directed that "*Any dispositive motion(s) shall be made*

on or before within 60 days of NOI" (emphasis added).[2] Thus, defendants' motion was required to be made on or before July 11, 2009.[3] In accordance with a Compliance Conference Order, plaintiff filed the Note of Issue on May 12, 2009 (see "the March 31, 2009 Compliance Conference Order" and "the May 12, 2009 Note of Issue"). Defendants' motion was made on July 24, 2009, almost two weeks after the deadline set forth by this Court in the Preliminary Conference Order.[4] Moreover, defendants' moving papers failed to set forth a reasonable excuse for their delay, and defendants failed to seek the Court's permission to file an untimely motion. Therefore, this Court should not consider defendants' untimely motion.

Second, plaintiff argues that defendants failed to meet their initial burden of proof by failing to submit an affidavit of an individual with personal or firsthand knowledge of the subject window's condition, or of any maintenance that had been performed on the subject window. Third, plaintiff argues that issues of fact exist as to whether defendants created the dangerous condition that caused plaintiff's injuries by failing to properly paint the subject window. Finally, plaintiff argues that her actions on the day of the incident were reasonably foreseeable, and not a superseding cause absolving defendants of liability.

In their reply, defendants contend that although their motion may have been untimely, they can establish "good cause" for the brief delay. The deposition of Joseph Xuereb ("Mr. Xuereb"), the superintendent of the Building, was taken on April 15, 2009 (see the "Xuereb

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[2]The Court notes that the Preliminary Conference Order is not attached to plaintiff's opposition papers.

[3]The Court notes that because the 60th day, July 11, 2009, fell on a Saturday, defendants had until the next business day, Monday, July 13, 2009, to serve their motion (*see* Siegel, NY Prac §33 [4 ed]; General Construction Law §§20, 24, 25, and 25-a).

[4]The Court notes that defendants motion was actually served on July 27, 2009 (see the "July 27, 2009 Affidavit of Service"). July 24, 2009 is the date on which attorney Timothy J. Dunn III signed the Notice of Motion and annexed Affirmation.

EBT"). Defendants contend that plaintiff "did not forward the deposition transcript, in compliance with CPLR §3116, *prior to* serving the note of issue and *certifying that discovery was complete*" (reply ¶ 5) (emphasis added). Plaintiff served her Note of Issue on May 6, 2009. However, defendants did not serve plaintiff with the Xuereb EBT until two days later, on May 8, 2009. Defendants' counsel received the Xuereb EBT on May 15, 2009. Further, defendants relied on the Xuereb EBT in making their motion. While the delay in completing discovery after incorrectly certifying that all discovery was complete was not extensive, neither was defendants' delay in making their motion, defendants argue.

Defendants further argue that defendants' counsel "had to obtain the signed and executed copy from [Mr. Xuereb], a part-time employee who has other employment." Defendants also contend that the delay in serving their motion was "minimal and inadvertent," the motion was made well within the 120-day deadline imposed by CPLR§3212(a), and plaintiff demonstrates no prejudice resulting from the brief delay. The Courts have greater discretion in such cases, defendants contend. Finally, defendants argue that their counsel's overlooking of that portion of the handwritten preliminary conference order regarding the submission date was inadvertent.

Defendants go on to contest plaintiff's arguments that they failed to meet their burden for summary judgment.

Discussion

Timeliness of Defendants' Motion

Here, the evidence demonstrates that defendants' motion was not timely served, and defendants have failed to establish "good cause" for the delay (*see* CPLR §3212(a); *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Rule 17 of the NY New York County Justices Rules provides: "*Unless otherwise provided in a particular case in the preliminary conference order or other directive of the Justice assigned*, a motion for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court for good cause shown" (emphasis added). Pursuant to CPLR §2211, a motion is made when it is served. Service of papers in a pending action by mail is deemed complete upon mailing (*i.e.*, depositing papers enclosed in a postpaid wrapper, addressed to a proper person with an appropriate address, in post office or official depositories within the state) (CPLR §2103[b][2], [f][1]; *see* Practice Commentaries, Alexander, McKinney's Cons. Laws of NY, Book 7B, C2103:3, at 737). Therefore, where the mail is used as the method of service, a motion is made upon the proper mailing of the motion papers (*see* Practice Commentaries, Siegel, McKinney's Cons. Laws of NY, Book 7B, C2211:4, at 38-39; Siegel, NY Prac §243, at 390 [3d ed]).

Here, it is uncontested that the Preliminary Conference Order required that dispositive summary judgment motions be made within 60 days of the filing of the Note of Issue. It is further uncontested that plaintiff filed her Note of Issue on May 12, 2009. Therefore, defendants had until July 13, 2009 to serve their motion. However, defendants served their motion *via* mail delivery on July 27, 2009 (see the July 27, 2009 Affidavit of Service), 14 days after the deadline. Further, defendants did not seek leave to file their motion late. Therefore, defendants have the burden of establishing "good cause" for the delay (CPLR §3212[a]).

Litigants are expected to take Court-ordered time frames "seriously" *(Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004] ["Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored"]; *Buckner v City of New York*, 9

Misc 3d 510, 515, 800 NYS2d 333 [Sup Ct New York County 2005]). The Court of Appeals makes clear that CPLR 3212(a) "requires a . . . satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy. . . . No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill* at 652; *see also Perini Corp. v City of New York*, 16 AD3d 37, 38 [1st Dept 2005] ["We take this opportunity to emphasize and to caution the Bar that the language of *Miceli* and *Brill* is clear and strict. Therefore, the rule these holdings address may not be approached casually without significant risk of adverse consequences"]). Further, a showing of good cause is required before a Court reaches the merits of an untimely served motion (*Perini* at 38 ["Furthermore, in the wake of *Miceli* and *Brill*, parties may no longer rely on the merits of their cases to extricate themselves from failing to show good cause for a delay in moving for summary judgment pursuant to CPLR 3212(a)"]).

In *Glasser v Abramovitz* (37 AD3d 194 [1st Dept 2007]), the plaintiff moved for summary judgment after the court-imposed deadline, albeit within the statutory maximum 120-day period set forth in CPLR §3212(a). The trial court refused to consider the plaintiff's untimely motion. In affirming the trial court's decision, the First Department held: "We reject plaintiff's argument that motion courts have discretion to entertain nonprejudicial, meritorious post-note of issue motions made after a court-imposed deadline but within the statutory maximum 120-day period in CPLR 3212(a) regardless of whether good cause is shown for the failure to meet the deadline" (*id.*) (internal citations omitted). Relying on the holding in *Glasser*, the First Department in *Giudice v Green 292 Madison, LLC* (858 NYS2d 111, 112 -113 [1st Dept 2008]), stated: "[The movant's] argument that 'the motion was served well within the statutory time frame, albeit later than the deadline set by the [c]ourt,' *effectively admitted the*

absence of good cause, and was correctly rejected by the motion court" (emphasis added).

Here, none of defendants' excuses explains defendants' 14-day delay in serving their motion (*see, e.g., Buckner* at 515 ["Here, neither [movant has] set forth any reason for why their motions were made more than 60 days after the note of issue was filed"]).

First, defendants do not demonstrate how any problems with discovery caused their delay. The Courts have made an exception for delays attributable to the delayed receipt or completion of discovery: "When the reason for delay is to complete depositions (*cf.* CPLR 3212, subd [f]), which as the Appellate Division found was essential to the making of the motion, denial of the motion as untimely is error" (*Kule Resources, Ltd. v Reliance Group, Inc.*, 49 NY2d 587, 591 [1980]; *Rodriguez v Sequoia Property Management Corp.*, 24 Misc 3d 822, 824, 878 NYS2d 606 [Sup Ct Queens County 2009] ["'Good cause' is shown where a party is made to wait [until after the court-ordered deadline] for deposition transcripts in order to make its motion"]; *Fainberg v Dalton Kent Securities Group, Inc.*, 268 AD2d 247, 248 [1st Dept 2000] [holding that the defendant demonstrated good cause by showing that it "was unable to file a timely motion because it was required, pursuant to CPLR 3116(a), to wait beyond the court's deadline for the return of corrected, signed deposition transcripts upon which it intended to rely in making its motion"]).

However, here, by defendants' own admission, all discovery, including the Xuereb EBT, was completed by May 8, 2009, more than two months prior to the deadline to file dispositive motions (reply, ¶ 5). Further, while defendants contend that they relied on the Xuereb EBT in making their motion, they do not explain how their reliance on the Xuereb EBT delayed their filing of the motion. Finally, defendants do not contend that they had to wait beyond the Court's

deadline to file their motion (*cf. Fainberg; Torres v Prudential Securities Inc.*, 16 Misc 3d 1134, 847 NYS2d 905 [Sup Ct Kings County 2007] ["In this case, Prudential was unable to file a timely motion because it was required pursuant to CPLR 3116(a) to wait at least sixty days for the deposition transcript upon which it intended to rely to be available as useable evidence"]). Instead, defendants received the signed copy of the Xuereb EBT from plaintiff on May 15, 2009, well before the July 13 deadline to serve their motion (reply, ¶ 5). If there were a problem with discovery, "[n]othing prevented the parties from stipulating to an extension" (*Buckner* at 514). Similarly, while defendants contend that they had to get a signed and executed copy of the transcript from Mr. Xuereb, they do not explain how the fact that Mr. Xuereb is "a part-time employee who has other employment" prevented them from timely filing their motion.

Second, defendants' arguments regarding "counsel error" lack merit. Defendants contend that where a counsel errs in assuming that a motion would be timely if made within 120 days of the filing of the Note of Issue, and the delay is minimal, Courts have held that good cause was demonstrated. In support of this proposition, they cite *Koloski v Metropolitan Life Ins. Co.* (5 Misc 3d 1028, 799 NYS2d 161 [Sup Ct New York County 2004]), in which the Court held:

> In this case, defendants assert good cause *based on their counsel's error in assuming that the motion would be timely if made within [] 120 days of filing the note of issue*. While the court, in its discretion, may require that a motion be made in less then the 120-day period . . . the error of defendants' attorneys under the circumstances here, when the delay was minimal, is sufficient to constitute good cause. Accordingly, defendants' request to extend the time for making this motion is granted.
> (*id.*)

Defendants further contend that "there is no uniform rule in New York County concerning a shorter deadline than the 120 days imposed by statute, *and counsel's overlooking of that portion of the handwritten preliminary conference order was inadvertent*" (reply, ¶ 8) (emphasis added).

However, the Court in *Rosario v 674 Holding Ltd.* (2007 WL 2815182 [Sup Ct New York County 2007]) declined to follow *Koloski*, stating that "more recent authority makes clear that the Court of Appeals holding in *Brill* is not to be lightly circumvented." The Court in *Rosario* continues:

> 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. (*Id.*) (emphasis added)

Similarly, here, the Court does not consider as good cause the excuse that defendants' counsel overlooked the portion of the Preliminary Conference Order stating the deadline for filing their summary judgment motion.

Defendants also cite *Thacker v City of New York* (24 Misc 3d 1216 [Sup Ct New York County 2009]), a case that was initially assigned to one judge and then reassigned to another part. The court held:

> Although [the previous judge], in her discretion, shortened the period in which to make dispositive motions, this court, also in its discretion, can allow the full 120 days the statute provides, but cannot extend it beyond 120 days, except for good cause shown. Since the 60 day deadline was discretionary, and the court may always visit its discretionary order, the courts finds that this motion is timely. *Defendants have presented good cause for why the motion was brought later than 60 days, and they believed the deadline had been adjusted to 120 days, as CPLR 3212 provides.* Since this motion was brought within a 120 days of the note of issue being filed, and since the court can always revisit its own orders, this motion is timely and will be considered on the merits. (*id.*) (citations omitted) (emphasis added)

However, defendants here do not argue that they believed that the deadline had been adjusted. Therefore, *Thacker* is distinguishable.

Finally, the Court notes that the Second Department cases cited by defendants are neither

persuasive nor controlling on this Court.

As defendants have failed to show good cause for their delay, their motion for summary judgment is denied as untimely, and the Court does not reach the merits of defendants' motion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants George Frank Living Trust, Benjamin Ohebshalom, Sky Management Corp., and Sheila Hyman for an order, pursuant to CPLR §3212, for summary judgment dismissing the Complaint of plaintiff Jaimee E. Reiner is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 16, 2009

Hon. Carol R. Edmead, J.S.C.
HON. CAROL EDMEAD