

**175 Mulberry Realty, LLC v Kam Cheung Constr.,  
Inc.**

2010 NY Slip Op 32190(U)

August 12, 2010

Supreme Court, New York County

Docket Number: 112076/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

175 MULBERRY REALTY, LLC  
Plaintiff,

- v -

KAM CHEUNG CONSTRUCTION, INC.  
and TOMMY TSANG,

Defendants.

INDEX NO. 112076/2007

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on the motion by defendants for summary judgment on breach of contract issue.

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

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

**FILED**  
AUG 18 2010  
COURT OF NEW YORK  
CLERK'S OFFICE

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Defendant Tommy Tsang motion to dismiss the complaint as against him individually for summary judgment pursuant to CPLR 3212.

On September 5, 2007, plaintiff filed an action against the defendants Kam Cheung Construction, Inc. ("KCC"), and Tommy Tsang ("defendants") for breach of a construction contract and damages. The complaint indicates that defendant Tommy Tsang ("Tsang") and *is a director, officer and owner of co-defendant Kam Cheung Construction, Inc. (see plaintiff's complaint at ¶ 3).* KCC is a general contractor and Tsang is its principal. Defendants answered and counterclaimed for damages for work performed under the Contract that remained unpaid. KCC also filed a mechanic's lien against the Property.

On November 9, 2009, defendants moved to dismiss the action for summary judgment, in accordance with the terms of an amended contract, or, alternatively, compelling plaintiff to execute and file the stipulation of discontinuance. Plaintiff responded in opposition to that motion, and defendants filed a reply. The Court denied defendants motion by order dated May 5, 2010. See motion sequence 001.

Defendant Tommy Tsang now moves in his *second* summary judgment motion on

June 22, 2010, to dismiss the complaint as against him individually for summary judgment pursuant to CPLR 3212. Plaintiff opposes defendant's motion on grounds that it is without merit and untimely. CPLR 3212 requires that summary judgment be filed within 120 days of the Note of Issue ("NOI"). Plaintiff filed a Note of Issue on February 2, 2010 and produced to the Court an original affidavit of service indicating service on the defendants on January 28, 2010. Defendant Tsang does not dispute the affidavit of service, but in his reply requests that the Court extend the time to file summary judgment for good cause shown.

### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006]. The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

As an initial matter, plaintiff argues that defendant's summary judgment motion should not be considered on its merits as the motion is untimely since it was filed almost one month after the Court's deadline for the filing of summary judgment motions and defendant has failed to offer sufficient "good cause" for the late filing (see plaintiff's affirmation in opposition at ¶ 10). The Court agrees (see CPLR 3212 [a]).

The Court of Appeals has made it abundantly clear that "statutory time frames - like

court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-27 [2004] [citation omitted]).

Accordingly, under the standard announced in *Brill v City of New York*, 2 NY3d 648 [2004], leave to file a late motion for summary judgment under CPLR 3212 (a) requires a satisfactory showing of "good cause" for the delay in filing (see *Miceli*, 3 NY3d at 726 ["summary judgment motions should be timely made, or good cause shown"]; *Glasser v. Abramovitz*, 37 AD3d 194, 194 [1st Dept 2007] [statute applies to court imposed deadlines shorter than the statutory 120-day period]; *Chechile v Magee*, 66 AD3d 625, 625 [2d Dept 2009]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652).

In the absence of a satisfactory showing of good cause, "a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary" (*Dettmann v Page*, 18 AD3d 422, 422 [2d Dept 2005]; see also *John P. Krupski & Bros., Inc. v. Town Board of Town of Southold*, 54 AD3d 899, 901 [2d Dept 2008] ["In the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment"]; *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008]).

A compliance conference was held on May 1, 2009 and November 12, 2009, before Honorable Michael Stallman (JSC). At the May 1, 2009 compliance conference the plaintiff was ordered to complete Discovery by January 29, 2010 and file Note of Issue before February 5, 2010. On November 23, 2009, defendants filed their first summary judgment motion, (motion sequence 001). The plaintiff filed in opposition.

Plaintiff filed Note of Issue on February 2, 2010, well within the time frame set forth in

the Case Scheduling Order indicating a February 18, 2010-deadline. An affidavit of service indicated that defendant was served on January 28, 2010. Defendant, therefore, had until May 25, 2010 to timely move for their second -summary judgment. Defendant's second -summary judgment motion (is dated June 16, 2010, and) was filed on June 22, 2010, (see defendants reply affirmation at ¶ 6), which is almost one month after the Statutory 120-day deadline for the filing of summary judgment motions.

A compliance conference was thereafter held on April 14, 2010, (before Justice Wooten) at which the Court ordered a stipulated compliance conference order between the parties that outstanding discovery has not been held and Examinations Before Trial ("EBTs") are *to be completed by June 15, 2010, and deadline to file NOI to 7/15/2010*. The next compliance conference was scheduled for June 30, 2010. On May 6, 2010, this court issued a decision denying the defendants' first summary judgment motion, (motion sequence 001). The Court found that motion *The parties completed discovery and a Note of Issue was filed on February 2, 2010*. (See court's decision and order dated May 5, 2010, motion sequence 001, at p 1., ¶ 1)

At a subsequent compliance conference on June 30, 2010, the parties stipulated and the Court ordered that the parties had complied with the Court's order dated April 14, 2010, that *Discovery is complete, Motion to dismiss against defendant Tsang on calender for 7/15/2010 NOI was filed as of 2/2/2010*.

Defendant Tsang has offered as "good cause" for the late filing, (*see Brill*, 2 NY3d at 652-53; *Miceli*, 3 NY3d at 727), the confusion between the court's two compliance conference orders that were stipulated by both parties. Moreover, defendant asserts that the motion is not late because the Note of Issue date of February 2, 2010, should be deemed to be superceded by the July 15, 2010-noi date, since plaintiff filed the Note of Issue with a Certificate of Readiness representing that Discovery was complete or waived when, in fact, Discovery and EBTs were still outstanding. (See defendants reply affirmation at ¶ 6.).

The Court is unpersuaded that defendant Tsang met the "good cause" requirement that the Note of Issue dates were confusing or that the February 2, 2010-date was superceded by another date. There was ample and uncontroverted evidence that the Note of Issue date was February 2, 2010 and not superceded by the April 4, 2010, stipulated compliance order. In particular, first, the Court's first summary Judgment decision and order dated May 5, 2010 (filed May 6, 2010) held that the Note of Issue date was February 2, 2010. (See motion sequence 001.) This Court's decision and order in motion sequence 001 was more than a month after the April 4, 2010 stipulated order and more than a month before the defendant Tsang filed his second summary judgment motion (filed on June 22, 2010). Second, in the Court's June 30, 2010, stipulated compliance order, the parties agreed that the Note of Issue date was February 2, 2010. If the defendant Tsang concluded that the April 4, 2010 stipulated compliance order was in effect why, agree that Note of Issue date is February 2, 2010. Moreover, if defendant Tsang had issues regarding Discovery, he never moved to vacate the Note of Issue from the February 2, 2010-date.

Therefore, since defendant has failed to make a satisfactory showing of "good cause" for the late filing, this Court lacks discretion to consider the motion on its merits (see *DiBenedetto v Lowe's Home Centers, Inc.*, 43 AD3d 853 [2d Dept 2007] [summary judgment motion was properly denied as untimely without consideration of the merits where the motion was made over three months after Note of Issue was filed, contrary to a preliminary conference order requiring such motions to be made within 60 days of the filing of the Note of Issue, and the third-party defendant failed to present evidence of legitimate good cause for the delay]; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506 [1st Dept 2008] [summary judgment motions were properly denied as untimely where preliminary and compliance conference orders set deadlines for filing of summary judgment motions and good cause for untimely filing was not shown]; see also *Brill*, 2 NY3d at 652-53; *Miceli*, 3 NY3d at 727; *Cechile*, 66 AD3d at 625.

Finally, the fact that defendant Tsang filed two of the summary judgements motions is material here. The claims are still based upon the same evidence and the instant motion could have been brought in the earlier summary judgment motion. "Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment" *Phoenix Four, Inc. v Albertini*, 245 AD2d 166, 665 NYS2d 893 [1<sup>st</sup> Dept 1997]. [The IAS Court properly denied the plaintiff's motion for summary judgment since the motion was based on matters that could have been but were not raised in an earlier summary judgment motion by plaintiff's predecessor in interest]. Thus, the defendants second summary judgment is dismissed.

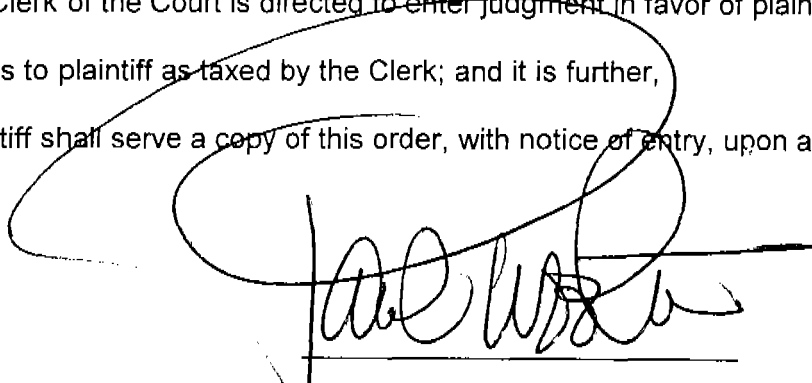
For these reasons and upon the foregoing papers, it is,

ORDERED that defendant Tsang's motion for summary judgment is denied; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff, with costs and disbursements to plaintiff as taxed by the Clerk; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon all parties.

Dated: 8-12-2010



PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
 AUG 18 2010  
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