

Dexter v 16th Street Holdings, L.L.C.,

2012 NY Slip Op 30020(U)

January 3, 2012

Sup Ct, NY County

Docket Number: 107910/04

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

Index Number : 107910/2004
DEXTER, JANE N.
vs.
16TH STREET HOLDINGS, L.L.C.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 107910/04
MOTION DATE 10/24/11
MOTION SEQ. NO. 003

The following papers, numbered 1 to 29, were read on this motion to Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + FA No(s). 1-14

Answering Affidavits — Exhibits + Memo of Law No(s). 15-23

Replying Affidavits _____ No(s). 24-27

Notice of X motion
Upon the foregoing papers, it is ordered that this motion is 28-29

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 3, 2012

Joan M. Kenney
JOAN M. KENNEY J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
JANE N. DEXTER

Plaintiff,

DECISION & ORDER
Index No.: 107910/04
Motion Seq. 003

-against-

16TH STREET HOLDINGS, L.L.C., CLASSIC
REALTY, L.L.C. and 200 EAST 16TH
STREET HOUSING CORPORATION,

Defendants.

-----X
16TH STREET HOLDINGS, L.L.C., CLASSIC
REALTY, L.L.C. and 200 EAST 16TH
STREET HOUSING CORPORATION,

Third-Party Index No.:
591281/04

Defendants/
Third-Party Plaintiffs,

-against-

DUNWELL ELEVATOR,

Third-Party Defendant.

-----X
JOAN M. KENNEY, J.:

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant/Third-Party Plaintiff 200 East 16th Street Housing Corporation (Housing Corp) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims asserted as against it. The action asserted as against defendants/third-party plaintiffs 16th Street Holdings, L.L.C. and Classic Realty, L.L.C. was discontinued by stipulation of the parties, filed with the Clerk of the Court on November 18, 2009. It is noted that, whereas a notice of cross motion with an attorney's affirmation was filed by third-party defendant Dunwell Elevator Maintenance Repair Service, Ltd. s/h/a Dunwell Elevator on September 23, 2011, incorporating Housing Corp's arguments to

dismiss the complaint and seeking summary judgment on the third-party complaint asserted as against it, no other papers have been filed in connection with this cross motion.

FACTUAL BACKGROUND

This is a personal injury action arising from an accident that occurred on January 23, 2003, at the premises owned by Housing Corp. Plaintiff alleges that she was injured when she was entering an elevator that mis-leveled, said mis-leveling causing her to trip and fall.

The action commenced with the service of a summons and complaint on May 20, 2004, and issue was joined by defendants/third-party plaintiffs 16th Street Holdings, L.L.C. and Classic Realty, L.L.C. on December 16, 2004. Issue was joined with Housing Corp on November 5, 2004; Housing Corp served an amended answer on or about February 6, 2006. The third-party action was commenced on or about December 14, 2004, and issue was joined in the third-party action on February 10, 2005.

Plaintiff was deposed by Housing Corp on March 28, 2007, two-and-one-half years after issue was joined. Third-party defendant also deposed plaintiff on December 11, 2007. On March 13, 2009, one-and-one-half years after plaintiff was deposed, Housing Corp was deposed, and third-party defendant was deposed a year after that on May 20, 2010.

Plaintiff filed her note of issue on March 31, 2011, 10 months

[* 4]
after the last deposition was held in this matter, and the instant dispositive motion was not filed until August 1, 2011, 123 days after the note of issue was filed.¹

DISCUSSION

CPLR 3212 (a) states:

" Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made 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."

In *Brill v City of New York* (2 NY3d 648, 652 [2004]), the Court of Appeals held that

"'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion— a satisfactory explanation for the untimeliness— rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute — only the movant can *show* good cause — as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause.'"

Moreover, "statutory time frames — like court-ordered time frames — are not options, they are requirements, to be taken seriously by the parties." *Miceli v State Farm Mutual Automobile*

¹The court notes that the 120th day was Friday, July 29, 2011, and that the instant motion was not filed until the Monday following the weekend. However, since the weekend fell after the 120th day, the court finds that the motion could and should have been filed no later than July 29, 2011, especially considering that the case is over seven years old and all the delays that have occurred with respect to discovery.

Insurance Company, 3 NY3d 725, 726 (2004). In determining whether a motion is timely, a trial court "has discretion ... whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue." *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 (2000).

In the case at bar, the matter has been on the court's calendar for well over seven years, the depositions of the parties took place years apart, and Housing Corp failed to seek any leave of court, nor did it proffer any explanation, for its late filing of the instant motion (*Group IX, Inc. v Next Printing & Design Inc.*, 77 AD3d 530 [1st Dept 2010]; *Coty v County of Clinton*, 42 AD3d 612 [3d Dept 2007] [summary judgment motion filed 125 days after filing note of issue properly denied as untimely, even though stipulated to by the parties]; *Castro v Homsum Corp.*, 34 AD3d 616 [2d Dept 2006] [3 day de minimis late filing of summary judgment motion excused because good cause was shown for the delay]). Therefore, since no explanation or excuse was given for the delay, or leave of court or stipulation of the parties permitting a late filing obtained (see *Jim Beam Brands Co. v Tequila Cuervo La Rojena, S.A.*, 85 AD3d 556 [1st Dept 2011] [late motion filed pursuant to stipulation and court order]; *Corchado v City of New York*, 64 AD3d 429 [1st Dept 2009] [motion filed late, pursuant to so-ordered stipulation]), in the exercise of its discretion, the court denies Housing Corp's motion as untimely. *Fine v One Bryant*

[* 6]
Park, LLC, 84 AD3d 436 (1st Dept 2011).

Since the main motion is denied as untimely, so too is the cross motion. Based on the foregoing, it is hereby

ORDERED that 200 East 16th Street Housing Corporation's motion for summary judgment is denied as untimely; and it is hereby

ORDERED that Dunwell Elevator's cross motion is denied as untimely; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: January 3, 2012

ENTER:



Joan M. Kenney, J.S.C.

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE