Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Emily Sanmartin and Juan Carlos Sanmartin,

Plaintiff,

- against -

The City of New York, Verizon new York, Inc., Verizon Corporate Services Group, Inc., Verizon Corporate Services Group., RCN Telecom Services, Inc.(s/h/a RCN Cable TV) and RCN Telecom Services of New York, Inc.,

Defendants.

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RCN telecom Services, Inc.,

Third-Party Plaintiff,

- against -

Sordoni Skanska USA,

Third-Party Defendant.

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Index Number: 12617/06

Motion Date: 1/11/13

Motion Cal. Number: 125

Motion Seq. No.: 14

The following papers numbered 1 to 10 read on this motion by third-party defendant, Sordoni Skanska USA, for leave to renew and/or reargue.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply.....	7-8
Reply.....	9-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Skanska or reargue or renew its prior motion for summary judgment dismissing the third-party complaint, which motion was denied pursuant to the order of this Court issued on August 27,

2012, is denied.

As stated by this Court in its prior order, Skanska's motion was denied as being untimely, pursuant to CPLR 3212(a). No excuse was given for making the untimely motion and, therefore, movant failed to show good cause. Skanska did not seek leave to serve a late notice of claim, but merely served the late motion for summary judgment.

Skanska's counsel now moves for renewal based upon her explanation that the lateness of the motion was due to a ministerial error and therefore renewal should be granted, that the holding in Brill v City of New York (2 NY 3d 648 [2004]) is inapplicable to the facts of this case because Skanska served, and therefore made, the motion in a timely manner but merely made the return date of the motion late through a ministerial error and therefore the Court misapprehended the law. Counsel also argues that the error in making the motion returnable late was a mere irregularity which should be ignored.

An application to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]) and that such additional facts "would change the prior determination" of the Court (see CPLR 2221[e][2]). This Court is also cognizant that it may exercise a certain degree of flexibility in this regard and may, in its discretion in very limited circumstances, grant renewal even where the additional facts were known to the movant at the time of the original motion, if movant shows a reasonable excuse for his failure to submit the additional facts in his original motion (see Granato v. Waldbaum's, Inc. , 289 AD 2d 289 [2nd Dept 2001]). Counsel's explanation that the motion was made returnable one day late was due to a ministerial or typographical error does not constitute additional facts but merely is an appeal to the Court to excuse her office's clerical inadvertence which this Court does not deem sufficient to constitute good cause to allow a late motion for summary judgment (see Breiding v Giladi, 15 AD 3d 435 [2nd Dept 2005]).

In terms of reargument, movant has failed to demonstrate that this Court misapprehended any question of law or fact in denying its motion for summary judgment upon the ground that it was untimely. Counsel's argument that the motion was timely because it was made (i.e. served) within the statutory 120-day time period and, therefore, the date it was made returnable by her office should be disregarded is without merit. Pursuant to CPLR 3212(a),

a motion for summary judgment must be made within 120 days after the filing of the note of issue unless an earlier date is fixed by the court. And this Court is aware that a motion is "made" when the notice of motion is served (see Russo v Eveco Dev. Corp., 256 AD 2d 566 [2nd Dept 1998]). However, in the present case, this Court specifically ordered that motions for summary judgment be made returnable by a certain date, not merely made, or served. There has been considerable delay in this matter by the parties in completing discovery, resulting in much motion practice and inordinate delay. Fixing a deadline for making summary judgment motions returnable was to insure that no further dilatory behavior would be engaged in by the parties. The Court notes that Skanska's notice of motion was served on April 16, 2012 but was not made returnable until May 16, 2012, one month later. If Skanska's counsel's reasoning were valid, then she could have served the notice of motion on May 15, 2012 and set the return date of it to June 15, 2012 or whenever she wanted and completely ignored the Court's requirement that the motion be made returnable by May 15, 2012.

Indeed, a court-ordered deadline for making summary judgment motions returnable (as opposed to merely "made") set forth in a so-ordered stipulation must be strictly adhered to under Brill (see Anderson v Kantares, 51 AD 3d 954 [2nd Dept 2008]).

Therefore, counsel's argument that the motion was timely because it was served four weeks before the May, 15, 2012 deadline is without merit.

In any event, the May 15, 2012 date fixed by the Court was an extension of time granted to the parties to move for summary judgment. Skanska's motion was served on April 16, 2012, considerably more than the 60-day time period set by Justice Elliot for filing summary judgment motions. Since the latest note of issue was filed on November 18, 2011, the parties were precluded from making summary judgment motions after January 17, 2012. This Court merely extended their time to submit motions for summary judgment by setting as a condition the requirement that any such motions must be made returnable – not merely made – by May 15, 2012. Skanska failed to do so.

Pursuant to the preliminary conference order issued by Justice David Elliot on August 1, 2006, the note of issue was to be filed by July 13, 2007 and summary judgment motions were required to be made within 60 days of said date. Pursuant to the order issued by Justice Martin E. Schulman on September 11, 2008, the note of issue was vacated. A subsequent preliminary conference held before Justice Martin E. Ritholtz on November 10, 2009 resulted in a order requiring, inter alia, the note of issue to be filed by May 21, 2010. A new note of issue was filed on May 20, 2010. Thereafter, pursuant to the stipulation of the parties, so-ordered by this Court on September 14, 2010, the note of issue was vacated a second

time to afford the parties additional time to complete discovery. Pursuant to the stipulation of the parties so-ordered by this Court on August 19, 2011, plaintiff's time to file a note of issue was extended to November 18, 2011. A new note of issue was filed on November 18, 2011. Thereafter, pursuant to the stipulation so-ordered by this Court on March 15, 2012, this Court ordered summary judgment motions to be made returnable no later than May 15, 2012.

Skanska's counsel's perfunctory allegation that the untimeliness of the motion, viz, its return date was a ministerial error does not constitute good cause under CPLR 3212(a) and Brill.

Counsel also stresses that the motion was made returnable only one day late and there has been no showing of prejudice.

"Untimely made summary judgment motions must be denied outright, irrespective of their merits, unless good cause is shown for the delay" (Castro v. Homsun Corp., 34 AD 3d 616 [2nd Dept 2006]). Even where the delay is de minimis, the motion will only be allowed where good cause was shown for the delay (see id.). "That the motion was only a few days late does not eliminate the requirement that good cause be demonstrated [citation omitted], and we are not free, for the sake of judicial economy, to consider an untimely summary judgment motion in the absence of a showing of good cause [citations omitted]" (Crawford v. Liz Clairborne, Inc., 45 AD 3d 284 [1st Dept 2007]).

Finally, this Court does not consider the missing of a court-ordered deadline a "mere irregularity" which may be ignored, as counsel urges.

In the absence of any ground for renewal or reargument, there is no basis to vacate this Court's prior order pursuant to CPLR 2221.

Accordingly, the motion is denied.

Dated: January 22, 2013

KEVIN J. KERRIGAN, J.S.C.