

<b>Ponce v Miao Ling Liu</b>
2014 NY Slip Op 33506(U)
October 15, 2014
Supreme Court, Queens County
Docket Number: 700809/2012
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

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JUAN PONCE and LORENA TORRES PONCE,

Index No.: 700809/2012

Plaintiff,

Motion Date: 09/19/14

- against -

Motion No.: 77

MIAO LING LIU,

Motion Seq.: 5

Defendant.

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MIAO LING LIU,

Third-Party Plaintiff,

-against-

NEXA GOMEZ,

Third-Party Defendant.

**FILED**

OCT 23 2014

COUNTY CLERK  
QUEENS COUNTY

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The following papers numbered 1 to 13 were read on this motion by defendant, MIAO LING LIU, for an order pursuant to CPLR 2004 extending the defendant's time to file a motion for summary judgment and for an order pursuant to CPLR 3212(b) granting defendant's motion for summary judgment and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Defendant's Affirmation in Opposition.....	7 - 10
Reply Affirmation.....	11 - 13

Plaintiff, Juan Ponce, commenced an action to recover damages for personal injuries he sustained on September 29, 2011, when he tripped and fell down a portion of the common stairway at

[\* 2]

the premises located at 41-07 Denman Street, Elmhurst, Queens County, New York. Plaintiff contends that he tripped on a loose piece of plastic runner covering the stairwell. In his complaint, filed on May 8, 2012, the plaintiff alleges that Miao Ling Liu owned, operated, managed, maintained, repaired and controlled the subject premises. The premises consists of a four-story multi-unit apartment building which is divided into four separate apartments all of which are rented to tenants by defendant, Ms. Liu.

Issue was joined by Miao Ling Liu by service of a verified answer dated August 15, 2012. A preliminary conference order was signed by this court on October 10, 2012. Pursuant to the preliminary conference order, "any motion for summary judgment shall be made no later than 120 days after the filing of the note of issue." A compliance conference order was signed by Justice Ritholtz on October 10, 2013 pursuant to which the plaintiff was required to file a Note of Issue and Certificate of Readiness on or before September 6, 2013. On May 9, 2013, defendant Liu commenced a third-party action for indemnification naming Nexa Gomez, as third-party defendant. The plaintiff served a Note of Issue on September 6, 2013. The matter is presently calendared in the Trial Scheduling Part on October 20, 2014.

In September 2013, third-party defendant moved to dismiss the third-party complaint for failure to state a cause of action. By decision and order dated December 24, 2013, the motion was granted and the third-party complaint was dismissed.

Defendant initially served the instant motion for summary judgment on March 31, 2014. The motion was marked off in the Centralized Motion Part and the defendant filed a second motion on June 17, 2014. When the second motion was marked off the calendar, the defendant filed a third motion for summary judgment on July 29, 2014. As the Note of Issue was filed on September 9, 2013, the defendant, pursuant to this court's preliminary conference order, had 120 days to file the motion for summary judgment which would have been before January 7, 2014. Here, the defendant did not file the first motion for summary judgment until March 31, 2014, almost three months after the 120 day deadline. Defendant seeks an extension to file the summary judgment motion claiming that he has good cause because he needed extra time to complete discovery in the third party action and he was waiting for a pending decision on a motion to strike the plaintiff's Note of Issue.

The plaintiff opposes the defendant's motion as untimely as it was made later than the date imposed by the court without good cause being offered for the delay. Counsel

[\* 3]

asserts that the defendant failed to supply a satisfactory explanation or good cause for its failure to comply with the time constraints of preliminary conference order.

Upon review and consideration of defendant's motion and plaintiff's affirmation in opposition thereto, this court finds that defendant's motion for summary judgment is denied as untimely. As stated above, the preliminary conference order required all motions for summary judgment to be made within 120 days of the filing of the note of issue. Here, there is no question that plaintiff's motion was served on March 31, 2014 which was almost three months past the deadline date set by the Court. Accordingly, the motion is untimely (see Brill v City of New York, 2 NY3d 648 [2004]).

The defendant's vague and conclusory claim of conducting discovery in the third-party action and waiting for a decision on the motion to strike the Note of Issue does not constitute good cause to have made a motion for summary judgment three months late (see Lyebyedyev v Hoffman, 84 AD3d 751 [2d Dept. 2011]; Giudice v Green 292 Madison, LLC, 50 AD3d 506 [1st Dept. 2008]; Rivers v City of New York, 37 AD3d 804 [2d Dept. 2007]; Gaines v Shell-Mar Foods, Inc., 21 AD3d 986 [2d Dept. 2005]; Gonzalez v Zam Apartment Corp., 11 AD3d 657 [2d Dept. 2004]). In the absence of a good cause showing, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment (see Brill v City of New York, supra; Bivona v Bob's Disc. Furniture of NY, LLC, 90 AD3d 796 [2d Dept. 2011]; Greenpoint Props., Inc. v Carter, 82 AD3d 1157 [2d Dept. 2011]; Cohen-Putnam Agency, Ltd. v Hudson Bldg. Maintenance, Inc., 55 AD3d 653 [2d Dept. 2008]; John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold, 54 AD3d 899 [2d Dept. 2008]). In the case of Milano v George, 17 AD3d 644 (2nd Dept. 2005), the Second Department held that even though the appellant's motion for summary judgment was made only one day past the deadline, the record did not establish "good cause" for the delay (also see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Hernandez v 35-55 73rd St., LLC, 80 AD3d 458 [1st Dept. 2011]; Derby v Bitan, 89 AD3d 891 [2d Dept. 2011]; Tapia v Prudential Richard Albert Realtors, 79 AD3d 735 [2d Dept. 2011]; West Broadway Funding Assoc. v Friedman, 74 AD3d 798 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the defendant's motion for summary judgment is denied as untimely. This matter remains on the calendar of the Trial Scheduling Part for October 20, 2014.

Dated: October 15, 2014  
Long Island City, N.Y.



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ROBERT J. MCDONALD  
J.S.C.