

Lecakes v Extell W. 45th LLC
2016 NY Slip Op 31723(U)
September 15, 2016
Supreme Court, New York County
Docket Number: 152763/2014
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. Kalish
Justice**

PART 29

Evan J. Lecakes

INDEX NO. 152763/2014

- v -

MOTION DATE 8/25/2016

Extell West 45th LLC and Lend Lease (US)
Construction LMB, Inc.

MOTION SEQ. NO. 003

The following papers, numbered 1-3, were read on the Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment

Plaintiff's Notice of Motion for Summary Judgment -----
— Affirmation — Exhibits — Memorandum of Law

No(s). 1

Defendant's Cross Motion for Summary Judgment -----
— Affirmation — Exhibits — Memorandum of Law

No(s). 2

Plaintiff's Opposition to Cross-Motion -----
— Affirmation — Exhibits — Memorandum of Law

No(s). 3

Upon the foregoing papers, the Plaintiff, Evan J. Lecakes' motion for Summary Judgment and the Defendants' cross-motion for summary judgment are both denied as untimely pursuant to CPLR §3212(a) and the compliance conference order of the Court dated October 5, 2015 as follows:

Without reiterating the entirety of the pleadings, the underlying labor law action arises from injuries that the Plaintiff allegedly sustained while working on the construction of a building owned by the Defendant Extell West 45th LLC. The Plaintiff further alleges that the Defendant Lend Lease (US) Construction LMB, Inc. acted in the role of the general contractor for the construction project.

In their submitted papers, both the Plaintiff and the Defendants argue in sum and substance that at the compliance conference of December 7, 2015, the Court "verbally ordered" that the motions be filed "per the CPLR", meaning that the Parties could file motions for summary judgment within 120 days from the filing of the note of issue. The Plaintiff specifically attaches with his opposition to the Defendants' cross-motion, a copy of what purports to be an email exchange between the Plaintiff's and Defendants' attorneys. The attorneys indicate in said email exchange that they agreed that the Court "verbally ordered" the Parties to file their motions for summary judgment within 120 days of the filing of the Note of Issue. However, said argument is directly contradicted by this Court's October 5, 2015 compliance conference order in the underlying action.

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

Relevant procedural history

On or about September 11, 2014, the Parties appeared before the Honorable Justice Tingling for a preliminary conference in the underlying action. Justice Tingling issued a preliminary conference order requiring that the Plaintiff file the note of issue on or before October 5, 2015. The preliminary conference order further indicated that any dispositive motions were to be made "per CPLR". Justice Tingling subsequently left the bench and the underlying action was placed upon this Court's calender.

On July 20, 2015, the underlying action first appeared before this Court for a compliance conference. The Court issued a compliance conference order dated July 20, 2015 setting the matter down for a second compliance conference to be held on October 5, 2015, and ordering that the notice of issue be filed by said date.

On October 5, 2015, the Parties appeared before the Court. On said date, the Court issued a compliance conference order extending the time to file the note of issue to December 7, 2015, and setting the matter down for a compliance conference to also be held on December 7, 2015. In addition, the Court's October 5, 2015 compliance conference order specifically required the Parties to make all dispositive motions within 60 days of the filing of the notice of issue.¹

On December 7, 2015, the Parties appeared before the Court. On said date, the Court issued another compliance conference order again extending the time to file a note of issue to January 15, 2016, and setting the matter down for a compliance conference to be held on January 25, 2016. The Court's December 7, 2015 compliance conference order made no mention of changing the Court's October 5, 2015 compliance conference order requiring that the Parties were to file any dispositive motions within 60 days of the filing of the note of issue.

On January 25, 2016 the Parties appeared before the Court. On said date, the Court issued another compliance conference order again extending the time to file a note of issue to February 22, 2016, and setting the matter down for a compliance conference to be held on February 22, 2016. The Plaintiff filed a note of issue on February 5, 2016.

¹ The Court notes that neither of the Parties mention nor attach with their submitted papers a copy of the Court's October 5, 2015 compliance conference order, which specifically required the Parties to make all dispositive motions within 60 days of the filing of the note of issue.

On or about February 25, 2016, the Defendants moved to vacate the note of issue. On or about March 21, 2016, the Defendants withdrew their motion to vacate the note of issue pursuant to a stipulation between the Parties.

The Plaintiff made the instant motion for summary judgment on or about May 10, 2016 and the Defendants cross-moved for summary judgment on or about June 24, 2016.

The Plaintiff's motion for Summary Judgment and the Defendants' Cross-motion are both denied as untimely pursuant to CPLR §3212(a) and compliance conference order of the Court dated December 7, 2015.

CPLR 3212(a) reads as follows:

CPLR 3212. Motion for summary judgment

(a) Time; kind of action. 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, such date being no earlier than thirty days after the filing of the note of issue. 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.

Further, the Appellate Courts have upheld dismissals of summary judgment motions and cross-motions as untimely based upon the specific written orders of the Court indicating specific time limits for Parties to move for summary judgment (See Corchado v City of New York, 64 AD3d 429 (NY App Div 1st Dept 2009); Farrell v Herzog, 123 AD3d 655 (NY App Div 2d Dept 2014); McDowell & Walker, Inc. v. Micha, 113 AD3d 979 (NY App Div 3d Dept 2014)).

In the instant action the Court specifically indicated in its October 5, 2015 compliance conference order that the Parties were required to make all of their dispositive motions within 60 days of the filing of the Note of Issue. Nothing in any of the Court's subsequent compliance conference orders dated December 7, 2015 or February 25, 2016 included any language suggesting that the Court was extending this 60 day time limit. The Court does recognize that the preliminary conference order indicates that dispositive motions were to be made "per the CPLR", implying within 120 days of the filing of the notice of issue. However, this Court's October 5, 2015 compliance conference order specifically required that all dispositive motions were to be made within 60 days of the filing of the note of issue. Further, this Court repeatedly extended the date for the filing of the note of issue pursuant to the compliance conference orders dated December 7, 2015 and February 25, 2016.

The Court further notes that although it published its Local Rules on or about April 1, 2016, after the Plaintiff had already filed the note of issue, said rules specifically require that all summary judgment motions are to be made within 60 days of the filing of the note of issue. The Court's 60 day Local Rule is fully consistent with the Court's October 5, 2015 compliance conference order requiring that the Parties make all dispositive motions within 60 days of the filing of the note of issue.

Further, said rules were published at least a month before the Plaintiff made the instant motion for summary judgment and at least two months before the Defendants cross-moved for summary judgment. As such, the Parties both had the opportunity to review the Court's Local Rules significantly prior to making the instant motion and cross-motion, inquire as to their time to move for summary judgment and request an extension to do so. Further, although the Parties' attorneys appear to have consulted with each other on April 29, 2016 as to their time to make summary judgment motions (as per the attached emails), at no point prior to the instant motion and cross-motion did either of the Parties contact the Court as to their time to move for summary judgment. This is despite the fact that the Court's October 5, 2015 compliance conference order specifically required them to make said motions within 60 days of the note of issue, and despite the fact that the Court's Local Rules (published and available to both of the Parties prior to either of their respective motions/cross-motions) specifically indicated that all summary judgment motions were to be made within 60 days of the filing of the note of issue.

Accordingly and for the foregoing reasons it is hereby

ORDERED that the Plaintiff's motion for summary judgment and the Defendants' cross-motion for summary judgment are both denied as untimely pursuant to CPLR 3212(a) and the Court's compliance conference order dated October 5, 2015.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: September 15, 2016


 _____, JSC
HON. ROBERT D. KALISH
 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 as appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE