SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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ARLENE BERGER, as Executor of the Estate of
JULIUS PEIMER, deceased,

INDEX NO. 805427/13

Plaintiffs

-against-

DEWITT REHABILITATION AND NURSING CENTER,
INC. And WEN RAY HSU,
Defendants.

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JOAN A. MADDEN, J.:

In this action against a nursing home and a physician, asserting claims of negligence, malpractice and wrongful death, defendant Dewitt Rehabilitation and Nursing Center Inc. (Dewitt) moves, and defendant Dr. Wen Ray Thomas Hsu cross moves, for summary judgment dismissing the complaint against them. Plaintiff opposes the motion and cross motion, including on the ground that they were was not filed within 60 days of the filing of plaintiff's note of issue as required by the preliminary conference order.

This action concerns the treatment of the deceased, Julius Peimer, while he was a resident at Dewitt from December 6, 2010[1] until his discharge to Lenox Hill Hospital on July 28, 2012, where he died on August 20, 2012 at the age of 91 years old. Dr Hsu was Mr. Peimer's attending physician at Dewitt. At the time of his December 6, 2010 admission to Dewitt, Mr. Peimer was diagnosed with dysphagia, status post endoscopy, percutaneous endoscopic gastrostomy (PEG) tube placement, gastritis and hiatal hernia, left arm subcutaneous hematoma resolving,

[1]Mr. Peimer first admission to Dewitt was on September 10, 2004; however, his second admission is the subject of this litigation.

hypothyroidism, hypertension, glaucoma, dementia, and vertigo. A bilateral hernia was performed and a chest tube placed for pleural effusion. Mr. Peimer, who was not ambulatory, used a wheel chair. He also used a feeding tube and was incontinent of bladder and bowel. Mr. Peimer was previously admitted to Lenox Hill Hospital from DeWitt, from December 2, 2011 to December 16, 2011, and from April 17, 2012 to April 25, 2012. Upon his second discharge from Lenox Hill his prognosis was "poor."

In the Bill of Particulars, plaintiff alleges, *inter alia*, that defendants were negligent and departed from accepted nursing home standards in failing to have Mr. Peimer seen timely and properly by a physician, in failing to timely transport him to a hospital, in failing to evaluate his lung and heart function, and to properly and timely perform a chest X-ray; in failing to obtain an infectious disease work up, to diagnose and treat pneumonia, to provide adequate nutrition, and to properly examine him and make a proper diagnosis; in failing to supervise him and for allowing his condition to remain untreated; in failing to communicate with medical personnel and to train, supervise and hire employees. It is further alleged that there was a failure to properly diagnose and treat fever, decreased oxygen saturation and to have the Mr. Peimer examined by a physician on July 27, 2012, and to perform lung auscultation and that defendants provided inadequate or improper doses of Lasix. Plaintiff alleges vicarious liability for all employees of the facility and various statutory violations.

After the completion of discovery, plaintiffs filed their note of issue on June 30, 2016. Dewitt filed its summary judgment motion on October 22, 2016, which is 114 days after the note of issue was filed. Dr. Hsu filed his cross motion for summary judgment on November 18, 2016, which is 141 days after the note of issue was filed. The preliminary conference order provides

that summary judgment motions (or other dispositive motions) "shall be made no later than 60 (sixty) days from filing the Note of Issue unless the Court directs otherwise."

Plaintiff argues that both the motion and cross motion should be denied as untimely. In addition, with respect to the cross motion, plaintiff asserts that at a November 2, 2016 conference, counsel for Dr. Hsu requested permission to file a cross motion for summary judgment after the expiration of the 60-day deadline and that Justice Alice Schlesinger, the judge who previously presided over this action, denied such request.

Dewitt counters that the summary judgment motion should not be denied as untimely since it was filed on October 22, 2016 "under the improper assumption that [Dewitt] had 120 days to file the motion." Dewitt asserts that under these circumstances, good cause exists for the considering its motion since (a) no party will suffer unfair prejudice, (b) the court would benefit if the summary judgment motion were granted in that the time and expense of a trial would be avoided, (c) defendants should not be penalized for their misunderstanding, (d) a trial has not yet been scheduled, and therefore trial would not be delayed by the court's consideration of the motion. Dewitt also asserts that the case law supports its position that it has adequately shown good cause for the delay in filing its motion, citing, *inter alia*, Okun v. Tanners. 11 NY3d 762 (2008); Gonzalez ex rel. Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 (2000); Cooper v. Hodge, 13 AD3d 1111 (4th Dept 2004); Werner v. Tiffany & Co., 291 AD2d 305 (1st Dept 2002).

Dr. Hsu asserts that while Judge Schlesinger denied his request to file an untimely cross motion, as Dewitt has demonstrated good cause for the delay in filing its motion, his cross motion should also be considered since it is premised on nearly identical grounds as Dewitt's motion, citing Homeland Ins. Co. of N.Y. v. National Grange Mut. Ins. Co.; 84 AD3d 737, 738

(2d Dept 2011)(untimely cross motion for summary judgment may be considered where timely motion for summary judgment is made on nearly identical grounds).

Defendants' arguments are unavailing. CPLR 3212(a) provides, in relevant part, that on a motion for summary judgment "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 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." This statute was amended in 1996 (L.1996, ch. 492), effective January 1, 1997, to "address the proliferation of eleventh hour motions, made when there is inadequate time for reply or proper court consideration, and to prevent trial delays which often prejudice litigants who have spent extensive time and money in trial preparation." Auger v. State of New York, 236 AD2d 177, 179 (3rd Dept 1997).

In Brill v. City of New York, 2 NY3d 648, 650-651 (2004), the Court of Appeals clarified that the deadline for summary judgment motions was to be strictly enforced to prevent "[e]leventh-hour summary judgment motions," a practice that "ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice." In this connection, the court found that "good cause" under CPLR 3212(a) "requires a showing of good cause for the delay in making the motion–a satisfactory explanation for untimeliness–rather then simply permitting meritorious non-prejudicial filings, however tardy. " Id at 652.

Furthermore, "it does not matter whether a motion for summary judgment has been made more than 120 days after the filing of the note of issue or after the expiration of a shorter time limit set by a court order or stipulation. Whatever the source of the deadline with which a party

fails to comply, the lateness may not be excused without a showing of good cause within the meaning of CPLR 3212 (a)—a showing of something more than mere law office failure." Quinones v. Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. of Cornell Univ., 114 AD3d 472, 473 (1st Dept 2014)(internal citations omitted); see also, Maschi v. City of New York, 110 AD3d 460, 460 (1st Dept 2013)(reversing grant of untimely motion for summary judgment, finding that defendants' excuse for filing the late motion, that counsel was on trial in another case, did not satisfy the good cause requirement "inasmuch as it is essentially an excuse of law office failure"); Azcona v. Salem, 49 AD3d 343 (1st Dept 2008)(finding that trial court erred in granting summary judgment motion "upon a perfunctory claim of law office failure").

Here, Dewitt's only excuse for failing to timely move for summary judgment is that their respective counsel did not know the deadline for such a motion was 60 days as provided in the preliminary conference order, as opposed to the 120-day statutory deadline. As this excuse for the delay constitutes law office failure, the motion and cross motion for summary judgment must be denied as untimely. See Waxman v. Hallen Construction Co., Inc., (1st Dept 2016)(trial court should have denied summary judgment motion as untimely where it was submitted past the deadline in preliminary conference order and the reassignment to new justice did not constitute good cause for the late filing); Quinones, 114 AD3d at 474 (affirming trial court's denial of untimely summary judgment motion, noting that excuse proffered by defendant's counsel of overlooking the deadline in a preliminary conference order "is a perfunctory claim of law office failure"); Giudice v. Green 292 Madison, LLC, 50 AD3d 506, 506 (1st Dept 2008)(finding that alleged ambiguity in preliminary conference order did not constitute good cause for delay in filing summary judgment motion and that defendant's "failure to appreciate that its motion was

due 45 days after the filing of the note of issue is no more satisfactory than a perfunctory law office failure")(internal citations and quotations omitted). As Dewitt's motion is untimely, Dr. Hsu's argument that his subsequently filed cross motion may be considered based on Dewitt's motion is unavailing.

Finally, the cases relied on by defendants are not to the contrary as they involved circumstances where good cause for the delayed filing of the summary judgment motion was shown based on outstanding discovery (see e.g. Gonzalez ex rel. Gonzalez , 95 NY2d 124; Cooper v. Hodge, 13 AD3d 1111), or are not relevant as they do not address the issue of the timeliness of summary judgment motions (see e.g. Okun v. Tanners. 11 NY3d 262; Werner v. Tiffany & Co., 291 AD2d 305).

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied as untimely; and it is further

ORDERED that the parties shall appear on May 4, 2017 at 10:00 am for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: May 1, 2017

HON. JOAN A. MADDEN
J.S.C.