

Pereira v JPMorgan Bank Chase Bank, N.A.
2018 NY Slip Op 30013(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 161864/2013
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

ANTHONY PEREIRA and MONICA PEREIRA,
Plaintiffs,

INDEX NO. 161864/2013

MOTION DATE 5/10/17

- v -

MOTION SEQ. NO. 004

**JPMORGAN BANK CHASE BANK, N.A.,
J.P. MORGAN CHASE & CO., ALL COUNTIES
SNOW REMOVAL CORP., and NEW YORK
PLUMBING-HEATING-COOLING CORP.,**

Defendants.

**JP MORGAN CHASE BANK, N.A., J.P. MORGAN
CHASE & CO., and ALL COUNTIES SNOW REMOVAL
CORP.,**

Third-Party Plaintiffs,

- v -

RIGGED RITE INC.,

Third-Party Defendant.

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

The following papers, numbered 109-127 and 133-137, were read on this motion for summary judgment.

- Notice of Motion (with Affidavit in Support) – Exhibits (Doc # 110-127) | Nos. 109-127**
- Affirmation in Opposition – Exhibits A-C – Memorandum of Law in Opposition | Nos. 133-137**

Motion pursuant to CPLR 3212 by Third-Party Defendant Rigged Rite Inc. for an order granting it: (a) leave to file the instant motion at this time; and (b) summary judgment dismissing the Third-Party Complaint with prejudice is denied.

This Court denied a prior motion for summary judgment brought by defendants JP Morgan Chase Bank, N.A. and J.P. Morgan Chase & Co. (“JP Morgan Chase”) by an order dated March 24, 2017. (*Pereira v JP Morgan Chase Bank*, 2017 NY Slip Op 30597[U] [Sup Ct, NY County 2017]; NY St Cts Elec

Filing [NYSCEF] Doc No. 106, decision and order on motion seq. 003.) That decision and all its discussion of the background of the instant action are incorporated herein by reference.

Plaintiffs Anthony and Monica Pereira filed the note of issue in the instant action on March 31, 2016. (NYSCEF Doc No. 54.) Pursuant to CPLR 3212 (a), a motion for summary judgment must be made no later than 120 days after the filing of the note of issue unless good cause is shown.¹ A showing of good cause requires that the movant explain its tardiness to the motion court satisfactorily. (*See Brill v City of New York*, 2 NY 3d 648, 652 [2004].) That a motion for summary judgment may be meritorious or nonprejudicial does not affect this bright-line rule. (*Id.*; see also *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013]; *Glasser v Abramovitz*, 37 AD3d 194 [2d Dept 2007].)

Third-Party Defendant filed the instant motion on or about April 12, 2017. To have been timely within the meaning of CPLR 3212, Third-Party Defendant would have to have filed the instant motion no later than July 29, 2016. Instead, 257 days passed before Third-Party Defendant filed its motion. As such, the instant motion is untimely, and the Court must consider if good cause has been shown.

“[A] court has broad discretion in determining whether the moving party has established good cause for the delay, and its determination will not be overturned unless it is improvident.” (*Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017], citing *Gonzalez v 90 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000].) Vague and conclusory assertions respecting settlement talks with opposing counsel do not constitute good cause. (*See State Farm Fire and Cas. V Parking Sys. Valet Svc.*, 48 AD3d 550, 550 [2d Dept 2008].) Nor does a party’s unilaterally requesting a voluntary discontinuance from a plaintiff satisfactorily explain any duration of lateness in filing a timely motion for summary judgment. (*See Holt v Goldmark*, 2012 WL 9515229, *3 [Sup Ct, Westchester County 2012, Lefkowitz, J.]; *Zovas v Eckerd Corp.*, 2010 NY Slip Op 31833(U) [Sup Ct, NY County 2010, Jaffe, J.]; *Remekie v The 740 Corp.*, 2006 WL 6353071 [Sup Ct, NY County 2006, Guzman, J.]; *Bouilland ex rel Bouilland v Angulo*, 5 Misc3d 1031(A) [Sup Ct, NY County 2004, Carey, J.]; cf *Morillo v West 43rd Street Restaurant Corp.*, 2004 WL

¹ This Court’s rules provide for dispositive motions to be filed within 60 days of the filing of the note of issue. As the Preliminary Conference Order (“PCO”) was signed by The Hon. Justice Milton Tingle and provided for dispositive motions to be filed “[p]er CPLR” and not per the conference court’s local rules, which may further limit the time for filing dispositive motions to 30–119 days after the filing of the note of issue, this Court would allow the maximum 120-day period to apply. (NYSCEF Doc No. 25, PCO; CPLR 3212 [a].)

5487787 [Sup Ct, NY County 2004, Lebedeff, J.]; *Lawrence v Chi-Chow Kuo*, 5 Misc3d 1019(A) [Sup Ct, Queens County 2004, Dollard, J.]

Upon a review of the papers, the Court finds that Third-Party Defendant's argument that it sought a voluntary discontinuance from Third-Party Plaintiffs does not satisfactorily explain its lateness. While Third-Party Defendant allegedly made "numerous written requests" for the voluntary discontinuance of this action as to it, Third-Party Plaintiff never responded to them. (Aff of Dowling ¶ 26.) Third-Party Defendant does not annex any copies of any of its alleged written requests to the instant motion but alleges that "every time a letter of request was written to the Third-Party Plaintiff's [sic] counsel of record, the attorneys representing them would be changed." (*Id.*)

In opposition, third-party plaintiff All Counties Snow Removal Corp. ("All Counties") annexes stipulations of consent to change attorney dated April 4, 2016 and April 8, 2016 for attorneys for third-party plaintiffs All Counties and JP Morgan Chase, respectively. This Court takes judicial notice that the substituted attorneys per the stipulations are currently the attorneys of record for their respective third-party plaintiffs. As it was only about a week after the filing of the note of issue in the instant action that any substitution of counsel appears to have occurred, Third-Party Defendant's argument is perplexing.

This Court could have easily and efficiently disposed of the instant motion when it was considering the prior summary judgment motion and reviewing some of the same documents now submitted in the instant motion. The Court heard oral argument on the prior summary judgment brought by JP Morgan Chase on January 3, 2017, at which time Third-Party Defendant failed to appear or even respond in any way.²

² JP Morgan Chase has appealed this Court's denial of its summary judgment motion. (NYSCEF Doc. No. 128, notice of appeal.) Most recently, on December 21, 2017, by an order of the Appellate Division, First Department, JP Morgan Chase's motion No. M-5990 for a stay of trial pending hearing and determination of the aforesaid appeal was denied. (*Pereira v JP Morgan Chase Bank*, 2017 NY Slip Op 96208[U] [1st Dept 2017].)

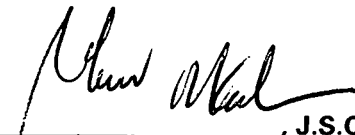
CONCLUSION

Accordingly, it is

ORDERED that Third-Party Defendant Rigged Rite Inc.'s motion pursuant to CPLR 3212 for an order granting it: (a) leave to file the instant motion at this time; and (b) dismissing the Third-Party Complaint with prejudice is denied; and it is further

ORDERED that all parties are to appear in Early Settlement Conference Part 1 (Room 422) on Tuesday, January 16, 2018, at 10:00 a.m., before Miles Vigilante, Esq., for a mandatory early settlement conference.

Dated: January 2, 2018
New York, New York



J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE