

Buschel v White Plains Shopping Ctr. Assoc., LLC

2018 NY Slip Op 34183(U)

September 11, 2018

Supreme Court, Westchester County

Docket Number: Index No. 60024/2016

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
CAROL BUSCHEL,

Plaintiff,

-against-

DECISION & ORDER

Index No.60024/2016

Seq. Nos. 1, 2 & 3

WHITE PLAINS SHOPPING CENTER ASSOCIATES,
LLC and ATLANTIC ASPHALT AND EARTH, INC.,

Defendants.
-----X

RUDERMAN , J.

The following papers were read on the motion by defendant Atlantic Asphalt and Earth, Inc. ("Atlantic") for an order granting summary judgment dismissing the complaint and any cross-claims and awarding such other and further relief as this court deems just and proper:

Notice of Motion; Affirmation in Support; Exhibits A-F; Memorandum of Law
Affirmation in Opposition to Motion and in Support of Cross-Motion, Exhibits a-j
Affirmation in Opposition to Cross-Motion and in Further Support of Motion
Reply Affirmation
NYSCEF File

The following papers were read on the motion by defendant White Plains Shopping Center ("Shopping Center") for an order granting summary judgment dismissing the complaint and any cross-claims and awarding such other and further relief as this court deems just and proper:

Notice of Motion; Affirmation in Support ; Exhibits A-K
Affirmation in Opposition to Motion and in Support of Cross-Motion; Exhibits a-j
Affirmation in Opposition to Cross-Motion and Reply, Exhibits A-B
Reply Affirmation
NYSCEF File

The following papers were read on the motion by plaintiff seeking summary judgment on liability, scheduling an inquest on damages and awarding such other and further relief as the Court deems just and proper:

Notice of Cross-Motion; Affirmation in Opposition to Motion and in Support of
Cross-Motion; Exhibits a-j
Affirmation in Opposition to Cross-Motion and Reply, Exhibits A-B
Affirmation in Opposition to Cross-Motion and in Further Support of Motion
Reply Affirmation
NYSCEF File

Plaintiff commenced this action to recover for injuries allegedly sustained when she tripped and fell while walking across a parking lot owned by the Shopping Center. Following the completion of discovery, plaintiff filed a note of issue and certificate of readiness on March 22, 2018.

On May 4, 2018, Atlantic filed a motion for summary judgment seeking an order dismissing plaintiff's claims asserted against it. On May 7, 2018, the Shopping Center also filed a motion for summary judgment seeking an order dismissing plaintiff's claims asserted against it. On July 10, 2018, plaintiff filed a motion, denominated as a cross-motion, seeking an order granting plaintiff summary judgment on liability and scheduling an inquest on damages.

Prior to addressing the merits of the parties' arguments, the court must address the issue of timeliness. In 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM Protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester County Supreme Court civil cases pursuant to the DCM Protocol.

In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice to all that enter our courts in a timely and efficient manner.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

"As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726-727 [2004] [internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

“As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that ‘[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity’” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, ‘the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment’” (*Greenpoint Props, Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; see *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Pursuant to the DCM Protocol Part Rules with respect to post-note of issue summary judgment motions, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue” (DCM Rule II.D, available at https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol.pdf).¹ The trial readiness order issued by this court contains similar language. In addition, the Part Rules state in bold-face type:

“Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 45-day time period pursuant to this protocol and the Trial Readiness Order shall result in the denial of the untimely motion or cross-motion” (DCM Rule II.D [emphasis in original]).

While the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it invites no extension of the time for making such motions.

¹ The protocol was most recently updated on February 23, 2018; however, no changes were made to the sections in effect when plaintiffs filed the note of issue in the instant matter.

Based on the Part Rules set forth above, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, both defendants' motions were filed within 45 days after plaintiff filed the note of issue on March 22, 2018. Accordingly, the defendants' initiatory papers were timely. By contrast, plaintiff's July 10, 2018 cross-motion for summary judgment – filed 110 days after the note of issue was filed – was untimely.

Plaintiff's untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing her motion within the applicable period, plaintiff waited until after her adversaries filed their motions before filing her own motion. Plaintiff did not file her motion by the deadline set forth in the trial readiness order, which provided that “[a]ny motion for summary judgment by any party must be served via NYSCEF within 45 days following the filing of the Note of Issue” [emphasis added]. Plaintiff also failed to establish good cause for the delay² (see generally *Brill v City of New York*, 2 NY3d 648 [2004]; see *Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 658 [2d Dept 2004]).

Standards and goals for civil cases in which a note of issue is filed is one year from the filing of the note of issue. If the making of summary judgment motions is delayed for months, this will inevitably mean that either counsel will be rushed to trial or else the case will go over standards and goals. The situation is compounded by adjournments of such motions, particularly where the adjournments are repeated and the motions were already made late. While standards and goals are not immutable, and exceptions will always exist, compliance should be the norm, not the exception. If counsel are serious about their motions, they should make them on time or, if they believe that they cannot, they should apply for relief, setting forth the good cause for granting it. What they cannot do is avoid the necessity for showing good cause by simply waiting until some other party moves within the time allowed and then take advantage of that party by denominating an untimely motion as a “cross-motion.”

It has been held that untimely cross-motions may be considered by the court, in the exercise of its discretion, where a timely motion for summary judgment has been made on nearly identical grounds (see *Williams v Wright*, 119 AD3d 670 [2d Dept 2014]). However, regardless of whether the grounds are identical, the case law does not mandate that the court must entertain such untimely cross-motions, especially where, as here, to do so would result in the circumvention of the Part Rules established by the court and reward non-compliance with court deadlines, without good cause. Therefore, plaintiff's cross-motion is denied as untimely (see *Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that plaintiff's cross-motion is denied as untimely; and it is further,

ORDERED that defendants' motions are transferred to an IAS Part for determination on

² Plaintiff's representation, asserted for the first time in her reply papers, that she was delayed because she resides out of state fails to establish good cause.

the merits;³ and it is further

ORDERED that defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the Decision and Order of this court.

White Plains, New York
September 11, 2018


HON. JERRY JANE RUDERMAN, J.S.C.

To:

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cc: Compliance Motion Clerk

³ To the extent that plaintiff's motion papers include arguments in opposition to defendants' summary judgment motions, such arguments were timely made. The court takes no position with respect to plaintiff's contentions advanced in opposition to defendants' motions.