

<b>Calle v Sullivan Farms II, Inc.</b>
2018 NY Slip Op 34195(U)
October 30, 2018
Supreme Court, Rockland County
Docket Number: Index No. 035360/2016
Judge: Paul I. Marx
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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. PAUL I. MARX, J.S.C.

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.

-----X  
LUIS CALLE,

Plaintiff,

Index No. 035360/2016

-against-

**DECISION AND ORDER**

SULLIVAN FARMS II, INC., RAY BUILDER, NY,  
CORP., and BLACK CREEK CONSTRUCTION LLC,

Motion date: August 1, 2018  
Motion Sequence No. 2

Defendants.  
-----X

The following papers numbered 1 to 4 were read on Plaintiff's motion for partial summary judgment on the issue of liability:

Notice of Motion/Affirmation of Timothy W. Norton Esq./Exhibits A-C.....	1-2
Affirmation of Thomas J. Leonard, Esq. in Opposition/Exhibits A-C .....	3
Reply Affirmation of Timothy W. Norton, Esq./Exhibit A .....	4

Upon reading the foregoing papers, it is ORDERED that the motion is denied for the reasons which follow.

**BACKGROUND**

Plaintiff Luis Calle brought this action against Defendants Sullivan Farms II, Inc., Ray Builder, NY, Corp., and Black Creek Construction, LLC under Labor Law §§ 240(1) and 241(6) based upon his fall from a roof at a work site. Sullivan Farms was the owner of the premises and Ray Builder NY Corp. was the general contractor. Plaintiff alleged that he was not provided with adequate safety devices to mitigate the risk of his fall from a roof that was wet with snow and ice.

Plaintiff e-filed the Note of Issue on April 24, 2018. On June 29, 2018, Plaintiff e-filed the instant motion for summary judgment.

## DISCUSSION

Plaintiff moves for partial summary judgment, claiming that the failure to provide safety devices was a proximate cause of the accident and any allegation of Plaintiff's contributory negligence is irrelevant. Affirmation of Timothy Norton, Esq. at ¶ 21.

Defendants Sullivan Farms and Ray Builder oppose Plaintiff's motion on the principal ground that it is untimely under this Court's Part Rules and Plaintiff has not provided "good cause" for its untimeliness. Defendants assert that Plaintiff's motion for summary judgment was not filed within sixty (60) days of the filing of the Note of Issue on April 24, 2018, as required by Part Rule IV.E. Defendants contend that Plaintiff's motion is untimely because it was served and filed on June 29, 2018, sixty-six days after the Note of Issue was filed. Defendants assert that Plaintiff has not acknowledged that his motion is untimely or given any excuse for why it should be accepted for filing. Defendants therefore request that the motion be denied as untimely.

Plaintiff contends that his motion was timely filed because his Note of Issue was not filed with the Court until May 2, 2018, when it "was actually filed with the Clerk of the court ...". Reply Affirmation of Timothy Norton at ¶ 5. Plaintiff submits proof of delivery of a working copy of the Note of Issue to the Supreme Court Clerk's Office on May 2, 2018. Plaintiff relies on *Castro v Homsun Corp.*, 34 AD3d 616, 617 [2<sup>nd</sup> Dept 2006], which held that the date papers are considered filed for purposes of computing time is "when they are received by the office with which, or by the official with whom, they are to be filed."

While the legal principle stated in *Castro v Homsun Corp.* is unassailable, Plaintiff overlooks two key distinctions. First, this is an e-filed case whereby filing is accomplished when the papers are uploaded to the County Clerk. Plaintiff e-filed its Note of Issue with the County Clerk on April 24, 2018. Second, Plaintiff submitted a working copy of the Note of Issue to the Supreme Court Clerk's Office. The Supreme Court Clerk's Office is not the office with which the Note of Issue was to be filed. The NOI was required to be filed with the County Clerk, as are all papers submitted in an action for filing with the Court. Third, submission of a working copy does not constitute "filing". A working copy is merely a courtesy copy submitted to the Court of paper(s) that has been properly filed with the County Clerk.

The record shows that the Notice of Issue was received by the County Clerk on April 24, 2018. Thus, that is the date it was considered filed for purposes of time computation. Pursuant to

this Part's Rules, Plaintiff was required to file his motion for summary judgment on or before June 25, 2018.

CPLR §3212(a) provides that summary judgment motions are required to be made within 120 days after the filing of the Note of Issue, unless the Court sets an earlier date. This Court set a 60-day deadline from the filing of the note of issue after which no such motion may be made. In this case, the 60-day time period expired on June 25, 2018. Plaintiff filed his motion on June 29, 2018, more than four days after it was due to be filed. Therefore, the motion was untimely.

“Untimely made summary judgment motions must be denied outright, irrespective of their merits, unless good cause is shown for the delay.” *Castro v Homsun Corp.*, *supra* at 617 (citing CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]).

Plaintiff has not shown good cause for the delay. He merely argues that his motion was timely filed because it was filed within 60 days of having delivered a working copy of the Note of Issue to the Supreme Court Clerk's Office on May 2, 2018.

In *Brill v City of New York*, *supra*, the Court of Appeals reviewed the history that led to the statutory deadline for filing a motion for summary judgment and emphasized the need to observe the deadline, to the absolute exclusion of consideration of the merits of the motion. Thus, the Court of Appeals clarified that “‘good cause’ in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness ...”. Moreover, the Court exhorted that “[n]o excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” 2 NY3d at 652.

In *Milano v George*, 17 AD3d 644 [2<sup>nd</sup> Dept 2005], the Appellate Division Second Department affirmed the Supreme Court's own 90-day deadline after the filing of a note of issue for making motions for summary judgment. The Appellate Division further upheld the trial court's denial of a motion for summary judgment that was made one day past that deadline. The Appellate Division held that “[b]ecause the record does not establish ‘good cause’ for the delay, we affirm the order appealed from on the basis of the untimeliness of the motion alone (see CPLR 3212 [b]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Kone v Ritter Sysco Food Serv., Inc.*, 15 AD3d 627 [2005]; *Sanango v Generoso*, 13 AD3d 349 [2004]), and we do not address the merits.” *Id.* at 645.

As Plaintiff has not shown any excuse at all for his delay in bringing his motion for summary judgment, the motion is denied as untimely, without consideration of the merits.

The parties are reminded that a Settlement Conference is scheduled for November 16, 2018 at 9:15 a.m.

Dated: October 30, 2018  
New City, New York

ENTER  
  
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HON. PAUL I. MARX, J.S.C.