

Scott v Kollore
2018 NY Slip Op 34289(U)
October 11, 2018
Supreme Court, Westchester County
Docket Number: Index No. 61084/2016
Judge: Terry Jane Ruderman
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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
EARL SCOTT and ANDRE LUIS FERNANDEZ,

Plaintiffs,

DECISION & ORDER

Index No. 61084/2016

-against-

Seq. Nos. 1 & 3

LACINA KOLLORE and NALGIA FERNANDEZ,

Defendants.

-----X
TERRY JANE RUDERMAN, J.S.C.

The following papers were read on this motion by defendant Lacina Kollore (Sequence No. 1) for an order pursuant to CPLR 3212 granting defendant Lacina Kollore summary judgment dismissing plaintiffs' complaint and any and all cross-claims:

Notice of Motion; Affirmation in Support; Exhibits A - L
Affirmation in Opposition; Affidavit of Service; Exhibits A - K
Affirmation in Reply; Exhibit M
Proposed Stipulation; So-ordered Stipulation
Court File (NYSCEF Doc. Nos. 23-36, 53-69)

The following papers were read on this cross-motion by defendant Nalgia Fernandez (Sequence No. 3) for an order pursuant to CPLR 3212 granting defendant Nalgia Fernandez summary judgment dismissing plaintiffs' complaint:

Notice of Cross-Motion; Affirmation in Support; Exhibits A - C
Affidavit of Service
Affirmation in Opposition; Affidavit of Service; Exhibits A - K
Proposed Stipulation; So-ordered Stipulation
Court File (NYSCEF Doc. Nos. 47-69)

Plaintiffs commenced this personal injury action resulting from a motor vehicle accident that occurred on or about September 18, 2013 on Ashburton Avenue at or near its intersection with Park Avenue in the City of Yonkers, by the filing of a summons and complaint on August 9, 2016. Defendant Nalgia Fernandez ("Fernandez") filed an answer with affirmative defenses and cross-claims on or about September 8, 2016. Defendant Lacina Kollore ("Kollore") filed an answer with affirmative defenses and cross-claims on September 29, 2016. After a preliminary conference and multiple compliance conferences, a trial readiness referee report dated May 22, 2018 was so-ordered (Lefkowitz, J.) on May 23, 2018 (NYSCEF Doc. No. 21). Plaintiffs filed a note of issue and certificate of readiness on June 8, 2018 (NYSCEF Doc. No. 22).

Defendant Kollore filed a Notice of Motion on July 9, 2018 seeking summary judgment. On July 24, 2018, defendant Fernandez filed a Notice of Cross-Motion seeking summary judgment.

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 in a timely and efficient manner to all who enter our courts.

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 current 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_June30_17.pdf). The trial readiness order contains similar language (NYSCEF Doc. No. 31). 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

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, defendant Kollore’s motion was filed on July 9, 2018, 31 days after plaintiffs filed the note of issue on June 8, 2018. Accordingly, defendant Kollore’s initiatory papers are timely. By contrast, defendant Fernandez’s July 24, 2018 cross-motion for summary judgment – filed 46 days after the note of issue was filed – is untimely.

1

On August 23, 2018, the parties filed a proposed stipulation adjourning the return date of defendant Kollore’s motion and defendant Fernandez’s cross-motion to September 27, 2018 (NYSCEF Doc. No. 53). The court (Lefkowitz, J.) so-ordered the stipulation on August 27, 2018 (NYSCEF Doc. No. 54). At no time did the court extend the filing deadline for summary judgment motions, including cross-motions. In fact, in so-ordering the stipulation submitted by the parties, the court added the following language, “The parties are reminded that any motion or cross-motion for summary judgment must be made in accordance with the DCM Protocol and within 45 days of the filing of the note of issue. The so-ordering of the parties’ proposed stipulation/order to adjourn the return date of a motion or cross-motion for answering or reply papers shall not be construed as extending the deadline to make any motion or cross-motion or approval of an untimely motion or cross-motion.”

Defendant Fernandez'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, defendant waited until after co-defendant filed a motion before filing her motion. However, defendant Fernandez did not file the 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" (NYSCEF Doc. No. 31 [emphasis added]). Defendant also failed to provide good cause for the delay (*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 their 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 would reward non-compliance with court deadlines, without good cause. Therefore, the cross-motion brought by defendant Fernandez is denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that defendant Fernandez's cross-motion (sequence no. 3) is denied as untimely; and it is further,

ORDERED that defendant Kollore's motion (sequence no. 1) is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order, with notice of entry, upon all parties within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 11, 2018


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

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