

Brown v Dossantos
2018 NY Slip Op 34351(U)
November 30, 2018
Supreme Court, Westchester County
Docket Number: Index No. 51151/2017
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
CLARENCE BROWN,

Plaintiff,

DECISION & ORDER

Index No. 51151/2017

-against-

Seq. Nos. 3 & 4

FERNANDO F. DOSSANTOS, KELLY E. WILLIAMS
and PAUL A. MENDES,

Defendants.

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

The following papers were read on this motion by defendant Kelley E. Williams (Sequence No. 3) for an order pursuant to CPLR 3212 granting defendant summary judgment dismissing plaintiff's complaint:

Notice of Motion; Affirmation in Support; Exhibits A - M
Affirmation in Opposition; Exhibits B - H, Affidavit of Service; Exhibit A
Affirmation in Reply
Court File (NYSCEF Doc. Nos. 53-67, 76-86)

The following papers were read on this cross-motion by defendants Fernando F. Dossantos and Paul A. Mendes (Sequence No. 4) for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint:

Notice of Cross-Motion; Affirmation in Support; Exhibits A - E
Affirmation in Opposition; Exhibits B - H, Affidavit of Service; Exhibit A
Court File (NYSCEF Doc. Nos. 68-85)

Plaintiff commenced this personal injury action resulting from a motor vehicle accident that occurred on March 17, 2016 on Central Park Avenue at or near the intersection with Balint Drive in the City of Yonkers, by the filing of a summons and complaint on January 27, 2017. Defendant Fernando F. Dossantos ("Dossantos") filed an answer with cross-claim on May 2, 2017. Defendant Kelly E. Williams ("Williams") filed an answer with cross-claim on June 8, 2017. After a preliminary conference and several compliance conferences, plaintiff filed a motion to amend the complaint to add another named defendant. By Order (Giacomo, J.) dated April 4, 2018¹, plaintiff's motion to amend the complaint to add defendant Paul Mendes as the operator of defendant Dossantos' vehicle was granted without opposition. On May 3, 2018, defendants Dossantos and Mendes filed their answer with cross-claims to the amended complaint. Thereafter, on June 13,

¹ See Order (Giacomo, J.) filed to NYSCEF as Doc. No. 34.

2018, defendant Williams filed an amended answer with cross-claim. After several more compliance conferences, a trial readiness referee report dated August 29, 2018, so-ordered (Lefkowitz, J.) on August 30, 2018 was entered.² Plaintiff filed a note of issue and certificate of readiness on September 6, 2018³.

Defendant Williams filed a Notice of Motion on October 18, 2018 seeking summary judgment. On November 7, 2018, defendants Dossantos and Mendes 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

² See Trial Readiness Referee Report & Order filed to NYSCEF as Doc. No. 51.

³ See Note of Issue filed to NYSCEF as Doc. No. 52.

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.

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 Williams’ motion was filed on October 18, 2018, 42 days after plaintiff filed the note of issue on September 6, 2018. Accordingly, the initiatory papers of defendant Williams are timely. By contrast, the cross-motion for summary judgment of defendants Dossantos and Mendes - filed 62 days after the note of issue was filed –is untimely.

The untimely cross-motion of defendants is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing their motion within the

applicable period, defendants Dossantos and Mendes waited until after co-defendant Williams filed a motion before filing their cross-motion. However, defendants Dossantos and Mendes did not file their 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]). Here, defendants Dossantos and Mendes fail to demonstrate, much less allege, any 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 defendants Dossantos and Mendes is denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that the cross-motion of defendants Dossantos and Mendes (sequence no. 4) is denied as untimely; and it is further,

ORDERED that the motion of defendant Williams (sequence no. 3) is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiff 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
November 30, 2018.


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

To:

Scott Baron & Associates, P.C.
Attorneys for plaintiff
159-45 Cross Bay Boulevard
Howard Beach, New York 11414
BY NYSCEF

Law Offices of John Trop
Attorneys for defendants
Fernando F. Dossantos and Paul A. Mendes
73 Market Street, Suite 375
Yonkers, New York 10710
BY NYSCEF

McCabe & Mack, LLP.
Attorneys for defendant
Kelly E. Williams
63 Washington Street
P.O. Box 509
Poughkeepsie, New York 12602-0509
BY NYSCEF

cc: Compliance Motion Clerk