

<b>Scala v Mamaroneck Union Free Sch. Dist.</b>
2019 NY Slip Op 34589(U)
November 22, 2019
Supreme Court, Westchester County
Docket Number: Index No. 51692/2018
Judge: Joan B. Lefkowitz
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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  
FRANK SCALA,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 51692/2018  
Motion Seq. No. 2

MAMARONECK UNION FREE SCHOOL DISTRICT,

Defendant.

-----X  
LEFKOWITZ, J.

The following papers were read on defendant’s cross motion, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint in its entirety, together with such other and further relief as this Court deems just and proper.

Notice of Cross Motion  
Affirmation in Support - Exhibits A - H  
NYSCEF File

On or about February 8, 2018, plaintiff commenced this action against defendant seeking to recover damages for personal injuries allegedly sustained by the plaintiff on December 14, 2016, when he was injured when the ladder he was standing on slipped out from under him while he was installing speakers at the Hommocks Middle School, in Larchmont, New York. Issue was joined on or about March 8, 2018, when the defendant served its verified answer.

Following the completion of discovery, on August 20, 2019, the Supreme Court (Lefkowitz, J.) entered a Trial Readiness Stipulation & Order executed by the parties. Pursuant to the Trial Readiness Stipulation & Order, “[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; opposition papers must be served via NYSCEF within 30 days of service of motion papers; and reply papers, if any, must be served via NYSCEF within 10 days following service of any opposition papers.” On September 6, 2019, plaintiff filed his Note of Issue.

On October 17, 2019, plaintiff timely filed his motion for summary judgment (Motion Seq. No. 1). On November 7, 2019, more than 62 days after plaintiff filed his Note of Issue, defendant cross-moved for summary judgment.

Prior to addressing the merits of the parties’ arguments, the court must address the issue of timeliness and proper motion practice. 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 that 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]).

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\\_June30\\_17.pdf](https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol_June30_17.pdf)). The Trial Readiness Stipulation & Order entered on August 20, 2019, also directs 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). The DCM Protocol further provided in bold type as follows:

**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.**

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.

Accordingly, based on the Part Rules and the Trial Readiness Order, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, defendant’s cross motion was filed on November 7, 2019, 62 days after plaintiff had filed his note of issue on September 6, 2019. Therefore, the defendant’s cross motion is untimely.

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]). Here, plaintiffs failed 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]).

Here, the defendant’s cross motion seeking summary judgment was untimely and is a clear example of dilatory tactics which adversely impact the timely disposition of cases. Rather than filing his motion within the applicable period, defendant waited until after its adversary filed his motion to file its own motion. Defendant did not file its motion by the deadline set forth

in the trial readiness order which provided that “any motion for summary judgment by any party must be served within forty-five (45) days following the filing of the Note of Issue.” Having missed the deadline, it also failed to provide any explanation (let alone 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]). Defendant cannot seek summary judgment at such a late date by simply denominating its motion as a cross motion (see *Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v Hosp. for Special Surgery*, (114 AD3d 75, 88 [1st Dept 2013]).

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.” Not only does such practice allow the offending and untimely party to take unfair advantage of the timely party’s timeliness, it prejudices the timely party by providing only a short time to respond to the “cross motion.” Rather than having the Court extend the time to respond, and thus allow counsel to succeed in both detouring around the rules and in delaying the progress of the case unjustifiably, the consequences should be borne squarely by the offending party by denying the cross motion as untimely.

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 noncompliance with court deadlines. Moreover, the late filing of such cross motions places defendant’s adversary in an inequitable and prejudicial position where there is little time to oppose the defendant’s cross motion that should have been made as an initiatory motion. Granting a further adjournment would only enable the offending party to succeed in obtaining unwarranted delay--delay for which no good cause has been shown. Therefore, the defendant’s cross motion must be denied as untimely (see *Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

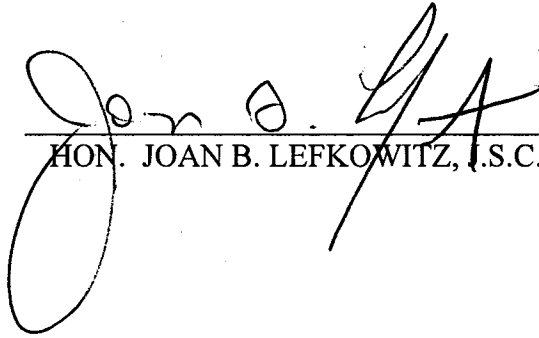
ORDERED that defendant’s cross motion is denied as untimely; and it is further

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

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

*11-22*, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

TO: All counsel by NYSCEF

cc: Compliance Part Motion Clerk