

<b>O'Meara v Ean Holdings, LLC</b>
2019 NY Slip Op 34593(U)
April 10, 2019
Supreme Court, Westchester County
Docket Number: Index No. 54984/2017
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

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PETER O'MEARA and NICKOL CAMACHO,

Plaintiffs,

**DECISION & ORDER**

Index No.: 54984/2017

-against-

EAN HOLDINGS, LLC and VENKATESH SHARMA

Seq. Nos.: 1, 2

Defendants.

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JOAN B. LEFKOWITZ, J.S.C.

The following papers were read on this motion (sequence # 1) by plaintiffs, Peter O'Meara and Nickol Camacho, for an order directing summary judgment in favor of plaintiffs, against defendant Venkatesh Sharma on the issue of liability; striking the third affirmative defense of the defendants' Answer alleging negligence, culpable conduct, assumption of the risk or fault on behalf of plaintiffs; striking the first counterclaim against plaintiff Peter O'Meara alleging negligence, recklessness and carelessness; and striking the second counterclaim alleging plaintiff Peter O'Meara was responsible for damages and/or injuries to plaintiffs Peter O'Meara and/or Nickol Camacho and that such damages should be apportioned against Peter O'Meara based on his portion of fault, negligence and want of care; setting the matter down for a trial on damages only; and for such other and further relief as to this court may seem just and proper as well as this motion (sequence # 2) for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff on the counterclaim, Peter O'Meara, dismissing the counterclaim asserted against him on the ground that the undisputed evidence on the record establishes that no liability for the occurrence of the accident on September 5, 2016, exists as against him; and for such other and further relief that this court may deem just and proper.

Notice of Motion (Seq. # 1) - Affirmation in Support - Exhibits A - H  
Defendant's Affirmation in Opposition - Exhibit A  
Reply Affirmation

Notice of Cross-Motion (Seq. # 2) - Affirmation - Exhibits A - D  
Defendant's Affirmation in Opposition - Exhibit A  
Reply Affirmation

NYSCEF Docs. # 42, 49, 54, 55, 56, 58<sup>1</sup>

On April 12, 2017, plaintiffs commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident which occurred on September 5, 2016, in Bedford, New York. Defendants served an answer with counterclaims against plaintiff Peter O'Meara on May 10, 2017. Plaintiff on the counterclaim filed a reply on November 2, 2017. On October 9, 2018, the parties filed a stipulation of partial discontinuance with respect to defendant Ean Holdings, LLC only. Following multiple compliance conferences, this Court entered a Trial Readiness Order on October 11, 2018, and plaintiffs filed a Note of Issue and Certificate of Readiness on November 7, 2018.

Thereafter, on December 20, 2018, plaintiffs, Peter O'Meara and Nickol Camacho, moved for summary judgment against defendant on the issue of liability; for an order striking defendant's third affirmative defense; striking defendant's first and second counterclaim; and for such other and further relief as to this court may seem just and proper. On January 10, 2019, the parties uploaded a stipulation to adjourn the return date of plaintiffs' motion from January 22, 2019, to February 27, 2019, (NYSCEF Doc. # 42). It does not appear that this stipulation was ever So-ordered. On February 20, 2019, defendant submitted an affirmation in opposition to plaintiffs' motion and on March 13, 2019, plaintiffs filed a reply affirmation.

In the interim, on February 7, 2019, plaintiff on the counterclaim, Peter O'Meara filed a cross-motion for an order pursuant to CPLR 3212 granting summary judgment on the ground that the undisputed evidence establishes that no liability for the accident on September 5, 2016, exists as to him. On March 7, 2019, the parties uploaded two seemingly identical stipulations to adjourn the return dates of plaintiffs' motion and plaintiff on the counterclaim's motion from February 27, 2019, to March 13, 2019, (NYSCEF Docs. # 54 & 55). On February 28, 2019, the court So-ordered the stipulation which was uploaded to NYSCEF on March 7, 2019, (NYSCEF Docs. # 56). As noted above, defendant filed an affirmation in opposition to plaintiff's motion and plaintiff on the counterclaim filed a reply affirmation on March 12, 2019.

Initially, the Court must address the issue of timeliness and proper motion practice. Ten years ago, in 2009, a new Differentiated Case Management (DCM) Protocol<sup>2</sup> 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 to 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

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<sup>1</sup>Defendant submitted a letter dated March 14, 2019 and plaintiff submitted a letter dated March 15, 2019, relating to plaintiff's motion for summary judgment. For the reasons that follow, these submissions do not impact this court's limited determination; accordingly, it need not and does not decide whether they are properly before the court.

<sup>2</sup>The DCM Protocol is available online on the Ninth Judicial District's website at <https://www.nycourts.gov/courts/9jd/diffCaseMgmt.shtml>.

Westchester 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]).

Pursuant to the current DCM Protocol, effective January 3, 2017<sup>3</sup>, “any motion for

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<sup>3</sup>The DCM Protocol was revised effective June 30, 2017, to the limited extent of providing a new, separate email for the Compliance Part Motion Clerk and revised again effective February 23, 2018, to the limited extent of providing additional judicial resources for the DCM Parts.

summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue.” The Trial Readiness Order 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.” In addition, the DCM Protocol states in boldface 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.**

Pursuant to the DCM Protocol set forth above, all summary judgment motions were due no later than December 24, 2018, 47 days after plaintiff filed the Note of Issue on November 7, 2018, insofar as December 22, 2018, the 45<sup>th</sup> day after plaintiff filed the Note of Issue, was a Saturday, *see* Gen. Constr Law § 25-a. Here, plaintiffs’ motion for summary judgment was filed on December 20, 2018, and is thus timely filed. In contrast, plaintiff on the counterclaim’s cross-motion was filed on February 7, 2019, 92 days following the filing of the Note of Issue and clearly violates the DCM Protocol.

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]).

Plaintiff on the counterclaim does not acknowledge that his cross-motion is untimely. To be sure, plaintiff on the counterclaim does not address the timeliness of his filing period.

Under these circumstances, plaintiff on the counterclaim’s untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Instead of filing his motion within the applicable period, plaintiff on the counterclaim waited until some 92 days after the Note of Issue was filed and nearly seven weeks after plaintiffs filed a motion before filing his own motion. Again, plaintiff on the counterclaim does not acknowledge that his cross-motion is untimely. Therefore, it is not surprising that he fails to provide any explanation, let alone good cause, for the lengthy 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]). Having missed the deadline, plaintiff on the counterclaim cannot now seek summary judgment at such a late date by simply denominating his 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 at 88).

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 generally 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.

In addition, while 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]), 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. Accordingly, plaintiff on the counterclaim'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 plaintiff on the counterclaim Peter O'Meara's cross-motion is denied in its entirety as untimely; and it is further


ORDERED that plaintiffs, Peter O'Meara and Nickol Camacho's motion for summary judgment and related relief is transferred to an IAS Part for determination; and it is further

ORDERED that plaintiff on the counterclaim, Peter O'Meara shall serve a copy of this Decision and Order, with notice of entry, upon all parties within seven days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

4-10, 2019

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

TO:  
All Parties  
BY NYSCEF

cc: Settlement Part Clerk