

Rodriguez v Wyldwood Owners Assn. Corp.
2019 NY Slip Op 34774(U)
February 4, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68572/2016
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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CESAR RODRIGUEZ,

Plaintiff,

DECISION & ORDER

Index No.: 68572/2016

-against-

WYLDWOOD OWNERS ASSOCIATION CORP.,

Seq. Nos.: 2, 3

Defendant.

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WYLDWOOD OWNERS ASSOCIATION CORP.,

Third-Party Plaintiff,

-against-

HUDSON VALLEY RESTORATION d/b/a T.O.D.
DEVELOPMENT CORP.,

Third-Party Defendant.

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JOAN B. LEFKOWITZ, J.S.C.

The following papers were read on this motion (sequence # 2) by defendant/third-party plaintiff, Wyldwood Owners Association Corp. ("Wyldwood"), for an order pursuant to CPLR 3212 granting summary judgment in favor of Wyldwood against third-party defendant Hudson Valley Restoration d/b/a T.O.D. Development Corp. ("HVR") for HVR's breach of a contractual duty to indemnify; granting Wyldwood judgment against HVR on its breach of contractual obligation to procure insurance together with attorney's fees and all costs and disbursements incurred in the defense herein; for costs and disbursements of this motion; and for such other, further and different relief as this court may deem just and proper as well as this motion (sequence # 3) by third-party defendant HVR for an order granting partial summary judgment and dismissing the defendant/third party plaintiff Wyldwood's claims for common law indemnification and contribution pursuant to CPLR 3212 and WCL § 11 on the grounds that HVR was the employer of plaintiff in the subject action and the plaintiff has not alleged, nor has he sustained a grave injury; and for such other and further relief as this court deems just and proper.

Notice of Motion for Summary Judgment (Seq. # 2) - Affirmation in Support -
Exhibits A - L

Notice of Cross-Motion for Partial Summary Judgment (Seq. #3) - Affirmation in Support and in Opposition to Third-Party Plaintiff's Motion for Summary Judgment - Exhibits A - E
Affirmation in Opposition to Cross Motion and Reply

On or about December 7, 2016, plaintiff commenced this action by the filing of a summons and complaint. Wyldwood interposed an answer on or about January 11, 2017. On or about September 15, 2017, Wyldwood commenced a third-party action against HVR and on or about January 26, 2018, HVR interposed an answer to the third-party complaint. Following multiple compliance conferences, this Court issued a Trial Readiness Order on October 30, 2018, and plaintiff filed a Note of Issue and Certificate of Readiness on November 7, 2018.

Thereafter, on December 21, 2018, defendant/ third-party plaintiff Wyldwood moved for summary judgment against third-party defendant HVR for HVR's breach of a contractual duty to indemnify; granting Wyldwood judgment against HVR on its breach of contractual obligation to procure insurance together with attorney's fees and all costs and disbursements incurred in the defense herein; for costs and disbursements of this motion; and for such other, further and different relief as this court may deem just and proper. On January 10, 2019, HVR filed an affirmation in opposition to Wyldwood's motion along with a cross-motion seeking partial summary judgment and dismissing Wyldwood's claims for common law indemnification and contribution pursuant to CPLR 3212 and WCL § 11 on the grounds that HVR was the employer of plaintiff in the subject action and the plaintiff has not alleged, nor has he sustained a grave injury and for such other and further relief as this court deems just and proper. On January 16, 2019, Wyldwood filed an affirmation in opposition to HVR's cross-motion and in further support of Wyldwood's motion for summary judgment against HVR.¹

Initially, the Court must address the issue of timeliness and proper motion practice. Ten years ago, in 2009, a new Differentiated Case Management (DCM) Protocol² 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 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

¹Plaintiff too filed a motion (sequence # 1) for partial summary judgment on December 20, 2018, which is also currently pending.

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

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, 2017³, “any motion for 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

³The 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.

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, 2017, the 45th day after plaintiff filed the Note of Issue, was a Saturday, *see* Gen. Constr. Law § 25-a. Here, defendant/third-party plaintiff Wylwood's motion for summary judgment was filed on December 21, 2018, and is thus timely filed. In contrast, third-party defendant HVR's cross-motion for partial summary judgment was filed on January 16, 2019, 70 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 [2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2008]; *see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

With regard to proper cross-motion practice, CPLR 2215 states, inter alia, that "[a]t least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers." As explained in *Kershaw v Hospital for Special Surgery* (114 AD3d 75, 87 [1st Dept 2013] [internal quotation marks omitted]), "[a] cross motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion."

Here, third-party defendant HVR's cross-motion is untimely and is a clear example of dilatory tactics which adversely impact the timely disposition of cases. Rather than filing its motion within the 45-day deadline, HVR waited until some 70 days after the Note of Issue was filed and nearly one month after its adversary filed a motion before filing its own motion. HVR also does not acknowledge that its cross-motion is untimely. Therefore, it is not surprising that it 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, third-party defendant HVR cannot now 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 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. Moreover, the late filing of such a cross-motion places Wyldwood in an inequitable and prejudicial position where there is little time to oppose a 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, HVR'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 third-party defendant HVR's cross-motion is denied in its entirety as untimely; and it is further

ORDERED that defendant/third-party plaintiff Wyldwood's motion for summary judgment and related relief is transferred to an IAS Part for determination; and it is further

ORDERED that third-party defendant HVR 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
Feb 4, 2019


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

ALL COUNSEL BY NYSCEF
cc: Settlement Conference Part Clerk
Compliance Motion Clerk