

**Buckstine v Schor**

2019 NY Slip Op 34917(U)

September 20, 2019

Supreme Court, Westchester County

Docket Number: Index No. 57710/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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  
HANNAH BUCKSTINE,

Plaintiff,

-against-

JORDAN SCHOR, JORDAN'S OF NEW PALTZ, L.L.C.,  
L'CORE ENTERPRISE CORP., KEITH CARPENTIER,  
WAYNE BRADFORD, and ROBERT GERMINARA,

Defendants.

-----X  
L'CORE ENTERPRISE CORP.,

Third-Party Plaintiff,

-against-

WAYNE BRADFORD,

Third-Party Defendant.

-----X  
LEFKOWITZ, J.

The following papers were read on the motion by defendant/third-party defendant, Wayne Bradford ("Bradford"), for an order pursuant to CPLR 3212 granting summary judgment, dismissing plaintiff's complaint plus costs and disbursements of this action together with such other and further relief as to the court seems and proper.

Notice of Motion - Affirmation in Support - Exhibits A - U  
Memorandum of Law in Opposition  
NYSCEF Docs

Upon the foregoing papers, the motion is decided as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff

as a result of a fall down stairs at 52 Main Street, New Paltz, NY that occurred on October 25, 2014, when she was a patron at a pizzeria operated by Jordan Schor and Jordan's of New Paltz, L.L.C. ("the Jordan defendants") on premises leased from defendant/third-party plaintiff L'Core Enterprise Corp. ("L'Core").

Plaintiff commenced this action against the Jordan defendants and L'Core with the filing of a summons and complaint on May 31, 2016. An amended complaint was then filed on August 1, 2016, followed by a second amended complaint on December 20, 2016, all against the same three defendants. On October 20, 2017, defendant/third-party plaintiff L'Core filed a third-party summons and complaint against defendant/third-party defendant Bradford to which Bradford filed an answer on February 9, 2018. Pursuant to an Order of this court (Ecker, J.), dated December 14, 2017, plaintiff was given leave to amend her second amended complaint to add Keith Carpentier, Wayne Bradford and Robert Germinara (deceased) as defendants. On December 20, 2017, plaintiff filed the third amended complaint.<sup>1</sup> Defendant L'Core filed its answer to the third amended complaint on January 16, 2018; the Jordan defendants filed their answer on March 8, 2018; and defendant Bradford filed his answer on May 2, 2018. Following numerous compliance conferences, this court entered a Trial Readiness Order on May 31, 2019. Plaintiff filed a Note of Issue and Certificate of Readiness on June 6, 2019.

On July 23, 2019, Bradford moved for an order granting him summary judgment pursuant to CPLR 3212, and dismissing the complaint, plus the costs and disbursements of this action together with such other and further relief as to the court may seem just and proper. Plaintiff filed her memorandum of law in opposition on August 19, 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 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

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<sup>1</sup>On February 9, 2018, Carpentier moved to dismiss plaintiff's third amended complaint as to the allegations against him. In a Decision & Order dated May 3, 2018, this court (Ecker, J.), granted Carpentier's motion to dismiss pursuant to CPLR 3211(a)(7), failure to state a cause of action.

<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>.

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 DCM Protocol Part Rules effective January 3, 2017, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue”<sup>3</sup> The Trial Readiness Order also directs that “[a]ny motion for summary

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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,

judgment by any party must be served via NYSCF within 45 days following the filing of the Note of Issue.” To be sure, while the DCM protocol authorizes limited extensions of return dates on summary judgment motions, it permits no extension of the time for the initial filing of such motions.

Pursuant to the DCM Protocol set forth above, all motions for summary judgment were due in this case no later than July 22, 2019, 46 days after plaintiff filed the Note of Issue on June 6, 2019, insofar as July 21, 2019, the 45<sup>th</sup> day after plaintiff filed the Note of Issue, was a Sunday, *see* Gen. Constr Law § 25-a. Here, defendants’ motion for summary judgment was filed after 4 PM on July 23, 2019, 47 days following the filing of the Note of Issue and clearly violates the DCM Protocol.

Defendant does not acknowledge that his motion is untimely. Indeed, defendant does not address the timeliness of his filing period. Defendant’s affirmation in support and affidavit of service for service by the United States Postal Service are both dated July 22, 2019; however, the Trial Readiness Order unequivocally states 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.) Plaintiff specifically argues that defendant Bradford failed to file timely his motion for summary judgment and has not offered any excuse, let alone “good cause” for his late submission. Notably, Bradford has not submitted a reply to plaintiff’s opposition.

Under these circumstances, defendant’s untimely motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Instead of filing their motion within the applicable period, defendant waited until the 47th day after the Note of Issue was filed before filing his motion. Moreover, as plaintiff argues, defendant fails to proffer any reason, 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]), even in response to plaintiff’s argument that the application is untimely.

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, 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. Again, here, defendant failed to provide *any* reason for his delay in moving for summary judgment, 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]). It therefore follows that defendant’s motion seeking summary judgment must be denied in full.

Accordingly, it is hereby

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to the limited extent of providing additional judicial resources for the DCM Parts.

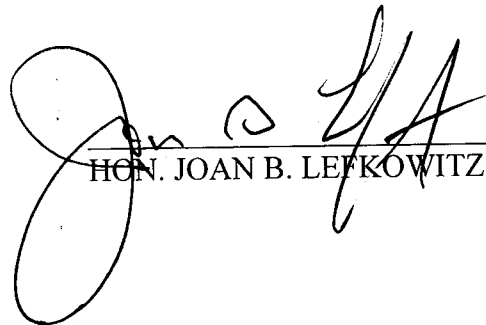
ORDERED that defendant's motion for an order pursuant to CPLR 3212 granting summary judgment, dismissing plaintiff's complaint plus costs and disbursements of this action together with such other and further relief as to the court seems and proper is denied as untimely; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order with Notice of Entry upon all parties within seven (7) days of entry, and shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York

9-20, 2019



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

All parties by NYSCEF

cc: Motion Part Clerk