At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of April, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JEFF JUST LLC,

Plaintiff,

- against -

M&Y DEVELOPERS INC. and GREEN PASTURES LLC,

Defendants,

----------X

M&Y DEVELOPERS INC. and GREEN PASTURES LLC

Third-Party Plaintiffs,

- against -

RYC TURBOS CORP.,

Third-Party Defendants,

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Index No. 523214/2016

DECISION AND ORDER

Motion Sequence # 3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross-Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4

After a review of the papers and oral argument the Court finds as follows:

The instant action is a claim for damage to real property purportedly owned by the Plaintiff, Jeff Just LLC (hereinafter referred to as "the Plaintiff"). The premises is located at 1238 - 1236 Broadway, Brooklyn, New York (hereinafter referred to as the "Premises"). The damage was allegedly caused by construction work at an adjoining property, located at 1003 Greene Avenue, Brooklyn, New York (hereinafter referred to as the "Project Site"). Defendant, Greene Pastures LLC (hereinafter referred to as "GP") purportedly owns the Project Site.

GP allegedly contracted with Defendant M&Y Developers Inc. (hereinafter referred to as the "M&Y") to perform certain construction activities at the Project Site (hereinafter referred

to as the "Project"). Part of the Project included the undertaking of certain excavation, support, shoring and underpinning work at the Project Site. The Plaintiff alleges that the underpinning work caused damage to its Premises.

GP and M&Y commenced a third-party action against the Third-Party Defendant, RYC Turbos Corp. (hereinafter referred to as "RYC"). GP and M&Y (collectively referred to as "the Third-Party Plaintiffs") allege that M&Y contracted with RYC to do the underpinning work and contend that RYC caused any alleged damage to the Plaintiff's Premises.

The Third-Party Plaintiffs now move (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment against RYC and a determination that the Third-Party Plaintiffs are entitled to contractual and common-law indemnification from RYC and declaring thatRYC breached its contract with M&Y by failing to provide contractually mandated insurance coverage to the Third-Party Plaintiffs.

The Third-Party Plaintiffs allege that GP hired M&Y to be the general contractor for the Project. M&Y engaged Cross Concrete, as a subcontractor, to perform the excavation and foundation work for the Project. Cross-Concrete then retained RYC to perform the underpinning work. M&Y contends that M&Y and RYC agreed, by written agreement dated March 1, 2016 (hereinafter referred to as the "Indemnification Agreement"), that RYC would defend, indemnify, and hold M&Y harmless for RYC's work on the Project. M&Y also contends that RYC was to acquire general liability insurance and name the Third-Party Plaintiffs as additional insureds, on a primary and non-contributory basis. RYC purportedly provided the Third Party Plaintiffs with certificate(s) of liability insurance.

The Third-Party Plaintiffs further allege that M&Y's responsibility for the Project was limited to retaining the various trade subcontractors and paying them. The Third-Party Plaintiffs argue that they did not perform any construction work. M&Y represents that its work was limited to scheduling subcontractors to come to the Project Site, managing the subcontractors' schedule, and ensuring the subcontractors perform the work. M&Y represents that it did not approve the subcontractors hired by Cross Concrete. M&Y claims to have had an engineer inspect and monitor movement of adjacent properties during the underpinning work but states that RYC performed the underpinning work. It appears that the parties indicate that it was the underpinning work that allegedly caused the damage to the Premises.

RYC opposes the Third-Party Plaintiffs' application and argues that there are a number of material issues of fact that should cause the Court to deny the Third-Party Plaintiffs' motion. RYC argues that it had no contract with M&Y. RYC contends that it fulfilled its contractual duty by providing the Third-Party Plaintiffs with insurance. RYC argues that the Indemnification Agreement is unenforceable and that even if the Indemnification Agreement is enforceable, the Third-Party Plaintiffs have not established freddom from comparative negligence. Finally, RYC argues that the Third-Party Plaintiff's motion should be disregarded and dismissed as it is untimely.

The Third-Party Plaintiffs reply by arguing that (i) their motion was timely made and should be considered on the merits; (ii) the Indemnification Agreement is valid and enforceable; (iii) there are no material issues of fact in dispute; and (iv) the argument regarding the Third-Party Plaintiffs' comparative negligence is merely speculative and should be disregarded.

A motion for summary judgment must be filed within the proscribed period. If a motion is filed after that time, it must be with the Court's leave, on good cause shown. See CPLR 3212(a). "... good cause in CPLR 3212(a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute – only the movant can *show* good cause – as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" *Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264 [2004] cited by *Gonzalez v. Pearl*, 179 A.D.3d 645, 113 N.Y.S.3d 584 [2nd Dept 2020] and *Wells Fargo Bank, NA v. Apt*, 179 A.D.3d 1145, 118 N.Y.S.3d 155 [2nd Dept 2020].

A prior court order provided that, "[a]ll parties time to make motions for summary judgment and/or dispositive motions shall be extended to May 12, 2019" (see Exhibit I, Third-Party Plaintiffs' Affirmation in Support of Notice of Motion, Order dated January 24, 2019, the Honorable Lizette Colon) (hereinafter referred to as "Judge Colon's Order"). The Third-Party Plaintiffs filed this motion *via* the e-filing platform on May 13, 2019. RYC argues that this motion is untimely and should be denied for being filed in violation of Judge Colon's order and without leave on good cause. The Third-Party Plaintiffs challenge RYC's position and seek to

rely on the New York General Construction Law §25-a. They contend that the filing is timely because Judge Colon's Order provided an outside date of May 12, 2019, which fell on a Sunday. The movants argue that they had until the next business day, Monday 13th, 2019 to file their motion. NY GEN CONSTR §25-a provides that:

> **When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next business day, except that where a period of time specified by contract ends on a Saturday, Sunday or public holiday such period is governed by section twenty-five of this chapter.**

The Third-Party Plaintiffs' reliance upon this provision is misplaced. The statute does not apply in this instance. Judge Colon's Order (made on consent at a conference that the parties attended) was clear that motions for summary judgment must be made on or before May 12, 2019. No computation was necessary to determine the deadline.

In addition the parties agreed to proceed by Electronic Filing and are governed by the rules of that program. N.Y.R.R. 202.5-b (d) (3) states that, "[a] document may be transmitted at any time of day or night to the NYSCEF site. A document other than an order or judgment is filed when its electronic transmission or, in the case of a petition that is e-filed by submission of a text file as provided in subdivision (b)(1) of this section, the electronic transmission of the text file is recorded at that site." N.Y.R.R. 202.5-b (f) (2) (ii) states, "[a]n e-filing party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically." Consequently, the Third-Party Plaintiffs cannot argue that they could not file their motion on May 12, 2019. The movants electronically filed the instant motion. They were aware, when Judge Colon's Order was made, that the deadline imposed was on a Sunday. They could have filed the motion on that day, or any other day between the date of the order and the deadline.

The Third-Party Plaintiffs could also have provided the Court with a showing of good cause for the late filing of this motion, in order for the Court to consider same. No explanation was forthcoming. The Third-Party Plaintiffs consider argue that RYC's argument is "petty and meritless." However, the law is clear as it relates to the late filing of motions for summary judgment – "[i]n the absence of a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment." *John P. Krupski & Bros. v. Town Bd. of Town of Southold*, 54 A.D.3d 899, 901, 864 N.Y.S.2d 149, 150 [2nd Dept 2008] and quoted by *Bricenio v. Perez*, 178 A.D.3d 1002, 115 N.Y.S.3d 406 (2nd Dept 2019). Good cause may not be established by a perfunctory excuse or no excuse at all (see *Brill* and *Varela v. Rohlf*, 176 A.D.3d 651, 112 N.Y.S.3d 43 [1st Dept 2019]). It is also immaterial that the delay is a relatively short period. A one day delay is sufficient to defeat the motion. *Derby v. Bitan*, 89 A.D.3d 891, 932 N.Y.S.2d 718 [2nd Dept, 2011]. Therefore, the Third-Party Plaintiff's motion is denied.

It is hereby Ordered that:

The Third-Party Plaintiffs' motion (motion sequence #3) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C