

Sassoon v CDX Diagnostics, Inc.

2020 NY Slip Op 33913(U)

November 25, 2020

Supreme Court, New York County

Docket Number: 653111/2017

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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IAN SASSOON,

Plaintiff,

- v -

CDX DIAGNOSTICS, INC., MARK RUTENBERG, GALEN
MANAGEMENT L.L.C., GALEN SPV MANAGEMENT LLC

Defendants.

INDEX NO. 653111/2017

MOTION DATE 11/23/2020

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is

ORDERED that the summary judgment motion filed by Defendants Galen Management LLC and Galen SPV Management LLC (together, “Galen”) is denied as untimely (CPLR 3212 [a] [“Any party may move for summary judgment . . . provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue.”]).

This Court ordered, repeatedly, that “[a]ll dispositive motion(s) shall be made within 30 days after the filing of the Note of Issue” (NYSCEF 71 [Preliminary Conference Order]; *see* NYSCEF 105 [“All dispositive motion(s) shall be made within 30 days after the Note of Issue is filed.”] [Compliance Conference Order]; NYSCEF 180 [Status Conference Order] [“Any motions for summary judgment shall be filed on or before September 15, 2019,” *i.e.*, 30 days after Note of Issue deadline therein]). Plaintiff filed the Note of Issue on February 10, 2020 (NYSCEF 238). Galen filed the instant motion on November 5, 2020, nearly eight months after

the 30-day deadline. Therefore, the motion is untimely and will not be considered by the Court (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-27 [2004] [“[C]ourt-ordered time frames . . . are not options, they are requirements, to be taken seriously by the parties.”]).

Galen insists that its motion was filed “well within” the applicable time limit, which Galen calculates as 120 days from Note of Issue and tolled by Executive Order 202.8 (NYSCEF 250). But the 120-day deadline – the default deadline for filing summary judgment motions supplied by CPLR 3212 [a] – was not in place here. While the Court did extend the Note of Issue deadline, the Court did *not* extend the 30-day deadline for filing dispositive motions once the Note of Issue was filed. As noted, the Note of Issue was filed on February 10, 2020. As such, Galen’s motion was already untimely when Executive Order 202.8 went into effect on March 20, 2020.¹

Moreover, Galen fails to show “good cause” to excuse its untimely filing. In this context, “‘good cause’ . . . 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” (*Brill v City of New York*, 2 NY3d 648, 652 [2004])

¹ Galen observes that “a new date for summary judgment motions was never set” (NYSCEF 250). True, and that is no accident. After Note of Issue was filed, Defendants represented to the Court (and to Plaintiff) that they did not expect to file a dispositive motion (NYSCEF 252 at 3:13-15 [Feb. 25, 2020 Tr.]). Based on that representation – along with Plaintiff’s representation that it, too, would not file a dispositive motion – the Court proceeded to set the matter for trial, rather than set a new briefing schedule (*see id.* at 3:7-15 [THE COURT: “Are there any barriers to setting a trial date or do the parties expect to file dispositive motions?”] . . . MR. SPANO: “Your Honor, not a dispositive motion but defendants are planning to make a motion to preclude the testimony of the plaintiff’s expert.”]). Now Galen, armed with new counsel, tries to walk back those statements, urging that its untimely, unexpected motion represents “change[d] strategies” and “a fresh perspective” (NYSCEF 254). While Galen is certainly entitled to the “fresh perspective” of new counsel, it must abide by the time limits and schedule previously set by the Court and agreed to by the parties.

[declining to consider merits of untimely summary judgment motion]). To justify its eight-month delay, Galen invokes the “state of emergency in New York” declared in early March, arguing that it could not have filed a summary judgment motion “in the midst of this unfolding crises [sic]” (NYSCEF 250). That argument presumes that Galen expected to file a summary judgment motion but simply needed more time, which runs counter to Defendants’ statements to the Court in the weeks preceding the dislocations resulting from the pandemic (*see* n.1, *supra*).

Had Galen requested a reasonable extension of the summary judgment deadline prior to the expiration of the 30-day period for submitting its motion, the Court would have considered such request. Indeed, the Court fielded and granted many such requests in other cases around that time. And given the circumstances, the Court likely would have considered such a request even if it had been made shortly *after* the 30-day period. Instead, Galen stayed silent.

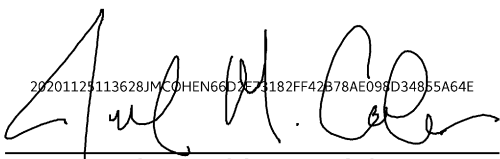
In the intervening months, after a brief period when certain Court operations were temporarily suspended, the Court was open for business. This Part (and many others) fielded and decided *waves* of motions, received a steady stream of email requests, and held numerous conferences and oral arguments by Skype. Still, nothing from Galen. Even in September, when the parties submitted a stipulation regarding “trial and related dates,” there was no mention of dispositive motion practice (NYSCEF 242).² At this stage, permitting Galen to file its belated motion would unduly prejudice Plaintiff.

² One would expect the September stipulation to address Galen’s nascent motion because, under Galen’s theory of applicable deadlines, summary-judgment motion practice was on a collision course with the dates for pre-trial submissions. According to Galen, the Executive Order tolled its time to respond 39 days into the 120-day filing period (NYSCEF 250 at 2). When tolling expired on November 4, therefore, Galen would have had another 81 days to file its summary judgment motion, around the same time pre-trial motions in limine were due (*see* NYSCEF 242 [“All motions in limine . . . shall be brought by Order to Show Cause, which shall be e-filed by January 19, 2021.”]). When the September stipulation was submitted, the parties would not have

Galen’s other argument for good cause – that the untimely motion “is clearly meritorious” – is irrelevant (*Brill*, 2 NY3d at 652).

Accordingly, Galen’s motion for summary judgment is denied. This constitutes the decision and order of the Court.

11/25/2020
DATE


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JOEL M. COHEN, J.S.C.

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| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
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known when tolling would expire, making it even more important to budget time for a summary judgment motion, if that is what Galen intended to do.