

Passalacqua v AVR Realty Co., LLC
2020 NY Slip Op 34683(U)
April 21, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53984/2018
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

-----X
ANTHONY PASSALACQUA and
VIRGINIA PASSALACQUA,

Plaintiffs,

DECISION & ORDER

Index No.: 53984/2018

-against-

Seq. Nos. 4 & 5

AVR REALTY COMPANY, LLC, SOLAL REALTY LIMITED PARTNERSHIP, SCHIMENTI CONSTRUCTION COMPANY, LLC, DICK'S SPORTING GOODS, INC. and BRANSTETTER CONSTRUCTION, INC.,

Defendants.

-----X
SOLAL REALTY LIMITED PARTNERSHIP and
SCHIMENTI CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against

DAME CONTRACTING, INC.,

Third-Party Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on the motion by defendant (sequence no.4), Dick's Sporting Goods, Inc., for summary judgment and dismissing plaintiff's complaint in its entirety, together with such other and further relief as this Court may deem just and proper:

- Notice of Motion - Affirmation in Support- Exhibits A - J
(NYSCEF Docs#186-198)
- Affirmation in Partial Opposition (NYSCEF Doc#234)
- Affirmation (NYSCEF Doc#240)

The following papers were read on the cross-motion by plaintiffs (sequence no.5) for an order pursuant to CPLR §3212 seeking partial summary judgment on the issue of liability as against the defendants, Solal Realty Limited Partnership, Schimenti Construction and Dick's Sporting Goods, Inc., and seeking denial of the motions for summary judgement on behalf of the defendants Solar Realty Limited Partnership, Schimenti Construction Company, LLC., Dick's

Sporting Goods, Inc., and Branstetter Construction, Inc, and for such other and further relief as this Court deems just, proper and equitable.

Notice of Cross-Motion - Affirmation in Opposition to Defendants' Motions and in Support of Cross-Motion - Amended Affirmation Exhibits 1 - 25 (NYSCEF Doc#202-231)
Affirmation in Opposition - Exhibit 1-2 (NYSCEF Docs#237-239)
Affirmation in Opposition (NYSCEF Doc#248)
Affirmation in Further Support of Cross-Motion (NYSCEF Doc#249)

Upon the foregoing papers, these motions are determined as follows:

In this labor law action, plaintiffs seek to recover for damage allegedly sustained by plaintiff, Anthony Passalacqua, when he fell while performing renovation work at a strip mall. Plaintiff asserts Labor Law §§ 240(1), 241-a, 241(6) and 200 claims, as well as a common-law negligence claim.

As relevant here, a trial readiness stipulation and order was entered on October 2, 2019, which provided that any motion for summary judgment must be served within 45 days of the filing of the Note of Issue. Plaintiff filed the Note of Issue on October 7, 2019. On November 20, 2019, third-party defendant Dame Contracting, Inc. ("Dame") filed a motion for summary judgment to dismiss the third-party complaint. On November 21, 2019, defendant, Branstetter Construction ("Branstetter"), moved for summary judgment in its favor. Similarly, on November 21, 2019, Solal Realty Limited Partnership ("Solal") and Schimenti Construction Company, LLC ("Schimenti") move for summary judgment in their favor.

By stipulation filed on December 13, 2019, the parties stipulated to adjourn the return dates of these three motions to February 5, 2020. On December 18, 2019, the stipulation was so-ordered. The so-ordered stipulation contained the following warning: "The parties are cautioned that any requests for further adjournments shall comply with DCM Protocol Part Rules, which are available at <http://www.nycourts.gov/courts/9jd/diffCaseMgmt.sht>." On December 20, 2019, Dick's moved for summary judgment (motion sequence no.4). On January 14, 2020, plaintiffs filed a cross-motion. return dates of these motion were adjourned by stipulation of parties. Both motions are untimely.

In 2009, a new Differentiated Case Management (DCM) Protocol 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 Supreme Court civil cases pursuant to the DCM protocol. The DCM Protocol¹ provides that “any motion or cross-motion for summary judgment by any party must be served within forty-five (45) days following the filing of the Note of Issue[.]” and that “[i]n no event shall an adjournment be granted after the time to move or submit opposition or reply papers has expired.”

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 manner to all that 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.”

¹The DCM Protocol is available online on the Ninth Judicial District’s website at <https://www.nycourts.gov/courts/9jd/diffCaseMgmt.shtml>.

(*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 [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]).

Here, the motion by Dick’s was untimely. Not a single excuse is proffered for the delay in the filing of the motion for summary judgment so as to exempt defendant Dick’s from the firmly rooted rule that all motions for summary judgment must be served within 45 days of the filing of the Note of Issue. Similarly, plaintiffs’ cross-motion is untimely. In the motion papers in support, plaintiffs failed to demonstrate, much less allege, any excuse for their delay. Defendants Solal and Schimenti correctly note that plaintiffs’ cross-motion is untimely, having been filed fifty-four (54) days after the deadline. Further, plaintiffs’ attempt to excuse their lateness, addressed for the first time in reply, is unavailing. For example, plaintiffs claim that since the Court so-ordered a stipulation adjourning the motions of defendants, a cross-motion was permissible. Notably, the stipulation so-ordered by the Court contained no provision for the filing of a cross-motion. Moreover, the stipulation referred the parties to the DCM Protocol which provides in bold-face 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” (DCM Rule II.D [emphasis in original]).

Based on the Part Rules set forth above, *all* summary judgment motions were due within 45 days of the filing of the Note of Issue. Here Dick’s motion and plaintiffs’ cross-motion for summary judgment were untimely.

The late motion and cross-motion are clear examples of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing the applications within the applicable period, Dick’s and plaintiffs waited until after other parties filed motions before filing their own motion. They did not file his motion by the deadline set forth in the trial readiness order, which provided that “[**any** 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]). They also failed to provide 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]).

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. 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.”

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]). However, regardless of whether the grounds are identical, 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 would reward non-compliance with court deadlines, without good cause. Therefore, plaintiffs’ cross-motion must be denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]). To the extent that Dick’s untimely motion and plaintiffs’ untimely cross-motion contain arguments in opposition to the timely motions made, such may be considered by the Court.

It must be noted that these untimely motions were fully submitted for decision prior to the suspension of deadlines due to the COVID-19 health emergency.

In view of the foregoing, it is hereby

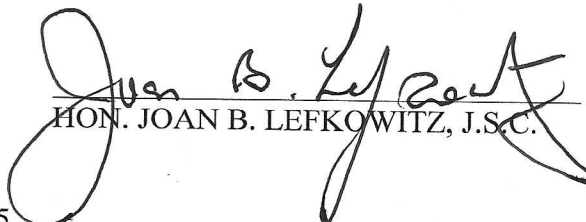
ORDERED that the motion (sequence no.4) by defendant, Dick’s Sporting Goods, Inc. is denied as untimely; and it is further,

ORDERED that plaintiffs’ cross-motion for summary judgment is denied as untimely; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order, with notice of entry, upon all defendants within ten days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 21, 2020


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

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To:

All Counsel by NYSCEF:

Grey and Grey
Attorneys for Plaintiffs
ANTHONY PASSALACQUA and
VIRGINIA PASSALACQUA
360 Main Street
Farmingdale, New York 11735

Mcgivney, Kluger & Cook, P.C.
Attorneys for Defendant
DICK'S SPORTING GOODS, INC.
80 Broad Street, 23rd Floor
New York, New York 10004

Fabiani Cohen & Hall, LLP
Attorneys for Defendants/Third Party Plaintiffs
SOLAL REALTY LIMITED PARTNERSHIP and
SCHIMENTI CONSTRUCTION COMPANY, LLC
570 Lexington Avenue, 4th Floor
New York, New York 10022

Black, Marijeh & Sanford, LLP
Attorneys for Defendant
BRANSTETTER CONSTRUCTION
100 Clearbrook Road, Suite 345
Elmsford, New York

Ahmuty, Demers & McManus
Attorneys for Third Party Defendant
DAME CONTRACTING, INC.
1541 Route 82
Hopewell Junction, New York 12533

cc: Compliance Motion Clerk