

Attwood v County of Westchester
2020 NY Slip Op 34801(U)
April 23, 2020
Supreme Court, Westchester County
Docket Number: Index No. 67642/2018
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
DAWN ATTWOOD,

Plaintiff,

DECISION & ORDER

Index No. 67642/2018

-against-

Seq. Nos. 5, 7 & 8

THE COUNTY OF WESTCHESTER, CITY OF
NEW ROCHELLE and RAYMOND JAMES,

Defendants.

-----X
JOAN B. LEFKOWITZ, J.S.C.

The following papers were read on this motion by defendant CITY OF NEW ROCHELLE (Sequence No. 5) for an order pursuant to CPLR 3212 granting it summary judgment:

Notice of Motion; Affirmation in Support; Exhibits A-I; Memorandum of Law in Support;
Affirmation in Opposition (D. Owens); Affidavit of Service
Affirmation in Reply (Powers); Exhibits J-M
Court File (NYSCEF Doc. Nos. 76-87; 102-103; 126-130)

The following papers were read on this cross-motion by defendants Raymond Jones i/s/h/a Raymond James (Sequence No. 7) for an order pursuant to CPLR 3212 granting him summary judgment:

Notice of Cross-Motion; Affirmation in Support; Exhibits A-H
Affirmation in Opposition (Owen); Affidavit of Service
Affirmation in Opposition (Powers)
Court File (NYSCEF Doc. Nos. 106-115; 123-124; 132)

The following papers were read on this motion by plaintiff (Sequence No. 8) for an order pursuant to CPLR 3212 granting her summary judgment:

Notice of Cross-Motion; Affirmation in Support; Exhibits A-C; Affidavits of Service
Affirmation in Opposition (Greisman)
Affirmation in Opposition (Powers)
Court File (NYSCEF Doc. Nos. 116-122; 125, 133)

This is an action for personal injuries allegedly stemming from a trip and fall on premises located in New Rochelle on July 23, 2017. Plaintiff commenced the action by filing a summons and

verified complaint on October 19, 2018. On December 11, 2018, defendant Raymond Jones i/s/h/a Raymond James (“defendant Jones”) filed his answer with cross-claim. On March 22, 2019, defendant Jones filed a subsequent answer with affirmative defenses and cross-claim. On May 8, 2019 defendant City of New Rochelle filed its answer to the complaint with affirmative defenses and cross-claim.

After a preliminary conference and several compliance conferences, a trial readiness referee report dated December 19, 2019 was so-ordered (Lefkowitz, J.) on December 20, 2019 (NYSCEF Doc. No. 56). Plaintiff filed a note of issue on January 2, 2020 (NYSCEF Doc. No. 57). On February 6, 2020, defendant City of New Rochelle filed a Notice of Motion seeking summary judgment (Seq. No. 5). On February 17, 2020, defendant Raymond Jones i/s/h/a Raymond James filed a Notice of Cross-Motion seeking summary judgment (Seq. No. 7). Plaintiff subsequently filed a Notice of Cross-Motion seeking summary judgment on February 19, 2020 (Seq. No. 8).

Prior to addressing the merits of the parties’ arguments, the court must address the issue of timeliness. 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 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 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 current DCM Protocol Part Rules with respect to post-note of issue summary judgment motions, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue” (DCM Rule II.D, available at https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol_June30_17.pdf). The trial readiness order contains similar language (NYSCEF Doc. No. 31). In addition, the Part Rules state 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]).

While the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it invites no extension of the time for making such motions.

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, the motion of defendant City of New Rochelle (Seq. #5) was filed on February 6, 2020, 35 days after plaintiff filed the note of issue on January 2, 2020. Accordingly, the initiatory papers of defendant City of New Rochelle are timely. Additionally, the cross-motion of defendant Raymond Jones i/s/h/a Raymond James (Seq. #7) was filed on February 17, 2020 and is timely. Although it was filed 46 days after the note of issue, the 45th day fell on Sunday and the 46th day fell on President’s Day, which is a federal holiday. By contrast, plaintiff’s cross-motion for summary judgment (Seq. #8) filed on February 19, 2020—48 days after the note of

issue was filed – is untimely.

The cross-motion of plaintiff is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing her cross-motion within the applicable period, plaintiff waited until after her adversaries filed a motion before filing her own motion. However, plaintiff did not file her motion by the deadline set forth in the trial readiness order, which provided 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” (NYSCEF Doc. No. 31 [emphasis added]). Plaintiff 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 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, the cross-motion brought by plaintiff is denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]). To the extent that plaintiff’s cross-motion contains opposition to the timely motion of defendant City of New Rochelle and/or the cross-motion of defendant Jones, the opposition contained therein may be considered by the IAS Part in determining the timely motion and cross-motion.

In view of the foregoing, it is hereby

ORDERED that plaintiff’s cross-motion for summary judgment (Sequence No. 8) is denied as untimely; and it is further,

ORDERED that the motion of defendant City of New Rochelle (Sequence No. 5) seeking summary judgment is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that the cross-motion of defendant Raymond Jones i/s/h/a Raymond James (Sequence No. 7) seeking summary judgment is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that to the extent that the papers submitted with plaintiff's untimely cross-motion contains opposition to the timely motion or cross-motion of defendants, those portions may be considered by the IAS Part in determining the timely motion and cross-motion by defendants; and it is further

ORDERED that defendant City of New Rochelle shall serve a copy of this Decision and Order, with notice of entry, upon all parties within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 23, 2020

**Joan B.
Lefkowitz**

Digitally signed by Joan B. Lefkowitz
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Hon. Joan B. Lefkowitz, J.S.C.

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