

Caverly v A.O. Smith Water Prods. Co.
2020 NY Slip Op 34879(U)
October 27, 2020
Supreme Court, Westchester County
Docket Number: Index No. 63465/2018
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
JOHN CAVERLY and SANDRA CAVERLY,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 63465/2018
Motion Seq. No. 16

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on the motion by defendant Watts Regulator Company (“movant” or “Watts Regulator”), pursuant to CPLR 3212, for an order granting it summary judgment.

- Notice of Motion-- Affirmation in Support --
- Exhibits A through E
- Plaintiff’s Affirmation in Opposition –
- Exhibits 1 through 6
- Reply Affirmation
- NYSCEF File

On or about Aug. 28, 2018, plaintiffs commenced this action against defendants seeking to recover damages for lung cancer allegedly sustained by plaintiff John Caverly resulting from his exposure to asbestos-containing products from 1961 through 2009. By amended complaint, dated December 16, 2019, plaintiffs asserted claims against Watts Regulator. Watts Regulator served and filed its answer on or about January 7, 2020.

Following the completion of discovery, the Supreme Court (Lefkowitz, J.), entered a Trial Readiness Order on July 18, 2019. Pursuant to the Trial Readiness Order, “[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; opposition papers must be served via NYSCEF within 30 days of service of motion papers; and reply papers, if any, must be served via NYSCEF within 10 days following service of any opposition papers.” Plaintiffs filed their Note of Issue on July 19, 2019.

On July 30, 2020, more than 377 days after plaintiffs filed their Note of Issue, Watts Regulator moved for summary judgment.

Prior to addressing the merits of the parties' arguments, the court must address the issue of timeliness and proper motion practice. 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 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” (*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 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 entered on July 18, 2019, also directs 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). The DCM Protocol further provided in bold type as follows:

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.

While the DCM Protocol Part Rules authorize 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 and the Trial Readiness Order, all summary judgment motions were due within 45 days of the filing of the note of issue. Notably, while filing deadlines were extended by Administrative Orders issued by the Chief Administrative Judge as a result of the COVID-19 pandemic, here, the Trial Readiness Order and Note of Issue were both entered long before the crisis emerged. Watts Regulator’s motion was filed on July 30, 2020, 377 days after plaintiffs filed their note of issue on July 19, 2019. Therefore, the motion is untimely.

Watts Regulator’s untimely motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Watts Regulator’s motion was not only untimely, it also failed to demonstrate 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]). In fact, Watts Regulator did not address the untimeliness of its motion at all nor did it seek leave from this Court to file a late motion. While movant did not serve its answer to the amended complaint until January 7, 2020, no explanation is offered by Watts Regulator as to why it waited

until July 30, 2020, 205 days later, to file its motion. Further, Watts Regulator's parent company, Watts Water Technologies, Inc., was a defendant in this action and has actively participated in this litigation from its inception and throughout discovery. In fact, both entities, movant Watts Regulator and its parent company, Watts Water, are represented by the same counsel. Accordingly, the procedural posture of this action was known to movant's counsel at the time its answer was served.

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.

In view of the foregoing, it is hereby

ORDERED that the defendant Watts Regulator Company's motion is denied as untimely; and it is further

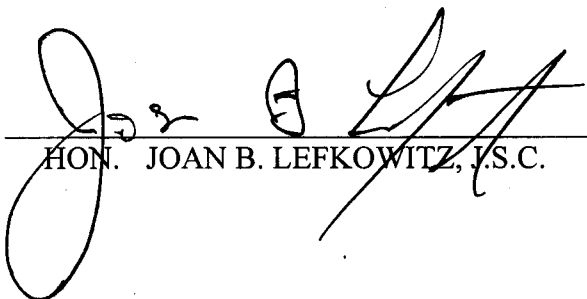
ORDERED that the defendant Watts Regulator Company shall serve a copy of this Decision and Order, with notice of entry, upon all parties within five days of entry; and it is further

ORDERED that the matter is referred to the Settlement Conference Part. Due to the COVID-19 health emergency, the Clerk of the Settlement Part shall notify the parties of the date, time, and method of the settlement conference.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

October 21, 2020


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

TO: All counsel by NYSCEF

cc: Compliance Part Motion Clerk
Settlement Conference Part Clerk