

Milea v Shorefront Operating LLC
2021 NY Slip Op 30645(U)
March 3, 2021
Supreme Court, Kings County
Docket Number: 514372/17
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of March, 2021.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,

Justice.

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FRANCIS MILEA, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF ELIZABETH
MILEA, DECEDENT,

Plaintiff,

- against -

Index No. 514372/17

SHOREFRONT OPERATING LLC D/B/A SEAGATE
REHABILITATION AND HEALTHCARE CENTER,
METROPOLITAN JEWISH HEALTH SYSTEM,
INC., MJHS HOSPICE AND PALLIATIVE CARE, INC.,
AND JACOB PERLOW HOSPICE CORPORATION,

MOT. SEQ. 7-8

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

169-194, 195-231

Opposing Affidavits (Affirmations) _____

235-247, 248-261

Reply Affidavits (Affirmations) _____

262-264

Upon the foregoing papers, defendant Shorefront Operating LLC d/b/a Seagate Rehabilitation and Healthcare Center (Seagate) moves (in motion seq. no. 7) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff

Francis Milea, individually and as Administrator of the Estate of Elizabeth Milea (Mrs. Milea). Defendants Metropolitan Jewish Health System, Inc., MJHS Hospice and Palliative Care, Inc., and Jacob Perlow Hospice Corporation (collectively the MJHS defendants) move (in motion seq. no. 8), pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

Background and Procedural History

In July 2013, Mrs. Milea suffered a stroke that rendered her completely immobile, incontinent of bladder and bowel, and requiring tube feeding and maximum assistance with all activities of daily living. She had been a patient in several different nursing home facilities following her stroke. In or about early April 2014, Mrs. Milea was admitted to Virtua/West Jersey Hospital, where she was treated for a urinary tract infection as well as three pressure ulcers: 1) Stage II pressure ulcer on right back; 2) Stage III posterior buttock pressure ulcer; and 3) Stage II posterior buttock pressure. Mrs. Milea, who was then 83 years old, was admitted to Seagate on April 16, 2014. She presented to Seagate with a primary diagnosis of altered mental state and a number of secondary diagnoses, including rhabdomyolysis, urinary tract infection, cerebrovascular disease, atrial fibrillation, diabetes mellitus and others. Mrs. Milea was non-verbal and required total care with activities of daily living, including a two person assist for transfers. During her time at Seagate, various medications and measures were employed to treat her skin ulcers. She started receiving hospice care through the MJHS defendants soon after her admission as she was

assessed to be terminally ill with a life expectancy of six months or less. Mrs. Milea, however, survived for approximately 15 months.

In December 2014, Mrs. Milea was noted to have discoloration on her face with slight swelling. She was taken to Coney Island Hospital at this time and treated for a urinary tract infection and hyperglycemia. Upon her return to Seagate, it was noted that the size of her sacral pressure ulcer had increased. On June 13, 2015, swelling of Mrs. Milea's left forearm and shoulder with no discoloration, and a limitation of movement was noted. An x-ray was conducted at Seagate, which revealed the presence of osteoporosis and a "displaced left surgical neck fracture humerus." She was thereafter taken to Maimonides Medical Center (Maimonides) where she was treated by an orthopedist who diagnosed a proximal humerus fracture. The orthopedist put her arm in a sling and recommended no weight bearing activity. Mrs. Milea continued to suffer from ulcer pressure wounds and on July 17, 2015, the records reveal that she also developed a new abrasion over the right temporal side of her scalp, which developed into cellulitis. On August 4, 2015, Mrs. Milea was taken to the Emergency Department at Maimonides due to her elevated blood sugar levels. On August 5, 2015, she was experiencing tachycardia, as her heart rate was in the 160 beats per minute range and she was also hyperglycemic, with a blood sugar of 460. Mrs. Milea died of a heart attack the following day on August 6, 2015.

This action was commenced by filing of a summons and verified complaint on or about July 25, 2017. Issue was joined on behalf of Seagate by way of a verified answer

filed on August 24, 2017, and on behalf of the MJHS defendants on September 5, 2017. An amended summons and verified complaint was filed on February 6, 2018, asserting the following ten causes of action: 1) wrongful death; 2) conscious pain and suffering; 3) negligent hiring/supervision; 4) respondeat superior/vicarious liability; 5) res ipsa loquitur; 6) patient abandonment; 7) negligent infliction of emotional distress on behalf of Mrs. Milea; 8) negligent infliction of emotional distress on behalf of plaintiff; 9) violation of Public Health Law § 2803-c (e); and 10) violation of Public Health Law § 2801-d. The MJHS defendants filed a verified answer in response to these allegations on or about February 8, 2018, and Seagate filed its verified answer on March 12, 2018.

On February 5, 2018, a preliminary conference was held and a discovery schedule was set. The case was put on the complex track for the purposes of standards and goals and the filing date for the note of issue was set at December 27, 2018. On July 19, 2018, a compliance conference was held in the Central Compliance Part (CCP) and the discovery schedule was amended and the time to file note of issue was extended to January 28, 2019. Thereafter, plaintiff moved (in motion seq. no. 3) for leave to extend the time to file the note of issue. This motion was resolved in a February 13, 2019 CCP order that extended the time to file note of issue to April 25, 2019. The parties appeared in the Final Conference Part (FCP) on April 9, 2019, and the time to file was again extended to September 23, 2019. The parties thereafter appeared in the FCP on August 13, 2019, and the time to file note of issue was further extended to November 22, 2019, to ensure that all party depositions were completed prior to its filing.

During the course of the litigation, bills of particulars and amended bills of particulars and authorizations were exchanged. Plaintiff was deposed on February 26, 2019, May 10, 2019, and September 10, 2019. Plaintiff's counsel waived the depositions of all defendants via an email sent on October 3, 2019. Non-party witness Barbara Farro was deposed on January 21, 2020. Plaintiff filed note of issue on November 22, 2019, which was rejected by the Court. Plaintiff then made the requested corrections and re-filed his note of issue on November 25, 2019, which was again rejected for untimeliness, as it was past the November 22, 2019 court ordered filing deadline. However, plaintiff's note of issue was accepted and filed on December 2, 2019. On or about February 4, 2020, MJHS moved, by way of an Order to Show Cause, seeking an order extending its time to move for summary judgment until 120 days following the completion of all discovery.

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order 202, which declared a disaster emergency in New York State due to the COVID-19 pandemic and temporarily suspended and/or modified certain laws of the State of New York. This included suspending the filing of all motions except those deemed essential until April 19, 2020. Further Executive Orders were issued that continued to extend the suspension, including on July 6, 2020, an Executive Order extending the filing of motions to August 5, 2020.

On July 16, 2020, Seagate moved (in motion seq. no. 5), and on August 5, 2020, MJHS cross-moved (in motion seq. no. 6) for an order pursuant to CPLR 3212 (a), seeking an extension of time to move for summary judgment until 30 days after the expiration of

the current tolling order in effect, pursuant to New York State Executive Order 202.48, which would have extended the time to file until September 4, 2020. Hon. Lawrence Knipel, in an August 12, 2020 CCP Order, denied the motion and cross motion. The denial was without prejudice to reassert before this Court the argument raised in the motions that Executive Orders relating to the Coronavirus crisis (as well as any other relevant factors) constitute “good cause” for the belated summary judgment motions, pursuant to CPLR 3212 (f). The record also reveals that the attorneys of record for all the parties entered into a stipulation, dated August 7, 2020, which provided that “the deadline to move for summary judgment is now enlarged to September 4, 2020 due to the evolving circumstances surrounding COVID-19 and the difficulties of meeting with front line health care professionals and obtaining necessary affirmations.”

Seagate filed the instant summary judgment motion on August 28, 2020, and MJHS filed its summary judgment motion on September 4, 2020.

Discussion

At the outset, the court finds that the summary judgment motions by both Seagate and the MJHS defendants are untimely.¹ In this regard, Seagate acknowledges that plaintiff filed note of issue on December 2, 2019, but maintains that discovery was not yet complete at that time as the deposition of non-party witness and plaintiff’s sister, Barbara Farro, was not taken until January 21, 2020. In addition, Seagate contends that due to an

¹ The MJHS defendants also assert that their summary judgment motion is timely.

error in New York State Court's Electronic Filing System (NYSCEF), the note of issue was entered as filed on January 29, 2019. Seagate contends that it was unclear which date note of issue was filed and by which date summary judgement motions were required to be made, thus the MJHS defendants sought clarification from the court. Specifically, the MJHS defendants moved, by way of an order to show cause, dated January 10, 2020, seeking clarification and an extension for time to move for summary judgment until 120 days from the completion of all discovery. Seagate submitted an affirmation in support of this request. Both the MJHS defendants and Seagate argued that good cause existed to grant the extension of time since Ms. Farro had not yet been deposed and plaintiff had testified that she was the person in charge of making decisions related to Mrs. Milea's care. The court notes that the parties appear to be under the mistaken belief that they initially had until April 1, 2020 to move for summary judgment. In this regard, in the order to show cause, the MJHS defendants note that:

[a] review of her Honor's Court rules does not address a time frame for submittal of summary judgement motions. Therefore, based on CPLR 3126 which allows 120 days for summary judgment from the date of the filing of the Note of Issue and the Court's acknowledgment that the Note of Issue was received December 2, 2019, the Summary Judgment motion was to be filed by April 1, 2020.

Seagate further notes that this motion had not yet been heard at the time the COVID-19 pandemic hit, which resulted in Governor Cuomo issuing several Executive Orders, which extended the time to make motions in all non essential matters, including summary

judgment motions. Seagate points to Executive Order 202.55, which continued the tolling period for summary judgment motions to September 4, 2020. Finally, Seagate points to the fact that the parties also agreed, by stipulation, to extend the time to move for summary judgment until September 4, 2020, due to the evolving circumstances surrounding COVID-19. Thus, the parties now contend that the instant motions are timely inasmuch as they received the benefit of the extension of time provided under the Governor's Executive Orders.

Pursuant to CPLR 3212 (a), courts have "considerable discretion to fix a deadline for filing summary judgment motions," so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]; see CPLR 3212 [a]; *Lanza v M-A-C Home Design & Constr. Corp.*, 188 AD3d 855, 856 [2d Dept 2020]; *Gonzalez v Pearl*, 179 AD3d 645, 645-646 [2d Dept 2020]). To that end, Part C of Rule 6 of the Kings County Supreme Court Uniform Civil Term Rules, which relates to post note of issue summary judgment motions, provides as follows:

In cases where the City of New York is a defendant and is represented by the Tort Division of the Corporation Counsel's office, summary judgment motions may be made no later than 120 days after the filing of a Note of Issue. **In all other matters, including third party actions, motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue.** In both instances, the above time limitation may only be extended by the Court upon good cause shown. See CPLR 3212(a) (emphasis added).

Accordingly, pursuant to the Uniform Civil Term Rules of the Supreme Court, Kings County, a motion for summary judgment must be made no later than 60 days after the filing of the note of issue, unless leave of the court is obtained on good cause shown (*see Goldin v New York and Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; *Gonzalez*, 179 AD3d at 646).

Here, the note of issue was filed on December 2, 2019. Thus, based upon the Kings County Uniform Civil Term Rules applicable herein, the parties had until January 31, 2020 to move for summary judgment. The court finds no merit to the parties' contention that there was confusion regarding which date the note of issue was filed. Although NYSCEF's document list reflects an initial filing date of January 29, 2019, a review of the e-filing confirmation notice accurately reveals that the note of issue was in fact filed on December 2, 2019, which is not disputed by the parties. Furthermore, the parties are well aware that plaintiff's motion (motion seq. no. 3) was resolved in CCP on February 13, 2019, resulting in an extension of time to file note of issue, as well as the subsequent issuance of multiple orders extending the time to file note of issue in this case, which ultimately resulted in the extension of the time until November 22, 2019.² The parties were present at all of these conferences and signed the orders noting their appearance. In addition, the fact that the parties entered into a stipulation to extend the time to move for

² The record reveals that the note of issue was not accepted for filing until December 2, 2019.

summary judgment is without effect herein, inasmuch as said stipulation was not so-ordered by the court. Moreover, the court notes that the parties entered into this stipulation more than seven months after the motions were required to be filed.

The Court of Appeals, in *Gibbs v St. Barnabas Hosp.* (16 NY3d 74, 81 [2010]), noted that:

... our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice (citations omitted). 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.

“Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated” (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; see *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2004]; *Brill v City of New York*, 2 NY3d at 652-653; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

“While significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment” (*Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 723 [2d Dept 2014]; see *Czernicki v Lawniczak*, 25 AD3d 581, 581-582 [2d Dept 2006]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Kung v Zheng*, 73 AD3d 862, 863 [2d Dept 2010]), here the only

discovery outstanding at the time the note of issue was filed was the deposition of a non-party witness, whose testimony was not essential to the arguments raised in the summary judgment motions (*see Avezbakiyev v City of New York*, 104 AD3d 888, 888-889 [2d Dept 2013]; *Greenpoint Props., Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011]; *Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702, 703 [2d Dept 2007]; *Neil v New York City Hous. Auth.*, 15 Misc 3d 1115[A][Sup Ct. Kings County 2007], *affd* 48 AD3d 76 [2d Dept 2008] [court held that the fact that a non-party deposition occurred after the filing of the note of issue did not excuse the failure to timely move for summary judgment]).

Moreover, the court notes that inasmuch as note of issue was filed on December 2, 2019, and the parties were required to move for summary judgment by January 31, 2020, which was well before Governor Cuomo issued the Executive Orders in relation to the COVID-19 pandemic extending the time to move for summary judgment, the parties herein do not get the benefit of such extension (*see Vaz v Galileo Cortlandt, LLC*, 2013 NY Slip Op 31147[U], 2 [Sup Ct, NY County 2013][court found that parties failed to establish good cause for filing untimely summary judgment motions where they asserted that the late filing was due to Hurricane Sandy; the court noted that note of issue had been filed several weeks prior to the hurricane and more than five months passed before the motion was filed]).

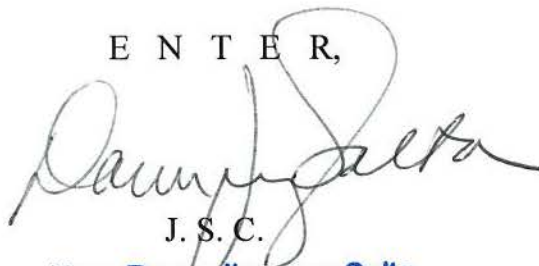
Indeed, the law is clear as it relates to the filing of untimely motions for summary judgment “[i]n the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment” (*Bricenio v Perez*, 178 AD3d 1002, 1003 [2d Dept 2019], quoting *John P. Krupski & Bros. v Town Bd.*

of *Town of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; see *Brill*, 2 NY3d at 652-653; *Planas v New York City Housing Authority*, 118 AD3d 687 [2d Dept 2014]; *Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796 [2d Dept 2011]; *Lyebiedyev v Hoffman*, 84 AD3d 751, 752 [2d Dept 2011]; *Cohen-Putnam Agency, Ltd. v Hudson Bldg. Maintenance*, 55 AD3d 653 [2d Dept 2008]; *Berano v City of New York*, 18 AD3d 681 [2d Dept 2005] [court erred in granting leave to file late summary judgment motion based upon allegations that the motion was meritorious and plaintiffs would not be prejudiced]).

Based upon the foregoing, both Seagate and MJHS defendants' motions for summary judgment are both denied as untimely.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court