

<b>Mejia v 69 Mamaroneck Rd. Corp.</b>
2021 NY Slip Op 33238(U)
March 12, 2021
Supreme Court, Westchester County
Docket Number: Index No. 63575/2017
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  
ROGER MEJIA,

Plaintiff,

**DECISION & ORDER**

Index No. 63575/2017

-against-

Seq. No. 6

69 MAMARONECK ROAD CORP, JBD DEVELOPMENT  
CORP., DALOMBA MASONRY, LLC, WR HOME  
BUILDERS, LLC and WESTCHESTER PAVERS, LLC,

Defendants.  
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LEFKOWITZ, J.

The following papers were read on this cross-motion by defendants 69 Mamaroneck Road Corp. and JBD Development Corp. (collectively, "JBD") (Sequence No. 6) for an order pursuant to CPLR 3212 granting their motion for summary judgment and dismissing the claims against them and entering a judgment in their favor:

Notice of Cross-Motion; Affirmation in Support  
Affidavit in Opposition; Exhibits 1-2  
NYSCEF File

Plaintiff commenced this action to recover for injuries allegedly sustained on the roof of the building located at 69 Mamaroneck Road, Scarsdale, New York 10583 (the "subject premises"). He seeks to hold defendants responsible for these alleged injuries pursuant to Labor Law §§ 240, 241(6) and 200.

As relevant here, plaintiff filed his note of issue on February 14, 2019 and thereafter moved for summary judgment against JBD on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6). By Decision & Order entered on July 12, 2019 (Giacomo, J.) the Court denied plaintiff's motion for summary judgment on his section 240 claim and granted his motion on his section 241(6) claim against JBD.

While plaintiff's summary judgment was pending, on January 2, 2019, plaintiff commenced a separate action against defendants Dalomba Masonry, LLC, WR Home Builders, LLC and Westchester Pavers, LLC. Thereafter, the Court consolidated the two related actions, vacated the note of issue and transferred this matter back to the Compliance Part for additional discovery. Following the completion of discovery in the consolidated action, plaintiff filed a new note of issue again on September 22, 2020.

WR Home Builders, LLC then filed a motion for summary judgment on October 23, 2020.

JBD filed the instant cross-motion on November 12, 2020. For the reasons that follow, the cross-motion is 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 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 DCM Protocol Part Rules then in effect 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.” The trial readiness order contains similar language . In addition, the Part Rules stated 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.”<sup>1</sup>**

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. In addition, although the court (Lefkowitz, J.) so-ordered stipulations extending the time for the parties in this action to file opposition and reply papers in connection with motions for summary judgment, at no time did the court authorize an extension of time to move or cross-move for summary judgment.

Based on the Part Rules set forth above and the trial readiness order, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, because plaintiff filed the note of issue on September 22, 2020, the deadline to file any motion or cross-motion for summary judgment was November 6, 2020. Accordingly, the cross- motion is untimely.

The untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing its motion within the applicable period, JBD waited until after one of its adversaries filed a motion before filing its own motion. However, JBD did not file the 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.” Moreover, JBD failed to demonstrate, much less allege, 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]).

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<sup>1</sup>The DCM Protocol has recently been revised, effective February 1, 2021, and the deadline has been extended to 60 days from the filing of the note of issue. However, this extension was not applied retroactively.

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.

Moreover, as explained in *Kershaw v Hospital for Special Surgery* (114 AD3d 75, 87 [1st Dept 2013] [internal quotation marks omitted]), “[a] cross motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.” However, “[t]he rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party” (*id.* at 88).

Therefore, the cross-motion is denied as improper and untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that the cross-motion by defendant 69 Mamaroneck Road Corp. and JBD Development Corp. (Sequence No. 6) is denied as untimely and improper; and it is further,

ORDERED that motion sequence number 5 is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiff serve a copy of this Decision and Order, with notice of entry, upon all other parties within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 12, 2021

  
HON. JOAN B. LEFKOWITZ, JSC

To All Counsel  
**BY NYSCEF**

cc: Compliance Motion Clerk