

**Weber v Petrie**

2021 NY Slip Op 33355(U)

April 30, 2021

Supreme Court, Westchester County

Docket Number: Index No. 57544/2018

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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  
GERHARD WEBER and WENDY WEBB-WEBER,

Plaintiffs,

**DECISION & ORDER**

Index No.: 57544/2018

-against-

Seq. No. 5

JEAN-PAUL PETRIE and PRESTIGE MOTORWORKS  
INC.,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on defendants’ motion for summary judgment on the issue of damages and for any possible economic loss, upon the ground that plaintiff Gerhard Weber did not sustain a “serious injury” as a result of the subject accident as defined by Insurance Law § 5102(d) and as required by Insurance Law § 5104(a) and for such other and further relief as this court deems just and proper.

Notice of Motion - Affirmation - Exhibits A - P  
Affirmation in Opposition - Exhibits 1 - 22  
Reply Affirmation

Upon the foregoing papers, the motion is determined as follows:

In this action, plaintiffs seeks damages for physical injuries allegedly sustained as a result of a motor vehicle collision on May 8, 2017 in the Town of Somers, Westchester County, New York.

A trial readiness order was entered on December 11, 2019, which provided that any motion for summary judgment must be served within **45** days following the filing of the Note of Issue. (Emphasis in the original.) Plaintiffs filed the Note of Issue on December 31, 2019. Accordingly, the 45-day deadline for the filing of motions for summary judgment was February 15, 2020.<sup>1</sup> On December 14, 2020, defendants moved for summary judgment. The motion is untimely.

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<sup>1</sup>February 14, 2020, the 45<sup>th</sup> day after plaintiff filed the Note of Issue, was a Sunday, *see* Gen. Constr Law § 25-a.

Twelve years ago, in 2009, and long before the implementation of e-filing, a new Differentiated Case Management (DCM) Protocol<sup>2</sup> 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.

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 to all that enter our courts in a timely and efficient manner.

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

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<sup>2</sup>The DCM Protocol is available online on the Ninth Judicial District’s website at <https://www.nycourts.gov/courts/9jd/diffCaseMgmt.shtml>.

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]).

Prior to the onslaught of the COVID-19 pandemic in March of 2020 and the modifications to the Protocol necessitated thereby, the DCM Protocol, effective January 3, 2017<sup>3</sup>, which governs this cases, required that 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 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[.]” To be sure, while the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it permits no extensions of the time for the initial filing of such motions.<sup>4</sup> Accordingly, summary judgment motions were due in this case no later than February 15, 2020, 46 days after plaintiffs filed the Note of Issue on December 31, 2019, given that the 45<sup>th</sup> day, February 14, 2020, was a Sunday, *see* Gen. Constr Law § 25-a. Here, defendants filed their motion for summary judgment on December 14, 2020, ten months following the filing of the Note of Issue and clearly violates the DCM Protocol.

Defendants did not initially acknowledge that their motion is untimely. Indeed, defendants simply asserted that in light of Executive Orders issued by the governor and Administrative Orders of the chief administrative judge of our courts, which tolled and/or suspended inter alia the filing of motions for summary judgment due to the COVID-19 pandemic, the motion is timely. It was only in response to plaintiffs’ argument that the motion is untimely, made without leave of court to file late and proffered without the requisite good cause for its late filing that defendants explained their delay.

Defendants state that the delay was “purely” an oversight by their office. After the Note of Issue was filed, the office looked to Judge Lefkowitz’ part rules, the Preliminary Conference Order and subsequent Compliance Conference Order<sup>5</sup> to determine the deadline for filing dispositive motions. Because none of these sources referenced a deadline, defendants relied on the CPLR. Defendants further state that plaintiffs have not been prejudiced by the delay and that had they realized that the time for the filing of their motion for summary judgment had not been extended to December 28, 2020 by the COVID-19 emergency orders, they would not have

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<sup>3</sup>The DCM Protocol was revised effective June 30, 2017, to the limited extent of providing a new, separate email for the Compliance Part Motion Clerk and revised again effective February 23, 2018, to the limited extent of providing additional judicial resources for the DCM Parts.

<sup>4</sup>The parties entered into two stipulations, both of which the court so-ordered, extending the initial return date of this motion.

<sup>5</sup>NYSCEF does not contain a Compliance Conference Order issued subsequent to the filing of the Trial Readiness Order and/or Note of Issue. It remains unclear as to which Order defendants refer.

withdrawn their motion to vacate the note of issue filed on July 20, 2020 to obtain additional discovery.

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, defendants fail to establish good cause. To begin, defendants’ assertion that the untimely filing of the instant application was purely an oversight amounts to nothing more than law office failure. While it is true that such a failure may be excused, such a claim must be supported by a detailed and credible explanation of the default at issue, as mere neglect is not a reasonable excuse (*cf. Tae Kim v Bishop*, [2d Dept 2017]; *One West Bank, FSB v Singer*, 153 AD3d at 716; *Onishenko v Ntansah*, 145 AD3d 910 [2d Dept 2016]). Here, the proffered “explanation” falls woefully short. The rule in Westchester County requiring that motions for summary judgment be filed within 45 days of the filing of the trial readiness order was well established by December 2020. It had been in existence for years. In addition, the parties submitted a trial readiness stipulation to be so-ordered in this case. That stipulation contains the language on the signature page in bold and underlined that motions for summary judgment are due **45** days following the filing of the Note of Issue. Moreover, why defendants reviewed multiple other sources except those that govern the filing of dispositive motions in this County, including the DCM Protocol and the Trial Readiness Order is not addressed. Similarly, not a single case is proffered in support. Nor is the case law plaintiffs cite in opposition distinguished.

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, 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 they cannot, they should apply for relief, setting forth the good cause for granting it. Again, here, defendants failed to provide the requisite good cause for their delay in moving for summary judgment, (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]).

Finally, it is worth noting that the filing of the Note of Issue is not a prerequisite to the service of a motion for summary judgment. Rather, it merely sets the date beyond which such an application cannot be timely made. Under all these circumstances, it can only follow that defendants’ motion seeking summary judgment must be denied as untimely.

Accordingly, in view of the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment on the issue of damages and for any possible economic loss is denied as untimely; and it is further,

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

The foregoing constitutes the Decision and Order of this Court.

White Plains, New York  
April 30, 2021

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HON. JOAN B. LEFKOWITZ, JSC

All counsel  
**BY NYSCEF**

cc: Compliance Motion Clerk