

<b>Buenabad v Finer Fire &amp; Restoration Corp.</b>
2021 NY Slip Op 33372(U)
September 9, 2021
Supreme Court, Westchester County
Docket Number: Index No. 52578/2019
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  
CARLOS BUENABAD,

Plaintiff,

**DECISION & ORDER**

Index No. 52578/2019

-against-

Seq. No. 4

FINER FIRE & RESTORATION CORP., 4 SEASONS FIRE RESTORATION, FOUR SEASONS RESTORATION, LLC, ANTONIO RODRIGUEZ d/b/a ANTONIO RODRIGUEZ HOME IMPROVEMENT INC. and PRISM GENERAL SERVICES CORP.,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this cross-motion (Sequence No. 4) by plaintiff for an order granting him partial summary judgment against defendants Finer Fire & Restoration Corp. and Four Seasons Restoration, LLC, and granting such other and further relief as the court deems just and proper.

Notice of Cross-Motion; Affirmation of John M. Shaw; Exhibits 1-7; Response to Statement of Material Facts; Statement of Material Facts  
Affirmation in Opposition of Nicole Gallletta; Response to Statement of Material Facts  
Affidavits of Service  
NYSCEF File

In February 2019, plaintiff commenced this action to recover damages for personal injuries allegedly sustained while working on a construction project in Tarrytown, New York on November 7, 2018. Defendants Finer Fire & Restoration Corp. and Four Seasons Restoration, LLC (the Finer Fire defendants) served a verified answer on March 26, 2019.<sup>1</sup> In April 2019, plaintiff commenced a separate action against Prism General Services Corp. (Prism), which was consolidated with the original action by Decision and Order of the court (Lefkowitz, J.) dated October 8, 2019. Plaintiff discontinued the action against Prism on October 6, 2020.

Following a preliminary conference and numerous compliance conferences, a trial readiness

<sup>1</sup> Plaintiff discontinued the action against defendants CRP Sanitation, Inc. and Callahead Corporation on September 10, 2019, and obtained a default judgment against defendant Rodriguez by Decision and Order of this court (Lefkowitz, J.) dated October 8, 2019.

order was filed on December 15, 2020 (NYSCEF Doc. No. 58). Plaintiff filed a note of issue and certificate of readiness on December 22, 2020 (NYSCEF Doc. No. 59).

On March 22, 2021, the Finer Fire defendants moved for summary judgment (Sequence No. 3) dismissing the complaint insofar as asserted against them. On June 18, 2021, plaintiff cross-moved for partial summary judgment (Sequence No. 4) against the Finer Fire defendants.

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 DCM Protocol Part Rules in effect when plaintiff filed the note of issue, “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). In addition, the Part Rules then in effect 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”** (DCM Rule II.D [emphasis in original]).

As a courtesy due to the pandemic, the trial readiness order issued by the court (Lefkowitz, J.) in this matter allowed for the filing of summary judgment motions and cross-motions within 90 days following the filing of the note of issue, instead of 45 days. However, the court did not deviate from the rule that an untimely motion cannot be made timely by denominating such as a cross-motion. Moreover, although the court (Lefkowitz, J.) so-ordered several stipulations adjourning the return date of the Finer Fire defendants’ motion (NYSCEF Doc. Nos. 87 and 89), the court did not extend the time to move or cross-move for summary judgment past the 90 days set forth in the trial readiness order.

Here, because plaintiff filed the note of issue on December 22, 2020, the deadline to file any motion or cross-motion for summary judgment was March 22, 2021. Accordingly, the Finer Fire defendants’ motion for summary judgment is timely. By contrast, as noted by the Finer Fire defendants, plaintiff’s cross-motion is not.

Plaintiff’s untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing his motion within the applicable period, plaintiff waited until after his adversaries filed a motion before filing his own motion. However, plaintiff did not file the motion by the deadline set forth in the trial readiness order, which provided that “[a]ny motion or **cross-motion** for summary judgment by **any** party must be served via NYSCEF within **90** days following the filing of the Note of Issue” (NYSCEF Doc. No. 58 [emphasis added]). Moreover, plaintiff 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]). Although plaintiff acknowledges that his cross-motion was made after the 90-day deadline had passed and asks the court to consider the cross-motion nevertheless, at no time does he explain why he was unable to comply with the court's rules.

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]). The court notes that in this instance, contrary to plaintiff's contention, the grounds are not identical. Moreover, 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]).

All other arguments raised with respect to timeliness have been considered by this court, notwithstanding the absence of specific reference thereto.

In view of the foregoing, it is hereby

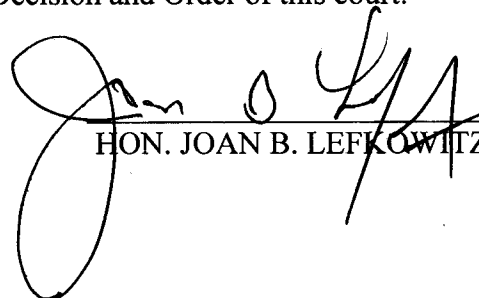
ORDERED that plaintiff's cross-motion (Sequence No. 4) is denied as untimely; and it is further,

ORDERED that Sequence No. 3 is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiff shall 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  
September 9, 2021

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

To All Counsel **BY NYSCEF**  
cc: Compliance Motion Clerk