

**Metropolitan Community Methodist Church v
Guideone Mut. Ins. Co.**

2022 NY Slip Op 30491(U)

February 16, 2022

Supreme Court, New York County

Docket Number: Index No. 655974/2017

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 655974/2017

METROPOLITAN COMMUNITY METHODIST CHURCH,

MOTION SEQ. NO. 005

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

GUIDEONE MUTUAL INSURANCE COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT.

In this insurance breach of contract action, Guideone Mutual Insurance Company (“Defendant”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Metropolitan Community Methodist Church (“Plaintiff”) opposes the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and caselaw, the motion is decided as follows.

Plaintiff sustained property damage when a portion of its church ceiling collapsed. At the time of the collapse, Defendant insured the premises under a General Commercial Liability policy that covered property damage (Insurance Policy #1425-045, Doc 116). After the collapse, Plaintiff presented its claim to Defendant. Defendant declined coverage based on specific policy exclusions. Plaintiff then commenced this action, claiming that Defendant’s wrongful denial of the claim constituted a breach of contract (Doc 118).

It is undisputed that Defendant moved for summary judgment two days after the court-ordered 45-day extension of time to file summary judgment motions had expired. In an amended

affirmation in support of his motion, Defense counsel explains that, at some point, he “learned that the expert that [he] relied upon was no longer employed by the consulting firm that [his firm] retained and [he was], therefore, required to identify and retain a new expert on relatively short notice, to perform a ‘desk review’ and comment on Plaintiff’s new expert exchange in affidavit form” (Doc 139). “After numerous conversations and exchanges of copious documents with [the] newly acquired expert, his affidavit was prepared and sent to him for review and signature, but was unfortunately, delayed again, this time by ‘house counsel’ for the consulting firm [Unbeknownst to Defense counsel], house counsel was required to review all expert affidavits [which] required some re-working of verbiage in the affidavit, entailing yet further, unanticipated delay” (id. ¶¶ 87-89).

In his affirmation in opposition to the motion, Plaintiff argues, inter alia, that Defendant’s motion is untimely and that Defendant fails to show good cause for the delay since Defense counsel fails to provide precise dates or timeline of his efforts to obtain an expert affidavit and his lack of knowledge that he needed to obtain approval from the house counsel is tantamount to law office failure. Plaintiff’s counsel maintains that he and Defense counsel “had a telephone conversation on June 16, 2021, prior to Defendant filing its motion, during which [he] stated that Defendant had failed to timely file its motion for summary judgment in accordance with the Court’s extended deadline [and] [Defense counsel] stated that [he (Plaintiff’s counsel)] was mistaken and Defendant had until June 30, 2021 to file its summary judgment motion [and] [s]hortly after [the] call ..., [Defendant] filed [the] motion, obviously having realized that it was he [Defense counsel] who was mistaken regarding the deadline to file” (Doc 143 ¶ 18).

In reply, Defense counsel contends that he attempted to retain a new expert starting in mid-March 2021 (Doc 155 ¶ 26); on April 6, 2021, he received notice from the consulting firm

that a new expert, Gary Ellis (“Ellis”) was assigned to the case (id. ¶ 28, citing Doc 158); Ellis finalized his affidavit on or around May 25, 2021 (id., citing Doc 160); the in-house attorney finished reviewing Ellis’s affidavit on June 14, 2021 (id., citing Doc 161); Ellis’s notarized affidavit reached Defense counsel after business hours on June 15, 2021 (see id. ¶ 39; see also Doc 160); and Defense counsel revised his affirmation and filed it the next day on June 16, 2021 (id. ¶ 39-40). Defense counsel also submits an email that he sent to Ellis on June 14, 2021, in which he asks Ellis: “Gary [Ellis,] can we get an affidavit by tomorrow [June 15, 2021] ... Wednesday [June 16, 2021] at the latest? I have to submit my papers” (Doc 161 at 3). Defense counsel also states that he “did state to [his] adversary in passing that [he] believed the return date had not passed [when] [a]ctually, it had” (Doc 155 ¶ 41).

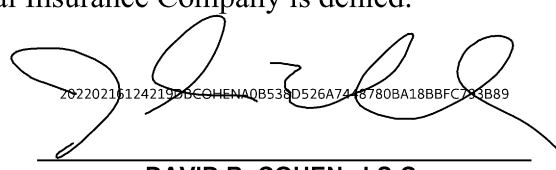
“[G]ood cause” in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; see also Patrick M. Connors & Chief Judge Judith Kaye, New York Court of Appeals, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, 71 Brook L Rev 1529, 1541-1542 [Summer 2006]). Motions for summary judgment submitted even one day beyond any court or statutorily imposed deadline should not be considered absent a showing of good cause (*Milano v George*, 17 AD3d 644, 645 [2d Dept 2005]). The motion court has “broad discretion” in determining whether there is “good cause” shown for a delay in the making of the motion (*Fofana v. 41 W34th St.*, 71 AD3d 445 [1st Dept 2010]; *Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 283 [1st Dept 2006]).

Defense counsel’s explanation for the two-day delay—that he was “required to identify and retain a new expert on relatively short notice” and was delayed once again by house counsel

for the consulting firm who, unbeknownst to Defense counsel, was required to review all expert affidavits and further work with the expert (Doc 139)—is contradicted by his own submissions in that on June 14, 2021, which was undisputedly the deadline set by this Court for the filing of summary judgment motions, he emailed Ellis asking to receive his affidavit by June 16, 2021 (Doc 161 at 3) and, further, on June 16, 2021, he undisputedly said “to [his] adversary in passing that [he] believed the return date had not passed [when] [a]ctually, it had” (id. ¶ 41). Given the timeline of events, Defense counsel’s explanation that the delay was caused by the retention of the new expert and the consulting firm’s additional requirements fails to rise to the level of good cause. Inadvertently overlooking a date set by the court amounts to “a perfunctory claim of law office failure” (Quinones v Joan and Sanford I. Weill Med. Coll. and Graduate School of Med. Scis. of Cornell Univ., 114 AD3d 472, 474 [1st Dept 2014]). This Court may not excuse this late motion -- and would not excuse the delay in the exercise of discretion in any event -- no matter how meritorious, upon such a cursory claim (Azcona v Salem, 49 AD3d 343 [1st Dept 2008]). In light of the above analysis, this Court need not consider the parties’ remaining arguments.

Accordingly, it is hereby:

ORDERED that the motion by Guideone Mutual Insurance Company is denied.



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DAVID B. COHEN, J.S.C.

2/16/2022
DATE

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APPLICATION:

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