

**Capra v Panzer**

2023 NY Slip Op 30720(U)

March 8, 2023

Supreme Court, New York County

Docket Number: Index No. 805131/2018

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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VIRGINIA CAPRA and ANTONIO CAPRA,

Plaintiff,

- v -

OLIVER PETER-FRIEDRICH PANZER, M.D., WILLIAM N. LEVINE, M.D., NEW YORK-PRESBYTERIAN COLUMBIA UNIVERSITY MEDICAL CENTER, NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, and THE COLLEGE OF PHYSICIANS AND SURGEONS OF COLUMBIA UNIVERSITY,

Defendants.

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**INDEX NO. 805131/2018**

**MOTION DATE 11/14/2022**

**MOTION SEQ. NO. 002**

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiffs oppose the motion. The motion is denied on the ground that the motion was not timely made, inasmuch as the defendants did not obtain court approval extending their motion filing deadline.

In a preliminary conference order dated September 25, 2018, the court (Shulman, J.) ordered that any dispositive motions were required to be made no later than 60 days after the filing of the note of issue. In a series of four status conference orders issued between May 14, 2019 and November 12, 2019, Justice Shulman did not revise that date. In a status conference order dated February 11, 2020, Justice Shulman extended the note of issue filing deadline until May 29, 2020. On March 17, 2020, all courts in New York were closed due to the COVID-19 pandemic, and did not reopen until June 10, 2020, and then only for justices and court

personnel. In addition, all filings in electronically filed actions were suspended between March 20, 2020 and May 5, 2020, and all deadlines were tolled between March 20, 2020 and November 3, 2020 (see Executive Law § 29-a; Executive Orders 202.8, 202.67; *Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]). After the action was reassigned to Part 56, this court issued a compliance conference order, dated October 1, 2020, that extended the note of issue filing deadline until March 31, 2021, and expressly reiterated that dispositive motions were required to be made no later than 60 days after the filing of the note of issue. In a series of four status conference orders issued between December 16, 2020 and September 30, 2021, the court repeatedly and expressly adhered to that 60-day deadline for making summary judgment motions, with the final status conference order fixing a note of issue filing deadline of January 31, 2022. On January 25, 2022, the court so-ordered the parties' stipulation further extending the note of issue filing deadline, this time until March 2, 2022. On March 2, 2022, the plaintiffs filed the note of issue.

Inasmuch as the note of issue was filed on March 2, 2022, the defendants had until the first business date following the lapse of 60 days after the filing date (see General Construction Law § 25-a), or until May 2, 2022, to serve and file their summary judgment motion papers. The defendants did not serve and file their papers by that date. Rather, the parties, without court approval, entered into a stipulation dated April 25, 2022 that purportedly extended the defendants' motion filing deadline until June 30, 2022. The stipulation was not so-ordered by the court. In fact, no party requested that the court extend the motion filing deadline, no party requested that the stipulation be so-ordered, and no party informed the court that the stipulation had been uploaded to the New York State Court Electronic Filing system. The defendants submitted their motion papers on June 30, 2022.

CPLR 3212(a) provides that, in connection with motions for summary judgment,

“the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred

twenty days after the filing of the note of issue, except with leave of court upon good cause shown.”

As the Court of Appeals elucidated the purpose of CPLR 3212(a), “statutory time frames — like court-ordered time frames (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]) — 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 Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]).

“‘[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. That reading is supported by the language of the statute--only the movant can show good cause--as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be ‘good cause’”

(*Brill v City of New York*, 2 NY2d 648, 652 [2004]; *see Buckner v City of New York*, 9 Misc 3d 510, 514-515 [Sup Ct, N.Y. County 2005] [denying untimely summary judgment motion where movants provided no excuse for untimeliness]; *see also Miller v New York City Hous. Auth.*, 29 Misc 3d 1214[A], 2010 NY Slip Op 51825[U], \*4, 2010 NY Misc LEXIS 5141, \*9-10 [Sup Ct, Kings County, Sep. 21, 2010] [defendant made no showing of good cause for late motion, and “made no effort to inform the court of its need for an extension”]; *Talon Air Servs. LLC v CMA Design Studio, P.C.*, 2009 NY Slip Op 32027[U], \*4, 2009 NY Misc LEXIS 6096, \*3-4 [Sup Ct, N.Y. County, Sep. 3, 2009] [summary judgment motions made after 60-day deadline were untimely]). “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d at 123). As the Appellate Division, First Department, wrote, “[w]e take this opportunity to emphasize and to caution the Bar that the language of *Miceli* and *Brill* is clear and strict. Therefore, the rule these holdings address may not be approached casually without significant risk of adverse consequences” (*Perini Corp. v City of New York*, 16 AD3d 37, 38 [1st Dept 2005]).

Crucially, in construing CPLR 3212(a), the First Department concluded that a motion court does not “have discretion to entertain nonprejudicial, meritorious post-note of issue motions *made after a court-imposed deadline* but within the statutory maximum 120-day period in CPLR 3212(a) *regardless of whether good cause is shown for the failure to meet the deadline*” (*Glasser v Abramovitz*, 37 AD3d 194, 194 [1st Dept 2007] [emphasis added]; *but cf. Reiner v George Frank Living Trust*, 2009 NY Slip Op 32993[U], \*6, 2009 NY Misc LEXIS 4369, \*7 [Sup Ct, N.Y. County, Nov. 16, 2009] [where it was “uncontested that the Preliminary Conference Order required that dispositive summary judgment motions be made within 60 days of the filing of the Note of Issue,” and it was further “uncontested that plaintiff filed her Note of Issue” on a date certain, requiring the defendants to move for summary judgment no later than 60 days thereafter, the fact that the “defendants did not seek leave to file their motion late” imposed upon them “the burden of establishing ‘good cause’ for the delay”]). Consequently, this court does not have discretion to entertain the defendants’ motion regardless of whether they have demonstrated good cause for a late filing.

Were the court nonetheless to consider the issue of good cause, it would be constrained to conclude that the defendants have not established it here. Rather, without having sought an extension of the motion filing deadline, they rely upon a stipulation with the plaintiff that purportedly extended that deadline. Parties may not, by stipulation, override or supersede a court order, including orders that fix filing deadlines (see *Connor v AMA Consulting Engrs., P.C.*, \_\_\_\_ AD3d \_\_\_\_, 2023 NY Slip Op 00808, \*1 [1st Dept, Feb. 14, 2023] [parties’ *so-ordered* stipulation agreeing that all dispositive motions would be filed by a date certain may not be superseded by a later, non-court approved stipulation agreeing to a single return date for all motions]; *cf. Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 479 [1st Dept 2011] [subsequent *so-ordered* stipulation did supersede prior motion filing deadline order]).

In light of the foregoing, it is

ORDERED that the defendants’ motion for summary judgment is denied as untimely.

This constitutes the Decision and Order of the court.

3/8/2023  
DATE

  
\_\_\_\_\_  
JOHN J. KEENELEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE