

Inbar Group, Inc. v St. Mark's World, Inc.

2023 NY Slip Op 31611(U)

May 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653565/2016

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

INDEX NO. 653565/2016

INBAR GROUP, INC.,

MOTION SEQ. NO. 012

Plaintiff,

- v -

ST. MARK'S WORLD, INC., ST. MARK'S WORLD
ACQUISITION LLC, MICHAEL MORGAN, FLEX
EMPLOYEE SERVICES, LLC, SCOTT HARTMAN,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 012) 377, 378, 379, 380, 381, 382, 383

were read on this motion to/for LEAVE TO FILE.

In this breach of contract action, defendants St. Mark's World Acquisition LLC, Flex Employee Services, LLC, and Scott Hartman (collectively, defendant movants) move, pursuant to CPLR 3212(a), for leave to file a late motion for summary judgment. Plaintiff opposes.

Factual and Procedural Background

Plaintiff commenced this action in July 2016, alleging causes of action for, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and quantum meruit related to a listing agreement for the sale of a business and a corresponding nondisclosure agreement (Doc No. 1). After discovery was completed, plaintiff filed a note of issue on May 20, 2021 (Doc No. 262), and subsequently moved for summary judgment in September 2021 (Doc No. 295).¹ Although defendant movants opposed one of the

¹ Defendants St. Mark's World, Inc. and Michael Morgan moved for summary judgment dismissing the complaint as against them two days before plaintiff filed its note of issue (Doc No. 252).

summary judgment motions (Doc No. 355),² they never cross-moved for summary judgment in response to either motion and did not otherwise timely move for summary judgment.

By decision and order of December 21, 2022, both summary judgment motions were denied (Doc No. 374). With respect to plaintiff's motion, this Court determined that it failed to make a prima facie showing that defendant movants violated the nondisclosure agreement because factual questions existed regarding whether defendant movants interfered with plaintiff's rights under the listing agreement (Doc No. 83). Defendant movants now move for leave to file a late motion for summary judgment dismissing the complaint as against them (Doc No. 377).

Legal Analysis and Conclusions

It is well established that a motion for summary judgment must be made within 120 days of the filing of the note of issue, and a party may only move after such time “with leave of court on good cause shown” (CPLR 3212 [a]; *see e.g. Appleyard v Tigges*, 171 AD3d 534, 535 [1st Dept 2019]; Part 58 rules). “Further, a court has broad discretion in determining whether the moving party has established good cause for the delay” (*Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017]). To establish good cause, a movant must provide “a satisfactory explanation for the untimeliness” in moving for summary judgment; whether the motion is meritorious or nonprejudicial is irrelevant (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *accord Kenny v Turner Constr. Co.*, 155 AD3d 479, 480 [1st Dept 2017] [finding “excuse that the attorney handling the matter had been on trial for two weeks d[id] not constitute good cause” for untimely filing, noting “14 other parties to the case made timely motions”], *lv dismissed* 31 NY3d 1112 [2018]; *see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004] [reiterating

² Defendant movants opposed plaintiff's summary judgment motion, but not the motion by St. Mark's World, Inc. and Michael Morgan.

holding of *Brill* that good cause analysis focuses on reason for delay in filing and not merit of motion]).

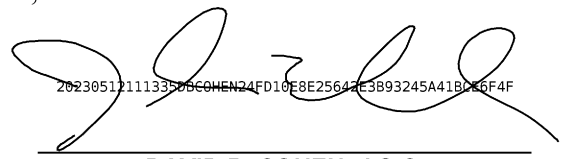
When plaintiff filed its note of issue on May 20, 2021, the statutory 120-day period gave defendant movants until September 17, 2021, to timely move for summary judgment. Despite the clear statutory timeframe, and multiple timely summary judgment motions filed by other parties in this action, defendant movants failed to timely move for summary judgment. They now seek leave to file an untimely motion, *over 600 days since the note of issue was filed*. However, they offer no excuse for their substantial delay. They only argue that their summary judgment motion is meritorious, asserting that they are entitled to judgment as a matter of law because the December 2022 order determined that plaintiff failed to present evidence that defendant movants violated the nondisclosure agreement. According to defendant movants, that determination means plaintiff would be unsuccessful at trial, and granting leave will conserve judicial resources otherwise expended later on at trial. However, plaintiff's inability to prevail on summary judgment is neither law of the case, nor determinative as to whether it will prevail at trial.

Thus, they have not shown good cause for why they should be granted leave to file a late summary judgment motion (*see Miceli*, 3 NY3d at 727 [denying untimely summary judgment motion because movant offered no excuse for delay in filing]; *Waxman v Hallen Constr. Co., Inc.*, 139 AD3d 597, 598 [1st Dept 2016] [similar]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013] [similar]; *cf. Stevens v RX Med. Dynamics, LLC*, 191 AD3d 487, 487-488 [1st Dept 2021] [finding good cause shown where summary judgment motion filed one day late due to confusion about note of issue filing deadline], *lv denied* 37 NY3d 909 [2021]; *Obiotta v Dukes Sys. Corp.*, 132 AD3d 421, 421 [1st Dept 2015] [finding good cause shown where summary judgment motion filed 21 days late due to attorney error in calendaring filing deadline]).

Accordingly, it is hereby:

ORDERED that the motion by defendants St. Mark’s World Acquisition LLC, Flex Employee Services, LLC, and Scott Harman for leave to file a late motion for summary judgment dismissing the complaint as against them is denied; and it is further

ORDERED that the parties shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on June 20, 2023, at 11:00 a.m.


2023051211133506COHEN24FD10E8E25647E3B93245A41B026F4F

5/12/2023
DATE

DAVID B. COHEN, 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