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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

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ROBERT AUGUSTINE,

Plaintiff,

- against -

JOHN N. SUGRUE, GEORGE J. EYTZINGER and ANDREW W. NOVAK

Defendants.

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Index Number 13376/01

Motion Date 11/09/04

Motion Cal. Number 4

The following papers numbered 1 to 13 read on this motion by the defendant JOHN N. SUGRUE for an Order granting summary judgment dismissing plaintiff ROBERT AUGUSTINE's complaint against JOHN N. SUGRUE and all cross-claims, staying this matter, and striking this matter from the trial calendar.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Plaintiff's Memorandum of Law in Opposition.....	8 - 9
Affirmation in Opposition (co-deft Eytzinger).....	10 - 11
Reply Memorandum of Law	12 - 13

This matter was referred to this court by the Honorable Alan LeVine, by Referral Memorandum dated November 15, 2004.

Upon the foregoing papers it is ordered that the motion is decided as follows:

This action was commenced by plaintiff Robert Augustine, a passenger in the vehicle driven by defendant-driver John N. Sugrue to recover damages for personal injuries allegedly sustained as a result of a three-car chain-reaction motor vehicle accident which allegedly occurred on or about January 6, 2000 on Woodhaven Boulevard in the County of Queens. The vehicles in that occurrence were allegedly driven by defendants John N. Sugrue, George J. Eytzinger and Andrew W. Novak. Driver Sugrue commenced a separate action seeking to recover damages for personal injuries allegedly arising out of the same occurrence against

drivers George J. Eytzinger and Andrew W. Novak under index number 10350/00. On September 19, 2001, this Court granted an application for consolidation by defendant Andrew W. Novak to the extent of ordering a joint trial of the two separate actions. On July 18, 2002, in the related action under index number 10350/00, defendant Novak moved for summary judgment, and plaintiff-driver Sugrue cross-moved for summary judgment on the issue of liability as against defendant George J. Eytzinger.

On May 12, 2003, the Second Department reversed this court's denial of the motion of defendant John N. Sugrue ("Segrue") for summary judgment based upon the applicability of the Worker's Compensation defense, and remitted the matter for a new determination of the motion after final resolution of an application to the Workers' Compensation Board ("Board") to determine the parties' rights under the Workers' Compensation Law (*see, Augustine v. Sugrue*, 305 A.D.2d 437 [2d Dept. 2003]). The Board, on April 28, 2004, determined that the within occurrence did not take place in the course of plaintiff's employment. Thus, upon reconsideration, it is ORDERED that defendant Sugrue's motion seeking a dismissal upon that basis is denied.

On June 21, 2004, the Second Department reversed this court's award of summary judgment to defendant Sugrue on his second application for same, holding that this court should not have applied the doctrine of collateral estoppel to a finding in a related lawsuit in which the plaintiff, albeit not a party, had submitted papers which were considered by the court (*see, Augustine v. Sugrue*, 8 A.D.3d 517 [2d Dept. 2004]).

Defendant Sugrue now makes a third summary judgment motion, arguing, *inter alia*, that, implicit in the court's prior holdings was a finding of non-liability on the part of defendant Sugrue.

The court finds, *seriatim* , for the reasons which follow, that the summary judgment branch of the instant motion is barred by the rule against successive summary judgment motions, is untimely pursuant to C.P.L.R. §3212(a), and wholly dilatory in intent and nature; that the branch seeking a stay is academic in light of the determination of the Worker's Compensation Board, and that the branch seeking to strike plaintiff's Note of Issue is untimely and without merit pursuant to 22 N.Y.C.R.R. §202.21(e), and hereby ORDERS that the motion is denied in its entirety, and further,

ORDERS, that the Clerk of the Trial Term/Trial Scheduling Part is directed immediately to restore this action to active status on the expedited trial calendar.

It is well settled in this department that successive

motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment (*see, Williams v. City of White Plains*, 6 A.D.3d 609 [2d Dept. 2004]; *Capuano v. Platzner Int'l Group, Ltd.*, 5 A.D.3d 620, 621 [2d Dept. 2004]; *Klein v. Auerbach*, 1 A.D.3d 317 [2d Dept. 2003]; *Davidson Metals Corp. v. Marlo Dev. Co.*, 262 A.D.2d 599 [2d Dept. 1999]). The arguments raised by defendant Sugrue could have been raised in any of the prior summary judgment motions, and there is no reason, other than to delay the ultimate disposition of this matter, for defense counsel to move separately, and in piecemeal fashion, for summary judgment on each of its potential defenses and affirmative defenses. Certainly, each of these defenses were known to counsel at the time of the making of the previous dispositive motions, and could have been efficaciously asserted at that time.

Moreover, plaintiff's argument as to the timeliness of the defendant's motion is well-taken. The Court of Appeals has recently affirmed and re-affirmed that C.P.L.R. §3212(a) requires a showing of "good cause" for the delay in making the motion, that is, a satisfactory explanation for the untimeliness, rather than "simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill v. City of New York*, 2 N.Y.3d 648 [2004]; *see also, Miceli v. State Farm Mut. Auto. Ins. Co.*, 2004 N.Y. LEXIS 2444 [2004]; *Sanango v. Generoso*, 2004 N.Y. App. Div. LEXIS 14909 [2d Dept. 2004]). Defendant Sugrue has not established "good cause," or any reason, for the attendant delay, or his failure to comply with C.P.L.R. §3212(a), thereby requiring that his motion be denied as untimely. Contrary to the misstatement of counsel for defendant Sugrue, the time parameters of C.P.L.R. §3212(a) apply to motions made more than 120 days after the Note of Issue is filed, not 120 days after a case is on the trial calendar (*see*, affirmation of Eric Dranoff, Esq. at p. 2, paragraph 3).

Likewise, the portion of defendant's motion seeking to strike this matter from the trial calendar for want of discovery is denied. This matter has been on the trial calendar since May 17, 2002, (over two years), and defendant failed to timely move to strike this matter from the trial calendar, (*see*, 22 N.Y.C.R.R. § 202.21 [e]), has waived his right to do so, and has failed to set forth any extraordinary circumstances justifying the court's exercise of discretion in this regard.

Defendant's motion for a stay to permit a hearing by the Worker's Compensation Board is denied as academic in light of the fact that the Worker's Compensation Board has already rendered its determination of the lack of applicability of Worker's Compensation benefits to the case at bar.

Accordingly, defendant JOHN N. SUGRUE's motion is denied in all respects as set forth above. The court directs this matter to proceed to trial without further unwarranted delay.

Dated: January 3, 2005

JANICE A. TAYLOR, J.S.C.

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