

**Orth v Calhoun School, Inc.**

2012 NY Slip Op 30195(U)

January 26, 2012

Supreme Court, New York County

Docket Number: 107896/2007

Judge: Shulman

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**  
J.S.C. Justice

PART 1

Index Number : 107896/2007  
ORTH, PETER  
vs.  
CALHOUN SCHOOL  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. 107896/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005

The following papers, numbered 1 to 5, were read on this motion to/for summary judgment  
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits A-I (No(s)) 2,3  
Answering Affidavits -- Exhibits A-E (No(s)) 4  
Replying Affidavits -- Exhibits F-J (No(s)) 5

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the attached decision and order.

**FILED**

JAN 30 2012

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: JAN 26 2012

**MARTIN SHULMAN**

J.S.C.

1. CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X

PETER ORTH,

Plaintiff,

Index No.: 107896/2007

-against-

THE CALHOUN SCHOOL, INC.,

Defendant.

-----X

**FILED**

JAN 30 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**MARTIN SHULMAN, J.:**

This action stems from a work-related accident which plaintiff Peter Orth alleges caused him to suffer injuries. At the time of the accident, plaintiff was working on a construction project located at defendant The Calhoun School, Inc. Defendant moves, pursuant to CPLR 3211 and CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Plaintiff had been employed as a laborer at the construction site prior to and on June 7, 2004, the date of the accident. His duties included cleaning the job site, specifically, placing the debris into dumpsters and rolling the dumpsters down a ramp to the sidewalk for collection. On the date of plaintiff's accident, plaintiff claims that his co-worker started rolling the dumpster down the ramp without plaintiff. Plaintiff then grabbed the dumpster to try to slow it down since the dumpster was getting out of control. Plaintiff allegedly injured his back as he was trying to slow down the dumpster and ultimately required surgery.

In June 2007, plaintiff filed a complaint against the defendant and plaintiff's employer alleging that they were negligent and violated multiple Labor Law provisions. The court has since dismissed the claims as against plaintiff's employer.

On July 22, 2008, the court issued a preliminary conference order directing that "[a]ny dispositive motion(s) shall be made on or before 60 days after NOI." Defendant's Exhibit H, at 2. Plaintiff filed his note of issue on July 14, 2011. Defendant served its motion for summary judgment on September 13, 2011.

Plaintiff argues that defendant's motion should be denied as untimely. In response, defendant contends that its motion is not untimely and was served within the 60-day period as set forth in the preliminary conference order.

#### DISCUSSION

CPLR 3212 (a) provides as follows:

Any party may move for summary judgment in any action, after issue has been joined; provided however, that 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 on good cause shown.

It is undisputed that plaintiff filed a note of issue on July 14, 2011. Pursuant to CPLR 3212 (a), the 60 days started to run after the note of issue was filed, making September 12, 2011 the final date to serve a motion for summary judgment. Defendant served its motion for summary judgment on September 13, 2011, which is outside of the 60 day period indicated by the court. Defendant did not seek an extension of time to serve its motion, nor does it explain the reason for the delay. In response to plaintiff's objection regarding the motion's untimeliness, defendant states:

In short, Plaintiff's argument that the motion is untimely is without merit. There is simply no question that Calhoun School served its motion for summary judgment on Plaintiff within 60 days from the day Plaintiff filed his note of issue. Calhoun School's motion is timely and should be considered by this Court. (Emphasis in original)

Clausen Affirmation in Reply, ¶ 13.

It is well settled that "[i]n the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment." *John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold*, 54 AD3d 899, 901 (2d Dept 2008), citing *Brill v City of New York*, 2 NY3d 648, 652 (2004). Similar to the present situation, "No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" *Brill v City of New York*, 2 NY3d at 652.

Moreover, even though defendant's motion was made within the 120-day period as set forth in CPLR 3212 (a), this court has no "discretion to entertain nonprejudicial, meritorious post-note of issue motions made after a court-imposed deadline but within the statutory maximum 120-day period." *Glasser v Abramovitz*, 37 AD3d 194, 194 (1<sup>st</sup> Dept 2007). As the Court of Appeals notes, court deadlines are to be "taken seriously." *Micell v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 (2004) ("statutory time frames – like court-ordered time frames – are not options, they are requirements ..."). Thus, even seemingly de minimis defaults, such as the one day delay here, cannot be overlooked absent the requisite showing of good cause. See *Derby v Bitan*, 89 AD3d 891 (2d Dept 2011)(motion for summary judgment denied without consideration of the merits where served 121 days after the note of issue was filed and defendant failed to seek leave of court and offer a reason for the delay).

Defendant having failed to serve its motion within 60 days after the note of issue filing date or to provide an explanation for the delay, this court cannot consider the merits of its motion for summary judgment. Accordingly, it is hereby

ORDERED that defendant The Calhoun School, Inc.'s motion for summary judgment is denied in its entirety.

The parties shall proceed to Mediation as previously scheduled.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York  
January 26, 2012

  
HON. MARTIN SHULMAN, J.S.C. **FILED**

JAN 30 2012

NEW YORK  
COUNTY CLERK'S OFFICE