

**Scheele v 1120 Ave. of the Ams., LLC**

2014 NY Slip Op 32074(U)

July 29, 2014

Sup Ct, NY County

Docket Number: 110095/08

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 59

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DENNIS SCHEELE,

Plaintiff,

-against-

Index No. 110095/08

1120 AVENUE OF THE AMERICAS, LLC, EDISON  
PROPERTIES, LLC, BOVIS LEND LEASE LMB,  
INC., BOVIS LEND LEASE INTERIORS, INC.,

Defendants.

-----X

1120 AVENUE OF THE AMERICAS, LLC, EDISON  
PROPERTIES, LLC, BOVIS LEND LEASE LMB,  
INC.,

Third-Party Plaintiffs,

Third-Party Index  
No. 590044/09

-against-

OPTION METAL & GLASS INC.,

Third-Party Defendant.

-----X

DEBRA A. JAMES, J.:

**FILED**

**AUG 01 2014**

**COUNTY CLERK'S OFFICE  
NEW YORK**

In this action which originates from a construction site accident, defendants 1120 Avenue of the Americas, LLC (1120), Edison Properties, LLC (Edison), and Bovis Lend Lease LMB, Inc. (Bovis) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and for summary judgment on their third-party claims for defense, contractual indemnification and insurance procurement. Plaintiff cross-moves for summary judgment on his claims under Labor Law §§ 200 and 241 (6).

The court notes that plaintiff has withdrawn his Labor Law § 240 (1) claim. Also, third-party defendant does not oppose summary judgment on the third-party claims for contractual indemnity, defense and insurance procurement.

The first issue, which must be considered, is whether the motion and cross motion were timely made.

CPLR 3212 (a) governs motions for summary judgment:

Time; kind of action. 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.

This court has not set a shorter time period within which to file summary judgment motions and thus, the 120-day period applies.

A motion is made when it is served (CPLR 2211).

The note of issue in this matter was filed on July 24, 2012. One hundred twenty days from that date was November 21, 2012. It is uncontested that defendants' counsel attempted to timely serve their motion on plaintiff's counsel on November 21, 2012, but sent the papers to an old address of plaintiff's counsel, one that has not been used by that firm in several years. By the time this error was discovered, the time for

making a timely motion was past.

CPLR 3212 (a) allows untimely motions to be considered "with leave of court on good cause shown." In 2004, the Court of Appeals handed down its decision in Brill v City of New York (2 NY3d 648, 652 [2004]), wherein the Court held that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the [summary judgment] motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." Shortly thereafter, the Court of Appeals again visited the issue, in Miceli v State Farm Mut. Auto. Ins. Co. (3 NY3d 725, 726 [2004]), and made it clear that, "statutory time frames ... are not options, they are requirements, to be taken seriously by the parties." "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (Brill, 2 NY3d at 652).

Defendants have given no excuse for their tardiness, and without a doubt, their motion for summary judgment is untimely. Therefore, the court must deny defendants' motion.

The plaintiff's cross motion for summary judgment is also untimely, having been made on January 31, 2013.

It is true that when a cross motion is untimely, the court may still consider it where "a timely motion for summary judgment was made on nearly identical grounds" (Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc., 106 AD3d 812, 813

[2d Dept 2013]). However, such is not the case here. There is no timely motion for summary judgment. Thus, it does not avail plaintiff to argue that the relief he seeks in his untimely cross motion is "nearly identical" as that sought by defendants in their untimely motion. Moreover, plaintiff, also, has failed to make a showing of good cause for his delay.

"In the absence of a 'good cause' showing, a court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion" (Hesse v Rockland County Legislature, 18 AD3d 614, 614 [2d Dept 2005], citing Brill). Plaintiff's cross motion must also be denied.

Accordingly, it is

ORDERED that the motion of defendants and the cross motion of plaintiff are denied for untimeliness.

Dated: July 29, 2014

**FILED**

AUG 01 2014

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NEW YORK

Debra A. James J.S.C.

**DEBRA A. JAMES**