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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 26

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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FOFANA,MOHAMMAD

Index Nº. **0001186/2006**

-against-

Hon. **NELSON S. ROMAN**,

41 WEST 34TH STREET

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **SUMMARYJUDGEMENT DEFENDANT**
Noticed on **March 282008** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this the motion is resolved in accordance with the annexed decision/order dated 9/2/08

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

RECEIVED
BRONX COUNTY CLERK'S OFFICE
SEP 16 2008
PAID ❑ NO FEE ❑

Dated: 9/2/08

Hon. _____
NELSON S. ROMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MOHAMMAD FIFANA,

DECISION AND ORDER

Plaintiff(s), Index No: 1186/06

- against -

41 WEST 34TH STREET LLC, GSL ENTRERPRISES, INC., WINOKER REALTY CO., INC., NEWMARK & COMPANY REAL ESTATE, INC., ALLIANCE ELEVATOR COMPANY D/B/A UNITEC ELEVATOR COMPANY AND MIDBORO HOLDING CO., LLC.,

Defendant(s).

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Defendants 41-45 WEST 34, LLC. (41-45), GSL ENTERPRISES, INC. (GSL), WINOKER REALTY CO. (Winoker), and MIDBORO HOLDING CO., LLC. (Midboro) move seeking an Order granting them leave make the instant motion for summary judgment insofar as the same is made past the deadline set by the CPLR. 41-45, GSL, Winoker and Midboro aver that the instant motion is being made after the statutory deadline insofar as the Court denied their prior motion to dismiss the instant action on grounds of res judicata and collateral estoppel. If leave to make the instant motion is granted, 41-45, GSL, Winoker and Midboro seek summary judgment against plaintiff on grounds that they neither created the dangerous condition alleged, nor had notice of the same. Plaintiff opposes the instant motion averring that 41-45, GSL, Winoker and Midboro's excuse for failure to make the

instant motion is nothing less than inexcusable law office failure, a ground not tantamount to good cause. Substantively, plaintiff opposes the instant motion averring that questions of fact regarding notice and creation of the condition alleged preclude summary judgment.

For the reasons that follow hereinafter, 41-45, GSL, Winoker and Midboro's motion is hereby denied.

The instant action is for alleged personal injuries. The second supplemental complaint alleges that on February 6, 2004, plaintiff was injured within the premises located at 64 West 35th Street, New York, NY (also known as 45 West 34th Street). It is alleged that plaintiff fell down the 4th floor elevator shaft. It is alleged that the premises herein were owned by, 41-45 and GLS, and managed by Newmark and Winoker. It is alleged that Alliance maintained, serviced, and inspected the elevator herein, pursuant to a contract with Newmark and Winoker. It is alleged that defendants were negligent with regard to the repair and maintenance of the subject elevator and that said negligence was the cause of plaintiff's accident.

The procedural history in this case is rather convoluted and as such merits discussion. The instant action was initially commenced in New York County by summons and complaint against some but not all of the defendants herein. Thereafter, the complaint was amended and the second supplemental complaint commenced the instant action against all defendants listed in the caption except

Midboro. Thereafter, plaintiff commenced a separate action in New York County against Midboro. On May 8, 2006, the Court issued an Order joining the instant action, then venued in New York County and bearing Index No. 117007/04, for joint trial with another action venued in Bronx County and bearing index No. 20819/04. The instant action was transferred to Bronx County and assigned the instant index number. Thereafter, on December 11, 2006, the Court issued an Order consolidating the instant action with the action against Midboro, then still venued in New York County. That action was also transferred to Bronx County and the caption above reflects the consolidation under the instant index number.

In support of the instant motion, 41-45, GSL, Winoker and Midboro submit a host of evidence, aside from two of this Court's prior decisions, none of the evidence submitted is pertinent to the Court's decision. 41-45, GSL, Winoker and Midboro submit a copy of this Court's Decision and Order , in a related case, joined for trial with the instant action and dated August 16, 2007. Said decision granted all parties summary judgment in an action titled Haynes v. the Estate of Sol Goldman, et al., and bearing index No. 20819/04. Said action arose out of the same transaction and occurrence giving rise to the instant action and involved identical claims. Summary judgment was granted to defendants therein, nearly identical to the defendants herein, on grounds that as a matter of law, defendants established that they neither created the dangerous condition alleged nor had notice of the same. 41-45, GSL, Winoker and Midboro submit a copy of this Court's

Decision and Order December 31, 2007, wherein this Court partially granted 41-45, GSL, Winoker and Midboro's motion seeking leave to amend their answer to assert the affirmative defenses of res judicata and collateral estoppel and dismissal of the instant action based on said defenses and this Court's Decision and Order in the Haynes case dated August 16, 2007. While the Court allowed 41-45, GSL, Winoker and Midboro to amend their answer to assert the defenses sought, the Court held that dismissal on grounds of res judicata and collateral estoppel was unwarranted insofar as premised on this Court's decision in the Haynes case. The Court concluded that an essential element of res judicata and collateral estoppel is an opportunity to litigate a prior determination. The Court further concluded that insofar as discovery in this action was not complete and continued after the Haynes Decision and Order, plaintiff in this action was not in a position to oppose summary judgment in the Haynes case and thus could not be bound by said decision.

In opposition to the instant motion plaintiff submits a host of evidence. With exception of plaintiff's Note of Issue and a portion of 41-45, GSL, Winoker and Midboro's prior motion, none of the evidence submitted is relevant to the Court's decision. Plaintiff submits a copy of his Note of issue evincing that the same is dated and served upon all parties on May 4, 2007. Plaintiff submits portions of 41-45, GSL, Winoker and Midboro's prior motion seeking to amend their answers and for dismissal. The same is dated August 31, 2007.

Timeliness of Summary Judgement Motions

CPLR §3212(a) prescribes the time within which summary judgement motions may be made. It states 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** (emphasis added).

Absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, the Court will not consider such a motion on the merits and will instead decline to hear the motion outright. Brill v. City of New York, 2 N.Y.3d 648 (2004); Glasser v. Ibramovitz, 37 A.D.3d 194 (1st Dept. 2007); Rocky Point Drive-In, L.P. v. Town of Brookhaven, 37 A.D.3d 805 (2nd Dept. 2007). The fact that the motion has merit, that the cause of action is meritless, that summary judgment is in the interest of judicial economy, or that the opponent will not be prejudiced by the Court's consideration of the motion, shall not, absent a showing of "good cause," be sufficient grounds for the Court to hear such a motion. Id. This is because "statutory time frames–like court-ordered time frames–are not options, they are requirements, to be taken seriously. Miceli v. State Farm Mutual Automobile Insurance Company, 3 N.Y.3d 725 (2004).

The Court of Appeals has defined "good cause" to mean a good excuse for the delay in filing the motion, a satisfactory explanation for the delay. Brill v. City of New York, 2 N.Y.3d 648 (2004). Further, it has been held that

> [g]ood cause is written expression or explanation by the party or his legal representative evincing a viable, credible reason for the delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement.

Bruno Suace v. Diane Lostrappo, 176 Misc.2d 498 (Supreme Court Nassau County 1998). Ultimately, what constitutes "good cause" has less to do with the merits of the actual motion and more to do with reason for the untimeliness. Luciano v. Apple Maintenance & Services, Inc., 289 A.D.2d 90 (1st Dept. 2001). The Court is always within its discretion to hear a summary judgment motion regardless of the time delay in filing the same. Id. The salient issue is always the nature of the excuse proffered for the delay. Id.

The "good cause" requirement not only applies to any motions made beyond the 120 days prescribed by the CPLR, but also applies to any court-ordered time frames which are set by the court, even if they are shorter. Cabibel v. XYZ Associates, L.P., 36 A.D.3d 498 (1st Dept. 2007); Eastman & Bixby Redevelopment Co., LLC., 34 A.D.3d 770 (2nd Dept. 2006).

It is well settled that law office failure, or ignorance, do not constitute good

cause warranting consideration of a belated motion for summary judgment. Azcona v. Salem, 49 A.D.3d 343 (1st Dept. 2008) (Defendant's motion for summary judgment was denied as untimely and court held that defendant's failure to learn that new note of issue had been filed, constituted law office failure and was thus not tantamount to good cause.); Crawford v. Claiborne, Inc., 48 A.D.3d 284 (1st Dept. 2007) (Defendant's motion for summary judgment denied when made after the deadline set by the court. Court held that defendant's failure to be aware that the court had shortened the time to make motion was tantamount to law office failure, which does not constitute good cause.); Farkas v. Farkas, 40 A.D.3d 207 (1st Dept. 2007) (Court held that plaintiff's failure to abide by statutory time frame due to oversight was tantamount to law office failure, which does not amount to good cause.); Breiding v. Giladi, 15 A.D.3d 435 (2nd Dept. 2005) (Court held that clerical inadvertence and reassignment of counsel were not tantamount to good cause so as to warrant consideration fo a belated motion for summary judgment.); Greenfield v. Gluck, 2003 N.Y. Slip Op. 50729(U) (Appellate Term, Second Department 2003) (Court held that ignorance of deadline within which to make motions for summary judgment was not tantamount to good cause despite the fact that defendant was self represented.). In Farkas, the court noted that if law office failure were held to constitute good cause for failure to comply with statutory and court deadlines, then the exception would in fact swallow the rule. Farkas v. Farkas, 40 A.D.3d 207 (1st Dept. 2007). Specifically, the Court held

> [t]he strictness mandated by *Brill* and *Miceli* necessarily implies that law office failure cannot generally be deemed to constitute 'good cause,' since, if good cause included law office failure, it would exist in every case of untimeliness where the opposing parties were not prejudiced by the delay.

Id. at 212.

An exception to the "good cause" requirement authorizes the court to consider a belated application for summary judgment when the same is made in response to still pending motions for summary judgment ans when the belated cross-motion seeks relief on the very issues raised by the timely motions. Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280 (1st Dept. 2006); Altshuler v. Gramatan Management, Inc., 27 A.D.3d 304 (1st Dept. 2006); Bressingham v. Jamaica Hospital Medical Center, 17 A.D.3d 496 (2nd Dept. 2005). The threshold issue is not whether the same relief is sought, but whether the same arguments are made and more importantly whether the same issues are addressed. Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280 (1st Dept. 2006); Altshuler v. Gramatan Management, Inc., 27 A.D.3d 304 (1st Dept. 2006).

Discussion

41-45, GSL, Winoker and Midboro's motion seeking summary judgment is hereby denied as untimely. It is well settled that absent a court Order extending

or truncating the time within which to make a motion for summary judgment, a motion for summary judgment must be made within the 120 days following the filing of plaintiff's Note of Issue. Any motion made after the deadline set by the CPLR or by a court Order must seek leave to make the same and must be denied as untimely, irrespective of merit, absent good cause for the delay in making the same. Law office failure is not tantamount to good cause and any belated motions premised upon the same must be denied.

In this action plaintiff filed his Note of Issue on May 4, 2007. Thus, absent any Orders truncating or extending the time within which to make dispositive, CPLR §3212 motions, all timely motions for summary judgment must have been made within 120 days of May 4, 2007, meaning no later than September 1, 2007. The instant motion is dated February 19, 2008, and was thus made 291 days after plaintiff filed his Note of Issue, 171 days after the expiration of the 120 day period prescribed by the CPLR and and 50 days after this Court issued its most recent Decision and Order denying 41-45, GSL, Winoker and Midboro's motion to dismiss.

The excuse given for the delay in making the instant motion is that 41-45, GSL, Winoker and Midboro believed that this Court's Decision and Order in the Haynes case was dispositive in the instant action and for this reason, rather than make the instant motion within the requisite time period, 41-45, GSL, Winoker and Midboro instead made a motion to amend their answer and thereafter dismiss the action on

grounds of res judicata and collateral estoppel. According to 41-45, GSL, Winoker and Midboro, the denial of said motion thus prompted the instant motion and the necessity of the instant motion was not known until the Court denied the prior motion, well after the expiration of the requisite time period prescribed by the CPLR.

41-45, GSL, Winoker and Midboro's excuse is nothing short of law office failure and as such no good cause has been shown warranting consideration of the instant belated motion. While it is true that 41-45, GSL, Winoker and Midboro's first motion to dismiss was made within the prescribed time period and the instant motion could not be made until this Court denied said motion, the failure to make the instant motion prior to or with the prior motion is law office failure. In particular 41-45, GSL, Winoker and Midboro failed to recognize that the prior motion could be denied and that given the statutory deadline and the good cause requirement for the making of belated motions, this motion should have been made with the prior motion. That 41-45, GSL, Winoker and Midboro's motion to dismiss was made within the 120 days prescribed by law is evidence that the instant motion could have been made with the instant motion in the form of alternative relief.

Based on the foregoing, the instant motion is denied as untimely and to the extent that no good cause has been shown for considering the same past the deadline prescribed by the CPLR. It is hereby

ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon defendants within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : Sept 2, 2008

Bronx, New York

9/2/08

Nelson S. Roman, J.S.C.