[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. PART 36
Justice

Wallach

- v -

Coliseum Tenants Corp et al.

INDEX NO. 106234/2009

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for extend time

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to extend time to move for summary judgment is denied in accordance with the attached memorandum decision.

FILED

AUG 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/22/11

DORIS LING-COHAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 36

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DORIT WALLACH,

Plaintiff,

v.

COLISEUM TENANTS CORP. and AKAM ASSOCIATES, INC., AND JMPB ENTERPRISES, LTD.

Defendants.

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DECISION AND ORDER
Index. No. 106234/2009

Motion Seq. No: 003 & 004

LING-COHAN, DORIS, J.S.C.

In this personal injury action, defendants move for permission to file late motions for summary judgment.

Plaintiff Dorit Wallach, who is currently 81 years of age, alleges that on May 4, 2009, she was injured when she tripped and fell on a "makeshift/removable flooring composite material" [Exh. C, Kilduff Affirmation, Verified Bill of Particulars][1] in the elevator in her apartment building, which was placed there by defendants. Defendants Coliseum Tenants Corp. ("Coliseum") and Akam Associates, Inc. ("Akam") are the owner/management agent for the building. Defendant JMPB Enterprises ("JMPB") was hired to conduct hallway restoration to the building.

The parties appeared before this court for a preliminary discovery conference on December 4, 2009. Documentary discovery was conducted, plaintiff's deposition was completed in August 2010, depositions of defendants were held on October 13, 2010 and a note of issue filed on or about October 20, 2010. Pursuant to the December 4, 2009 preliminary discovery conference order, depositions of the parties were to be completed on or before April 1, 2010 and a note of issue filed by July 20, 2010. As a courtesy, by order dated April 9, 2010, the parties were granted an extension of time to complete depositions, to August 18, 2010 and the note of issue was to be filed by September 23, 2011. By order dated August 27, 2011, defendants' were granted yet another extension of time to complete depositions, to October 13, 2010 and the time to file a note

[1] The court notes that it has not been supplied with a copy of plaintiff's deposition transcript.

of issue was extended to October 22, 2011.

In accordance with a stipulation by the parties dated October 27, 2010, plaintiff was granted a trial preference, pursuant to CPLR §3403(a)(4), as she is over the age of seventy (70) years.

On October 29, 2010, subsequent to the filing of the note of issue, the parties appeared before this court for a discovery conference, and certain post-note of issue documentary discovery was permitted to be completed. Significantly, there is no indication in the October 29, 2011 discovery conference order of defendants seeking additional time to move for summary judgment; nor was the issue raised by either side.

Thereafter, due to outstanding discovery, defendants moved to vacate the note of issue. By stipulation of the parties dated December 21, 2010, the discovery issues were resolved, with the parties specifically agreeing that the remaining discovery would be completed while the case remained on the trial calendar; the motion was deemed moot, by order of this court dated February 1, 2011.

The court notes that, neither the motion, nor the stipulation, addressed the issue of extending the parties' time to move for summary judgment; nor did the parties agree to vacate the note of issue. On January 31, 2011, in accordance with the parties' December 21, 2010 stipulation, a second deposition was conducted of defendant JMPB.

CPLR 3212(a) provides that the court may set a date by which "post-note of issue" summary judgment motions must be made and if no such date is set by the court then the motion must be made no later than 120 days after the note of issue is filed, except by leave of court with good cause shown. In this case, pursuant to the preliminary conference order dated December 4, 2009, dispositive motions, were to be filed, no later than sixty (60) days after the filing of the note of issue.

In *Brill v. City of New York*, 2 NY3d 648, 649 (2004) the Court of Appeals strictly interpreted the time limitations to move for summary judgment. There, the Court emphasized that where a

statute or court rule prescribes a limited time frame in which to move for summary judgment, a party's failure to act within that time frame will be excused only upon a showing of good cause.

> We conclude that 'good cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute - only the movant can show good cause - as well as by the purpose of the amendment, to end the practice of eleventh hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be "good cause".

In *Miceli v. State Farm Mutual Auto. Ins. Co.*, 3 NY3d 725, 726-727 (2004), the Court of Appeals reemphasized the importance of court ordered and statutory time frames for summary judgment motions, stating:

> As we made clear in *Brill*, and underscore here, statutory time frames - like court ordered time frames - are not options, they are requirements to taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored.

In this case, while defendants argue that they should be granted additional time to file their late motions for summary judgment because despite the filing of the note of issue, "the deposition of a key fact witness and critical discovery remained outstanding" [¶19, Kilduff Affirmation], such excuse is "perfunctory" and disingenuous; "good cause" has not been established here.

It is noted that, at the time of the filing of the within motions, it was not only beyond the 60 days provided in the preliminary conference order, but it was even more than 120 days from the filing of the note of issue.

Additionally, it is not disputed that depositions of representatives of defendants were conducted on October 13, 2010, prior to the filing of the note of issue; Josef Daggat, the resident manager of the building, was deposed, as well as Peter Brown, a 50% partner of JMPB. While a second

deposition of a witness from defendant JMPB was conducted on January 31, 2011, defendants *failed to demonstrate* that such witness (John Marino, the other 50% partner of JMPB), had testimony necessary to form a basis to move for summary judgment and/or that the testimony of the initial JMPB witness, Peter Brown, was lacking. In fact, in arguing that "defendants have a solid basis to move for summary judgment"[¶13, Kilduff Reply Affirmation], defendants Coliseum and Akam rely upon the testimony of Josef Daggett, the building superintendent, whose deposition was completed prior to the filing of the note of issue, and not on the testimony of John Marino, the alleged "key fact witness, whose remaining deposition was held on consent of the parties, after the filing of the note of issue. [¶19, Kilduff Affirmation]. Moreover, such witness was in the control of defendant JMPB and thus, if John Marino in fact had knowledge of facts, relevant and "crucial"to support a motion for summary judgment, an affidavit could have been supplied in support of a *timely* motion for summary judgment, in lieu of deposition testimony.

Further, while the December 21, 2010 stipulation with respect to outstanding discovery provides the parties with extensions of time to supply certain outstanding documentary discovery (in addition to the scheduling of John Marino's deposition), almost all of the discovery listed was the subject of prior court orders, which the parties failed to comply with, or was outstanding prior to the October 20, 2010 filing of the note of issue. For example, included in the December 21, 2010 stipulation, are the following *extensions* of time for the completion of discovery, which were given to themselves, *by the parties*, without permission of the court (as such stipulation was not "so ordered" by this court), with respect to discovery which was outstanding, prior to the filing of the note of issue, : (1) Defendant JMPB shall respond to Coliseum and Akam's demands dated April 29, 2010; (2) Defendants to respond to plaintiff's demands dated October 1, 2010; (3) Defendant JMPB to serve post EBT demands for Josef Daggett's deposition (which was held on October 13, 2010), and, in accordance with the October 29, 2010 "so ordered" stipulation, were ordered to be served within 45 days of October 29, 2010; [Exh. I, Kilduff Affirmation]. All of the outstanding discovery outlined in the December 21, 2010 stipulation was discovery which was owed by and between defendants, and not plaintiff. Thus, the court would be rewarding the parties who failed to abide by its numerous orders (and unilaterally stipulated to later discovery dates, without permission of the court), if such motion were granted and "good cause" for the

delay found; a result clearly not intended by the Appellate Courts, nor the Legislature. It would therefore be inappropriate to delay this case involving an 81 year old plaintiff who was granted a trial preference, any further, due to the failure of defendants to timely complete discovery and to comply with numerous prior court orders.

As the Court of Appeals stated in *Brill*, a perfunctory excuse cannot be good cause. *See Brill v. City of New York,* 2 NY3d at 649.

Moreover, even if the filing of late summary judgment motions were to be permitted, there appears to be factual issues which would preclude the granting of summary judgment including which entity placed the board in the elevator, allegedly creating the defective condition which caused plaintiff to fall. Josef Daggat, the resident manager/maintenance superintendent testified that the building provided protective covering to the floor of the elevator when work was being done in the building to protect the carpets and elevator. [Dagget EBT, at 3-16, Reply Affirmation]. It is not disputed that, at the time of plaintiff's accident, a corridor renovation project was in progress. On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York,* 49 N.Y.2d 557,562 [1980]). Where deposition testimony establish that triable issues of fact exist, a motion for summary judgment dismissing the complaint must be denied. (*Galarza v. Walgreen Eastern Co., Inc.,* 236 AD2d 265 [1st Dept 1997]).

Additionally, due to plaintiff's advanced age, a further delay in this case *would be* prejudicial to plaintiff.

Accordingly, it is

ORDERED that defendants' motions by orders to show cause for permission to filed late motions for summary judgment are denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy

upon all parties with notice of entry.

This decision constitutes the order of the Court.

DATED 8/22/11

Hon. Doris Ling-Cohan, J.S.C.

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