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| <b>Gemini Ins. Co. v MacQuesten Dev., LLC</b>                                                                                                                                                                                  |
| 2018 NY Slip Op 33727(U)                                                                                                                                                                                                       |
| September 11, 2018                                                                                                                                                                                                             |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: 60041/2017                                                                                                                                                                                                      |
| Judge: Terry Jane Ruderman                                                                                                                                                                                                     |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
GEMINI INSURANCE COMPANY,

Plaintiff,

DECISION & ORDER

-against-

Index No. 60041/2017  
Seq. Nos. 1 & 2

MACQUESTEN DEVELOPMENT, LLC,  
VAN SINDEREN PLAZA, LLC and  
BEST DEVELOPMENT GROUP, LLC,

Defendants.  
-----X

RUDERMAN, J.

The following papers were read on the motion (sequence number 1) by defendants, Macquesten Development, LLC, Van Sinderen Plaza, LLC, and Best Development Group, LLC (collectively, "defendants") for an order dismissing the Complaint, and for such other and further relief as this court deems just and proper, including an award of attorneys fees:

Notice of Motion; Affirmation in Support; Affidavit in Support

Exhibits A-I

Affirmation in Opposition to Cross-Motion and in Further Support of Defendants'

Motion

Affidavit in Opposition to Cross-Motion and in Further Support of Defendants' Motion

Reply Affirmation

NYSCEF record

The following papers were read on the cross-motion (sequence number 2) by plaintiff, Gemini Insurance Company, for an order granting summary judgment in favor of the plaintiff against defendant MacQuesten Development, LLC, together with attorneys fees and for such other and further relief as this court deems just and proper:

Notice of Cross-Motion; Affirmation in Support; Exhibits 1-13

Affidavit in Support

Affirmation in Opposition to Cross-Motion and  
in Further Support of Defendants' Motion

Affidavit in Opposition to Cross-Motion and in Further Support of Defendants' Motion  
Reply Affirmation  
NYSCEF record

Upon the foregoing papers, these motions are determined as follows:

This action involves a construction project at the Van Sinderen Plaza located in Brooklyn, New York for the development and construction of 131 low income housing units. This action was commenced by plaintiff on July 6, 2017 by the filing of a Summons and Verified Complaint. Issue was joined on August 9, 2017. Following the completion of discovery, on June 4, 2018, the Court issued a trial readiness order and on the same date, June 4, 2018, plaintiff filed a note of issue and certificate of readiness.

Thereafter, on July 18, 2018, defendants filed a motion for summary judgment. On August 22, 2018, plaintiff filed a motion, denominated as a cross-motion, seeking an order granting it summary judgment.

Prior to addressing the merits of the parties' arguments, the court must address the issue of timeliness. In 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM Protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester County Supreme Court civil cases pursuant to the DCM Protocol.

In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice to all that enter our courts in a timely and efficient manner.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

"As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be 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" (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004] [internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

“As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that ‘[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity’” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, ‘the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment’” (*Greenpoint Props, Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; see *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Pursuant to the DCM Protocol Part Rules with respect to post-note of issue summary judgment motions, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue” (DCM Rule II.D, available at [https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM\\_protocol.pdf](https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol.pdf)).<sup>1</sup> The trial readiness order issued by this court on June 4, 2018 contains similar language. In addition, the Part Rules state in bold-face type:

**“Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 45-day time period pursuant to this protocol and the Trial Readiness Order shall result in the denial of the untimely motion or cross-motion”** (DCM Rule II.D [emphasis in original]).

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<sup>1</sup> The protocol was most recently updated on February 23, 2018; however, no changes were made to the sections in effect when plaintiffs filed the note of issue in the instant matter.

While the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it invites no extension of the time for making such motions.

Based on the Part Rules set forth above, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, defendants' motion, filed on July 18, 2018, was filed within 45 days after plaintiff filed the note of issue. Accordingly, defendants' motion was timely. By contrast, plaintiff's cross-motion for summary judgment – filed on August 22, 2018, 79 days after the note of issue was filed – was untimely.

Plaintiff's untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing its motion within the applicable period, plaintiff waited until after its adversaries filed their motion before filing its own motion. Plaintiff did not file its motion by the deadline set forth in the trial readiness order, which provided that “[a]ny motion for summary judgment by any party must be served via NYSCEF within 45 days following the filing of the Note of Issue” [emphasis added]. Plaintiff also failed to establish, much less allege, good cause for the delay (*see generally Brill v City of New York*, 2 NY3d 648 [2004]; *see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 658 [2d Dept 2004]).

Standards and goals for civil cases in which a note of issue is filed is one year from the filing of the note of issue. If the making of summary judgment motions is delayed for months, this will inevitably mean that either counsel will be rushed to trial or else the case will go over standards and goals. The situation is compounded by adjournments of such motions, particularly where the adjournments are repeated and the motions were already made late. While standards and goals are not immutable, and exceptions will always exist, compliance should be the norm, not the exception. If counsel are serious about their motions, they should make them on time or, if they believe that they cannot, they should apply for relief, setting forth the good cause for granting it. What they cannot do is avoid the necessity for showing good cause by simply waiting until some other party moves within the time allowed and then take advantage of that party by denominating an untimely motion as a “cross-motion.”

It has been held that untimely cross-motions may be considered by the court, in the exercise of its discretion, where a timely motion for summary judgment has been made on nearly identical grounds (*see Williams v Wright*, 119 AD3d 670 [2d Dept 2014]). However, regardless of whether the grounds are identical, the case law does not mandate that the court must entertain such untimely cross-motions, especially where, as here, to do so would result in the circumvention of the Part Rules established by the court and reward non-compliance with court deadlines, without good cause. Therefore, plaintiff's cross-motion is denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that plaintiff's cross-motion (sequence number 2) is denied as untimely; and it is further,

ORDERED that defendants' motion (sequence number 1) is transferred to an IAS Part for determination on the merits;<sup>2</sup> and it is further

ORDERED that defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York  
September 11, 2018

  
HON. TERRY JANE RUDERMAN, J.S.C.

To:

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cc: Compliance Part Clerk

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<sup>2</sup> To the extent that plaintiff's motion papers include arguments in opposition to defendants' motion, such arguments were timely made. The court takes no position with respect to plaintiff's contentions advanced in opposition to defendants' motion.