

<b>SR Holdings I, LLC v Cannavo</b>
2018 NY Slip Op 34133(U)
November 26, 2018
Supreme Court, Westchester County
Docket Number: Index No. 54202/2016
Judge: Terry Jane Ruderman
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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  
SR HOLDINGS I, LLC,

Plaintiff,

**DECISION & ORDER**

Index No. 54202/2016

-against-

Seq. Nos. 5, 6, 7 & 8

JOSEPH CANNAVO, LEONARD CANNAVO,  
CARMELA CANNAVO, IRVING PLACE PROPERTIES  
LLC, ONE WAY PROPERTIES LLC, PUTNAM PARK  
PROPERTIES LLC, REGENT STREET PROPERTIES  
LLC, WASHINGTON PARK PROPERTIES LLC,  
BLUE MOUNTAIN PARTNERS LLC, CROWN ROYAL  
LLC, HASECO PROPERTIES LLC, WHITETAIL  
REALTY GROUP LLC, CAPITAL REALTY PARTNERS  
LLC, ALL NY HOLDINGS LLC, M&T BANK,  
PROVIDENT BANK n/k/a STERLING NATIONAL  
BANK, RED SOX FUNDING, LLC, BRANCA REALTY,  
LLC, CASTLE TITLE INSURANCE AGENCY, INC.,  
BLACK DIAMOND GROUP LLC, RANDOM PROPERTY  
GROUP LLC, 82-84 HAMILTON MANOR, LLC, DEREK  
WASHINGTON, BRANCA CONSULTING SERVICES,  
LLC, CREATIVE SCAPES MANAGEMENT, LLC,  
SINGER ENERGY GROUP, LLC, SHANA SIMMONS,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE and JOHN DOE #1 through JOHN  
DOE #15 inclusive.

Defendants.

-----X  
RUDERMAN, J.

The following papers were read on this motion by plaintiff (Sequence No. 5) for an order pursuant to CPLR 3212 granting plaintiff summary judgment on certain causes of action as well as additional relief:

- Notice of Motion; Affidavits in Support; Affirmation in Support; Exhibits 1-179; Memorandum of Law
- Affidavit in Opposition of Christine Moccia; Exhibits A-C; Memorandum of Law in Opposition
- Affidavit in Opposition of Jerry F. Kebrdle II; Affidavit in Opposition of Joseph Cannavo; Exhibits A-GG; Memorandum of Law
- Affidavit in Opposition and in Support of Michael J. Whartenby; Affidavit in Opposition and in Support of Adam W. Meyers; Memorandum of Law in

Opposition and in Support; Exhibits A-H  
Affirmation in Opposition of Andrew D. Brodnick; Affidavit in Opposition of  
Carmela Cannavo; Exhibits 1-21  
Supplemental Affirmation of Evan Wiederkehr; Exhibits CCC-EEE  
Reply Affidavits; Affirmation in Reply; Exhibits 1-32; Reply Memorandum  
NYSCEF File

The following papers were read on this motion by defendant Castle Title Insurance Agency, Inc. (Castle Title) (Sequence No. 6) for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims with prejudice, and for such other, further and different relief as this court deems just and proper:

Notice of Motion; Affirmation in Support; Memorandum of Law; Exhibits A-P  
Affidavit in Opposition of Jerry F. Kebrdle II; Affidavit in Opposition of Joseph  
Cannavo  
Affidavit in Opposition of Greg Silver; Affidavit in Opposition of Neil Spector;  
Affirmation in Opposition of Neil Spector; Exhibits 1-60; Memorandum  
of Law in Opposition  
Affirmation in Opposition of Andrew D. Brodnick; Exhibits 1-21  
Memorandum of Law in Reply  
NYSCEF File

The following papers were read on this cross-motion by defendant Provident Bank n/k/a Sterling National Bank (Sterling National) (Sequence No. 7) for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint insofar as asserted against it, and for such other and further relief as this court deems just and proper:

Notice of Cross-Motion; Affidavit in Opposition and in Support; Affirmation  
in Opposition and in Support; Exhibits A-BBB; Memorandum of Law  
Supplemental Affirmation of Evan Wiederkehr; Exhibits CCC-EEE  
Reply Affidavit of Neil Spector; Reply Memorandum  
NYSCEF File

The following papers were read on this cross-motion by defendant M&T Bank (Sequence No. 8) for an order granting it summary judgment dismissing the complaint with prejudice insofar as asserted against it.

Notice of Cross-Motion; Memorandum of Law in Opposition and in Support;  
Affidavits in Opposition and in Support; Exhibits A-H  
Reply Affidavit of Neil Spector; Reply Memorandum  
NYSCEF File

Plaintiff commenced this action to, inter alia, set aside the allegedly fraudulent conveyances of certain properties located in Port Chester, New York. Following a preliminary conference and

numerous compliance conferences, a trial readiness order was filed on July 2, 2018 (NYSCEF Doc. No. 278). Plaintiff filed a note of issue and certificate of readiness on July 23, 2018 (NYSCEF Doc. No. 279).

Plaintiff filed a Notice of Motion on August 8, 2018 seeking summary judgment on certain causes of action, as well as other relief. Thereafter, Castle Title filed a Notice of Motion on September 6, 2018 seeking summary judgment dismissing the complaint and all cross-claims with prejudice, and for such other, further and different relief as this court deems just and proper. Also on September 6, 2018, Sterling National filed a Notice of Cross-Motion seeking summary judgment dismissing the complaint insofar as asserted against it, and for such other and further relief as this court deems just and proper. On October 17, 2018, M&T Bank filed a Notice of Cross-Motion seeking summary judgment dismissing the complaint with prejudice insofar as asserted against it.

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 in a timely and efficient manner to all who enter our courts.

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 current 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)). The trial readiness order contains similar language (NYSCEF Doc. No. 278). In addition, and as noted in plaintiff’s counsel’s affidavit in opposition to M&T Bank’s cross-motion (NYSCEF Doc. No. 694), 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]).

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. In addition, although the court (Lefkowitz, J.) so-ordered several stipulations extending the time for the parties in this action to file opposition and reply papers in connection with motions for summary judgment (NYSCEF Doc. Nos. 542 & 549), at no time did the court authorize an extension of time to move or cross-move for summary judgment.

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, as plaintiff correctly observes, because plaintiff filed the note of issue on July 23, 2018, the deadline to file any motion or cross-motion for summary judgment was September 6, 2018. Accordingly, plaintiff’s motion, Castle Title’s motion, and

Sterling National's cross-motion are timely.<sup>1</sup> By contrast, as noted by plaintiff, M&T Bank's October 17, 2018 cross-motion for summary judgment – filed 86 days after the note of issue was filed – is untimely.

M&T Bank'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, M&T Bank waited until after its adversaries filed motions before filing its own motion. However, M&T Bank did not file the 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” (NYSCEF Doc. No. 278 [emphasis added]). Moreover, M&T Bank failed to demonstrate, much less allege, good cause for the delay<sup>2</sup> (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 their 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 would reward non-compliance with court deadlines, without good cause. Therefore, the cross-motion brought by M&T Bank is denied as untimely (see *Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

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<sup>1</sup> The court takes no position regarding the parties' dispute over opposition and reply papers concerning Motion Sequence No. 7 (NYSCEF Doc. Nos. 686 & 687), as the resolution of that dispute falls within the purview of the IAS Part.

<sup>2</sup> M&T Bank's request to file a supplemental submission in an effort to remedy this problem (NYSCEF Doc. Nos. 729 & 730) is denied.

ORDERED that defendant M&T Bank's cross-motion (Sequence No. 8) is denied as untimely; and it is further,

ORDERED that motion sequence numbers 5, 6 and 7 are transferred to an IAS Part for determination on the merits; and it is further

ORDERED that defendant M&T Bank shall serve a copy of this Decision and Order, with notice of entry, upon all other parties within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
November 26, 2018

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

To All Counsel  
**BY NYSCEF**

cc: Compliance Motion Clerk