

**Gallego v Royal Coach Lines Inc.**

2018 NY Slip Op 34203(U)

May 23, 2018

Supreme Court, Westchester County

Docket Number: Index No. 63058/2016

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  
ROSA GALLEGO and SEGUNDO GALLEGO,  
Plaintiffs,

**DECISION & ORDER**

Index No. 63058/2016

Seq. Nos. 1, 2 & 3

-against-

ROYAL COACH LINES INC., GLENDA L. JUAZO, and  
HUA QING ZHANG,  
Defendants.

-----X  
RUDERMAN , J.

The following papers were read on this motion by defendants Royal Coach Lines, Inc. and Glenda L. Juazo (Seq. No. 1) for an order granting summary judgment dismissing the complaint insofar as asserted against them and awarding such other, further or different relief as to this court may seem just, proper and equitable.

- Notice of Motion; Affirmation in Support; Exhibits A-K
- Affirmation in Opposition; Exhibits A-D
- Reply Affirmation; Exhibits A-E
- Affidavits of Service
- NYSCEF File

The following papers were read on this motion by defendant Hua Qing Zhang (Seq. No. 2) for a order granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against him and awarding such further, other and different relief that this court deems just and proper.

- Notice of Motion; Affirmation in Support; Exhibits A-H
- Affirmation in Opposition of Joseph Scarglato; Exhibits A-D
- Affirmation in Opposition of Phyllis W. Shandler
- Affidavits of Service
- NYSCEF File

The following papers were read on this motion by plaintiffs (Seq. No. 3) for an order granting them leave to file a late motion for summary judgment, granting summary judgment to plaintiffs on the issue of liability with respect to defendants Royal Coach Lines, Inc. and Glenda L. Juazo, and awarding such other and further relief as to this court may be just and proper.

Notice of Motion; Affirmation in Support; Exhibits A-F  
Affirmation in Opposition; Exhibits A-E  
Reply Affirmation  
Affidavits of Service  
NYSCEF File

This personal injury action stemming from an October 1, 2013 motor vehicle accident was commenced by the filing of a summons and verified complaint on or about September 19, 2016 (Pl. Ex. A for Seq. No. 3). Defendants Royal Coach Lines Inc. and Glenda L. Juazo (the Coach defendants) served an answer dated November 29, 2016 (Pl. Ex. B for Seq. No. 3). Defendant Hua Qing Zhang served an answer dated January 3, 2017 (NYSCEF Doc. No. 11). Following the completion of discovery, a trial readiness order was filed on February 16, 2018 (NYSCEF Doc. No. 25). Plaintiffs filed a note of issue and certificate of readiness on February 23, 2018 (Pl. Ex. C for Seq. No. 3).

On March 22, 2018, the Coach defendants moved for summary judgment dismissing the complaint insofar as asserted against them on the ground that plaintiff Rosa Gallego did not suffer a serious injury. Plaintiffs filed opposition papers on April 11, 2018, and the Coach defendants filed a reply affirmation on April 13, 2018.

On April 5, 2018, defendant Zhang moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against him on the ground that he was not responsible for the happening of the subject accident. The Coach defendants opposed the motion, as did plaintiffs.

On April 12, 2018, plaintiffs filed a document denominated as a "Notice of Motion for Summary Judgment."<sup>1</sup> Plaintiffs sought an order granting them leave to file a late motion for summary judgment, granting summary judgment to plaintiffs on the issue of the Coach defendants' liability, and awarding such other and further relief as to this court may be just and proper. Plaintiffs submitted an affirmation in support of their motion and various exhibits. The Coach defendants filed opposition papers on May 4, 2018. Plaintiffs filed a reply affirmation on May 9, 2018.

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.

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<sup>1</sup> As noted by the Coach defendants, plaintiffs' motion is in fact a cross-motion for summary judgment (Aff. in Opp. for Seq. No. 3 at ¶2).

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 that 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 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. 25). 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]).

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, the Coach defendants’ motion was filed on March 22, 2018, 27 days after plaintiffs filed the note of issue on February 23, 2018. Defendant Zhang filed his motion for summary judgment on April 5, 2018, 41 days after the filing of the note of issue. Accordingly, the Coach defendants’ and defendant Zhang’s initiatory papers are timely. By contrast, plaintiffs’ April 12, 2018 cross-motion for summary judgment – filed 48 days after the note of issue was filed on February 23, 2018 – is untimely.

Plaintiffs’ untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Rather than filing their motion within the applicable period, plaintiffs waited until after their adversaries filed motions before filing their own motion. Plaintiffs did not file their 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. 25 [emphasis added]). They also failed to provide 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]).

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<sup>2</sup> Plaintiffs acknowledge that they filed their motion after the 45-day deadline had passed, and request permission to file a late motion for summary judgment. Their contention is as follows: “[Defendant Zhang] has recently made a motion for Summary Judgment against [the Coach defendants]. That motion is returnable on May 14, 2018. Upon information and belief there is no surprise or claim of harm to the [Coach defendants] as, there is the current outstanding motion by [defendant Zhang] which is not yet ripe for decision” (Pl. Aff. for Seq. No. 3 at ¶8). Plaintiffs’ brief argument fails to address, let alone establish, good cause. As the Coach defendants observe, “Both the defendants had made their respective motions [for summary judgment] timely and the plaintiff should not have the benefit in having the motion heard in that she miscalculated the time to ... file the motion” (Aff. in Opp. for Seq. No. 3 at ¶3).

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.

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, the 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 plaintiffs' cross-motion (Seq. No. 3) is denied as untimely; and it is further,

ORDERED that the Coach defendants' motion (Seq. No. 1) and defendant Zhang's motion (Seq. No. 2) are transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order, with notice of entry, upon all other parties within five days of entry.

The foregoing constitutes the Decision and Order of this court.

White Plains, New York  
May 23, 2018

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

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cc: Settlement Conference Part Clerk