

**Rolfs v Medina**

2018 NY Slip Op 34238(U)

September 18, 2018

Supreme Court, Westchester County

Docket Number: Index No. 59515/2017

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  
MELINDA ROLFS,

Plaintiff,

**DECISION & ORDER**

Index No.: 59515/2017

-against-

JOSEPH MEDINA and ARILEYDA M. ORTIZ,

Seq. Nos.: 3, 4

Defendants.

-----X  
JOSEPH MEDINA and ARILEYDA M. ORTIZ,

Third-Party Plaintiffs,

-against-

MARK ROLFS,

Third-Party Defendant.

-----X  
TERRY JANE RUDERMAN, J.S.C.

The following papers were read on this motion (sequence # 3) by plaintiff Melinda Rolfs for an order pursuant to CPLR 3212 granting summary judgment against defendants on the issue of liability; pursuant to CPLR 1412 dismissing defendants Joseph Medina and Arileyda Ortiz' first and fourth affirmative defenses; setting the matter down for trial; and for any relief which this court deems necessary and proper as well as this motion (sequence # 4) by third-party defendant Mark Rolfs for an order granting summary judgment pursuant to CPLR 3212 and dismissing the complaint and any and all cross-claims, and for such other and further relief as this court deems just and proper.

Notice of Motion (Seq. # 3) - Affirmation in Support - Exhibits A - H  
Defendants' Affirmation in Opposition - Exhibit A  
Plaintiff's Reply - Exhibits A - D

Notice of Cross-Motion (Seq. #4) - Affirmation in Support  
Affirmation in Opposition to Cross-Motion - Exhibit A

NYSCEF Docs. # 59, 60, 61

On or about June 23, 2017, plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident which occurred on April 23, 2017, in Elmsford, New York. Issue was joined on or about August 1, 2017, by service of defendants Joseph Medina and Arileyda M. Ortiz' answer. Defendants commenced a third-party action against Mark Rolfs on or about April 9, 2018, to which Mark Rolfs answered on or about May 29, 2018. Meanwhile, following various compliance conferences, this Court entered a Trial Readiness Order on May 3, 2018, and plaintiff filed a Note of Issue and Certificate of Readiness on May 17, 2018.

Thereafter, on June 28, 2018, plaintiff Rolfs moved for summary judgment against defendants on the issue of liability; for a dismissal of defendants' first and fourth affirmative defenses; to set the matter down for trial; and for any relief which this court deems necessary and proper. On July 25, 2018, the parties submitted a stipulation to adjourn the return date of plaintiff's motion from July 31, 2018, to August 31, 2018, (NYSCEF Doc. # 60), which the court So-ordered on July 30, 2018, (NYSCEF Doc. # 61). Accordingly, on August 24, 2018, defendants submitted their affirmation in opposition to plaintiff's motion and on August 31, 2018, plaintiff filed a reply affirmation.

In the interim, on August 28, 2018, third-party defendant, Mark Rolfs filed a cross-motion for summary judgment and a dismissal of the complaint and any and all cross claims. Although third-party defendant states that his supporting papers include an affirmation of counsel and a memorandum of law with attachments thereto, only counsel's affirmation in support, which adopts the factual recitation, legal arguments and procedural history set forth in plaintiff's June 28, 2018 affirmation, was filed. Defendants/third-party plaintiffs filed an affirmation in opposition on August 30, 2018.

At the outset, the Court must address the issue of timeliness and proper motion practice. Eight years ago, in 2009, a new Differentiated Case Management (DCM) Protocol<sup>1</sup> 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 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

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<sup>1</sup>The DCM Protocol is available online on the Ninth Judicial District's website at <https://www.nycourts.gov/courts/9jd/diffCaseMgmt.shtml>.

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, effective January 3, 2017<sup>2</sup>, “any motion for

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<sup>2</sup>The DCM Protocol was revised effective June 30, 2017, to the limited extent of providing a new, separate email for the Compliance Part Motion Clerk and revised again effective February 23, 2018, to the limited extent of providing additional judicial resources for the DCM Parts.

summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue.” The Trial Readiness Order also directs 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.” In addition, the DCM Protocol states in boldface 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.**

Furthermore, the stipulation adjourning the return date of the instant motion, which this court So-ordered, reminds the parties in all capital letters and boldface type that

**ANY MOTION OR CROSS-MOTION FOR SUMMARY JUDGMENT MUST BE MADE IN ACCORDANCE WITH THE DCM PROTOCOL AND WITHIN 45 DAYS OF THE FILING OF THE NOTE OF ISSUE. THE SO-ORDERING OF THE PARTIES’ PROPOSED STIPULATION/ORDER TO ADJOURN THE RETURN DATE OF A MOTION OR CROSS-MOTION FOR ANSWERING OR REPLY PAPERS SHALL NOT BE CONSTRUED AS EXTENDING THE DEADLINE TO MAKE ANY MOTION OR CROSS-MOTION OR APPROVAL OF AN UNTIMELY MOTION OR CROSS-MOTION.**

Pursuant to the DCM Protocol set forth above, all summary judgment motions were due in this case no later than July 2, 2018, 46 days after plaintiff filed the Note of Issue on May 17, 2018, insofar as July 1, 2018, the 45<sup>th</sup> day after plaintiff filed the Note of Issue, was a Sunday, *see* Gen. Constr Law § 25-a. Here, plaintiff’s motion for summary judgment was filed on June 28, 2018, and is thus timely filed. In contrast, third-party defendant’s cross-motion was filed on August 28, 2018, 103 days following the filing of the Note of Issue and clearly violates the DCM Protocol.

Third-party defendant does not acknowledge that his cross-motion is untimely. Rather he summarily asserts that “[u]nder strict Court guidelines this motion for Summary Judgment is timely.” Counsel notes that the action against the third-party defendant commenced on or about April 11, 2018, by the filing of a summons and complaint; that issue was joined on or about May 29, 2018, by service of a verified answer which was accompanied by a demand for a bill of particulars and various other discovery requests; and that the third-party defendant’s deposition had recently been conducted, the transcript for which had yet to be received. While counsel does not elaborate in his affirmation, the court notes that during a compliance conference held on July 3, 2018, the parties represented that the third-party defendant’s deposition had already been completed. Significant as well is the fact that third-party defendant never sought to vacate the Trial Readiness Order or Note of Issue, notwithstanding that defendants/third-party plaintiffs had requested that very relief following the commencement of the third-party action, but subsequently withdrew on or about July 13, 2018. *See* NYSCEF Doc. # 59.

Under these circumstances, third-party defendant's untimely cross-motion is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Instead of filing his motion within the applicable period, third-party defendant waited until some *103* days after the Note of Issue was filed and some *61* days after his adversary filed a motion before filing his own motion. Both time frames well exceed the 45 days permitted under the DCM Protocol. Moreover, third-party defendant fails to proffer any reason, let alone good cause for the lengthy 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 their untimely motion as a "cross-motion." Not only does such practice generally allow the offending and untimely party to take unfair advantage of the timely party's timeliness, it prejudices the timely party by providing only a short time to respond to the "cross-motion." Rather than having the Court extend the time to respond, and thus allow counsel to succeed in both detouring around the rules and in delaying the progress of the case unjustifiably, the consequences should be borne squarely by the offending party by denying the cross-motion as untimely.

In view of the foregoing, it is hereby

ORDERED that third-party defendant Mark Rolfs' cross-motion is denied in its entirety as untimely; and it is further

ORDERED that plaintiff Melinda Rolfs' motion for summary judgment and related relief is transferred to an IAS Part for determination on the merits; and it is further

ORDERED that plaintiff Melinda Rolfs shall serve a copy of this Decision and Order, with notice of entry, upon all parties within seven days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
9/18, 2018

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

NYSCEF DOC. NO. 76

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