Dozier v Manhattan & Bronx Surface Tr. Operating Auth.
2020 NY Slip Op 32185(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 156053/2014
Judge: George J. Silver

Index №. 156053/2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

----------X

ORELIA DOZIER **Index №. 156053/2014**

Plaintiff

-against-

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and SHEARWOOD J. MCCLELLAND M.D.,

Defendants

----------X

HON. GEORGE J. SILVER:

With the instant motion, defendants New York City Health and Hospitals Corporation ("NYCHHC") and Shearwood McClelland, M.D. ("Dr. McClelland")(collectively, "defendants") move for permission to file an untimely motion for summary judgment. If the instant application is granted, defendants submit, based on an annexed medical affirmation, that they are entitled to judgment in their favor since no actions on their part proximately caused the injuries alleged in this lawsuit. Plaintiff ORELIA DOZIER ("plaintiff") opposes the instant application.

CPLR §3212(a) provides, in relevant part, that on a motion for summary judgment "the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." This statute was amended in 1996 (L. 1996, ch. 492), effective January 1, 1997, to "address the proliferation of eleventh hour motions, made when there is inadequate time for reply or proper court consideration, and to prevent trial delays which often prejudice litigants who have spent extensive time and money in trial preparation" (*Auger v. State of New York*, 236 AD2d 177, 179 [3rd Dept 1997]).

In *Brill v. City of New York*, 2 NY3d 648, 650-651 (2004), the Court of Appeals clarified that the deadline for summary judgment motions was to be strictly enforced to prevent "[e]leventh-hour summary judgment motions," a practice that "ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice." In this connection, the court found that "good cause" under CPLR §3212(a) "requires a showing of good cause for the delay in making the motion-a satisfactory explanation for untimeliness-rather then simply permitting meritorious non-prejudicial filings, however tardy" (*id.* at 652).

Furthermore, "it does not matter whether a motion for summary judgment has been made more than 120 days after the filing of the note of issue or after the expiration of a shorter time limit set by a court order or stipulation. Whatever the source of the deadline with which a party fails to

comply, the lateness may not be excused without a showing of good cause within the meaning of CPLR§3212 (a)--a showing of something more than mere law office failure" (*Quinones v. Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. of Cornell Univ.*, 114 AD3d 472, 473 [1st Dept 2014][internal citations omitted]; *see also, Maschi v. City of New York*, 110 AD3d 460, 460 [1st Dept 2013][reversing grant of untimely motion for summary judgment, finding that defendants' excuse for filing the late motion, that counsel was on trial in another case, did not satisfy the good cause requirement "inasmuch as it is essentially an excuse of law office failure"]; *Azcona v. Salem*, 49 AD3d 343 [1st Dept 2008][finding that trial court erred in granting summary judgment motion "upon a perfunctory claim of law office failure"]).

Here, the court has established a firm rule that motions for summary judgment must be filed within 60 days of the filing of a note of issue. Plaintiff filed a note of issue on July 30, 2019. In a certification stipulation prior to plaintiff's filing, plaintiff reserved her right to depose Dr. McClelland. Despite plaintiff's reservation of rights to depose Dr. McClelland, nowhere in that stipulation did defendants request an extension of time to file and serve a motion for summary judgment beyond the 60-days allotted by the court. Thereafter, on September 28, 2019, defendants' 60 days to file and serve a summary judgment motion expired. The day *after* defendants' time to file and serve a timely summary judgment motion expired, defendants' counsel contacted plaintiff's counsel to discuss Dr. McClelland's deposition and to obtain her consent to permit defendants to file a late summary judgment motion. Defendants' counsel contends that plaintiff's counsel gave defendants the unwritten assurance that a motion for summary judgment was premature since Dr. McClelland had not yet been deposed. This purported assurance is not documented in writing. Defendants' counsel further states that plaintiff's counsel gave defendants' counsel the assurance that plaintiff's counsel would consent to an extension of time for defendants to file a summary judgment motion. Again, this purported assurance is not documented in writing. Defendants' counsel subsequently submitted a proposed stipulation extending defendants' time to move for summary judgment that was never endorsed by either the court or plaintiff's counsel.

On October 8, 2019, at a conference before the court, plaintiff's counsel waived plaintiff's right to depose Dr. McClelland. Thereafter, defendants renewed their application to extend their time to file and serve a motion for summary judgment. Plaintiff's counsel objected to the request, and the court instructed defendants' counsel to make the instant motion by Order to Show Cause. Thereafter, defendants filed the instant application, accompanied by an untimely summary judgment motion on November 27, 2019.

Defendants' only excuse for failing to timely move for summary judgment is that their counsel relied, without supporting documentation, on the notion that the deadline for such a motion would be extended beyond 60-days because plaintiff was reserving plaintiff's right to depose Dr. McClelland. Defendants excuse that Dr. McClelland's deposition was necessary prior to the filing of a summary judgment motion is contravened by the fact that defendants have been in possession of the relevant Harlem Hospital records, and Dr. McClelland as an employee, throughout this litigation. In addition, defendants signed a certification stipulation permitting plaintiff to file a note of issue without making even a fleeting reference to the need for an extension of time to file a motion for summary judgment in light of the purported materiality of Dr. McClelland's testimony

prior to the filing of such a motion. Based on the foregoing, at best defendants' excuse for the delay constitutes law office failure, and as such defendants' instant application and motion for summary judgment must be denied as untimely (*see Waxman v. Hallen Construction Co., Inc.*, [1st Dept 2016][trial court should have denied summary judgment motion as untimely where it was submitted past the deadline in preliminary conference order and the reassignment to new justice did not constitute good cause for the late filing]; *Quinones*, 114 AD3d at 474, *supra* [affirming trial court's denial of untimely summary judgment motion, noting that excuse proffered by defendant's counsel of overlooking the deadline in a preliminary conference order "is a perfunctory claim of law office failure"]; *Giudice v. Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008][finding that alleged ambiguity in preliminary conference order did not constitute good cause for delay in filing summary judgment motion and that defendant's "failure to appreciate that its motion was due 45 days after the filing of the note of issue is no more satisfactory than a perfunctory law office failure"][internal citations and quotations omitted]).

Finally, the cases relied on by defendants are inapposite, as defendants do not provide an adequate reason for their acquiescence, via stipulation, to the notion that discovery was complete, and therefore that plaintiff could file a note of issue, even though Dr. McClelland had not been deposed. Indeed, defendants' stipulation runs athwart of their present self-serving argument that Dr. McClelland's deposition was material before plaintiff could file a note of issue. To be sure, defendants should have never endorsed a stipulation affording plaintiff the opportunity to file a note of issue if defendants truly believed that Dr. McClelland's deposition was material. Moreover, the fact that Dr. McClelland suffered a massive stroke, and therefore was essentially unavailable to testify, is contrary to defendants' argument that Dr. McClelland could have, and should have, been deposed prior to the expiration of defendants' time to file a timely motion for summary judgment.

The cases cited by defendants involve circumstances where good cause for the delayed filing of a summary judgment motion was shown based on the parties' agreement that material discovery remained outstanding at the time that plaintiff's note of issue was filed (*see e.g. Coon v. Hotel Gansevoort Group, LLC*, 150 AD3d 519 [1st Dept 2017]; *see also Gonzalez ex rel. Gonzalez*, 95 NY2d 124 [2000]). Relevantly, in *Coon*, the Appellate Division, First Department, found that the motion court providently exercised its discretion in granting leave for defendant to file a belated summary judgment motion upon "good cause shown" where defendant's counsel was not notified that plaintiff had e-filed the note of issue, the parties continued to engage in discovery after the filing of the note of issue, and plaintiff filed the note of issue more than one month before the deadline stipulated to by the parties (*Coon*, 150 AD3d at 519, *supra*). Here, defendants were aware that plaintiff was filing a note of issue and stipulated to the same despite the fact that Dr. McClelland's deposition was outstanding. Unlike *Coon*, here there was no surprise that plaintiff would file a note of issue, and plaintiff did not file a note of issue well before the stipulated deadline. To be sure, plaintiff's note of issue was filed on July 30, 2019, two days prior to the August 1, 2019 on or before date that the parties agreed to.

In addition, here plaintiff's counsel does not agree with the supposition that Dr. McClelland's testimony was material before defendants could file a motion for summary

judgment, and evidenced her disagreement with that notion by refusing to endorse any stipulation extending defendants' time to file a motion for summary judgment. Ironically, defendants annex an untimely summary judgment motion to the instant application even though Dr. McClelland was ultimately never deposed in connection with this case. Hence, defendants' instant untimely summary judgment motion, submitted without the perceived benefit of Dr. McClelland's testimony, illustrates in and of itself that defendants could have filed their summary judgment motion at an earlier juncture in time.

It is also notable that defendants never once sought an extension of time to file a summary judgment motion until their time to timely file such a motion had already expired. Nowhere do defendants address the issue of the timeliness of their requests, either to the court or plaintiff's counsel, for an extension of time to file a summary judgment motion (*see e.g. Okun v. Tanners*, 11 NY3d 262 [2008]; *Werner v. Tiffany & Co.*, 291 AD2d 305 [1st Dept. 2002]). Indeed, defendants cannot advance such an argument, because the record, by defendants' own concession, reveals that defendants did not make such requests until after their time to file a timely summary judgment motion had already expired. As such law office failure does not evince good cause, defendants' application is denied.

Accordingly, it is

ORDERED that the instant application is denied, and defendants' summary judgment motion is denied as untimely; and it is further

ORDERED that the parties shall appear on July 15, 2020 at ~~9:30 am~~ for a pre-trial conference ~~in Part 10, Room 1227, 111 Centre Street, New York, NY~~ a time to be determined to be held virtually. the parties are to forward their e mail addresses to HKings@nycourts.gov.

This constitutes the decision and order of the court.

Dated:

June 12, 2020

George J. Silver

GEORGE J. SILVER