

Finklea v Metropolitan Commuter Transp. Auth.

2024 NY Slip Op 31267(U)

April 11, 2024

Supreme Court, New York County

Docket Number: Index No. 151205/2019

Judge: Eric Schumacher

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIC SCHUMACHER PART **23M**

Justice

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PATSY FINKLEA,

Plaintiff,

- v -

METROPOLITAN COMMUTER TRANSPORTATION
AUTHORITY a/k/a METRO-NORTH COMMUTER
RAILROAD et al.,

Defendants.

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INDEX NO. 151205/2019

MOTION DATE 09/15/2023

MOTION SEQ. NO. 002

**AMENDED DECISION + ORDER
ON MOTION**

NYSCEF doc nos. 53-81 were read on this motion for summary judgment.

Motion by defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad (hereinafter defendants) pursuant to CPLR 3212 for an order granting summary judgment in favor of defendants and against plaintiff denied as untimely¹.

BACKGROUND

Plaintiff commenced this action on February 4, 2019, by filing the summons and complaint (NYSCEF doc no. 1).

On July 30, 2019, the prior court held a preliminary conference and at that conference set forth that “[a]ny dispositive motion(s) shall be made on or before 120 days of filing the [note of issue]” (NYSCEF doc no. 10 at 2).

On January 14, 2020, the prior court held a compliance conference and at that conference set forth that “[a]ll dispositive motions must be filed within 120 days of the note of issue” (NYSCEF doc no. 18 at 2). The same language was included in the prior court’s November 2, 2022 status conference order (NYSCEF doc no. 46 at 2).

On December 30, 2022, plaintiff filed the note of issue (NYSCEF doc no. 50). On January 23, 2023, this court issued a “Discovery Conference Notice -From Court” notifying the parties by NYSCEF that the January 24, 2023 discovery conference was adjourned to February 22, 2023 “in room 311” (NYSCEF doc no. 51). Room 311 is the courtroom of this court, to which court administration reassigned the case in early 2023.

¹ This order vacates, amends, and supersedes the order that was previously issued by the court on February 22, 2024 (see NYSCEF doc no. 82).

This reassignment is evidenced by, among other things, the NYSCEF Confirmation Notice for this filing. The Notice is also dated January 23, 2023, at 2:09 p.m., and states “Assigned Judge: Eric Schumacher” in bold, center-justified type directly below the index number and case caption provided at the top of the page. The Notice further states that an email notification regarding the filing was sent to both “Bryan P. Destefano”, at “bdestefano@lcbf.com”, and “Philip J. DiBerardino Jr.”, at “pdib@lcbf.com”, attorneys for defendants, with the law firm of Landman Corsi Ballaine & Ford, also on January 23, 2023, at 2:09 p.m. (*see id.*). The court is annexing a copy of the confirmation notice, which is already available on NYSCEF as indicated, to this decision and order for clarity. Moreover the change in schedule is reflected in eCourts, with “Schumacher, Hon. Eric” listed as the “Justice” for the February 22, 2023 appearance, and “23” listed as the “Part” for the same appearance.

This court’s part rules were online as of February 9, 2023, specifying that “[a]ll summary judgment motions must be filed within 60 days of the filing of the note of issue” (Part 23 R. III[G]).

On March 17, 2023, this court filed a further discovery notice informing the parties of the reassignment and directing the parties to familiarize themselves with this court’s part rules (NYSCEF doc no. 19). This court’s part rules were linked to the discovery notice. The February 22, 2023 discovery conference was not held as the note of issue was filed on December 30, 2022 and the court cancelled the conference pursuant to the part rules. This is also noted in eCourts.

On April 28, 2023, defendants filed this motion for summary judgment (NYSCEF doc no. 53). Defendants argue that the motion is timely as the preliminary conference order provides that dispositive motions are to be made on or before 120 days of the filing of the note of issue (affirmation of Destefano ¶ 12).

DISCUSSION

CPLR 3212(a) requires that motions for summary judgment be filed by a date set by the court, unless none is set, “except with leave on good cause shown.” “[G]ood cause’ in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Jarama v Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 692 [1st Dept 2018] [applying the rule to cross motions]). A movant’s “failure to appreciate that its motion was due . . . is no more satisfactory than a perfunctory claim of law office failure” (*Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008] [internal quotation marks omitted]).

Here, the deadline set by this court in its part rules for the filing of all summary judgment motions was 60 days from the filing of the note of issue. The note of issue was filed on December 30, 2022. 60 days from the filing of the note of issue was February 28, 2023. The motion for summary judgment was filed on April 28, 2023. That is 119 days from the filing of the note of issue. As such, the motion is untimely.

Moreover, defendants have not shown good cause for their untimeliness. The Appellate Division, First Department has held that good cause is not found where movants fail to file their summary judgment motions by the deadline set forth in a rule or order of the assigned judge before whom the motion is pending (see Appleyard v Tigges, 171 AD3d 534, 536 [1st Dept 2019]). In Appleyard, the prior judge gave the parties 120 days from the filing of the note of issue to file any dispositive motions. The note of issue was filed on December 16, 2016, while the case was still assigned to that prior judge. On December 31, 2016, that judge retired, and the case was administratively reassigned to a new judge on January 7, 2017. That new judge's part rules required dispositive motions be filed no later than 60 days from the filing of the note of issue. The defendants filed their motions for summary judgment 103 days after the filing of the note of issue. The trial court denied the motions as untimely, and the Appleyard Court affirmed.

The Appleyard Rule therefore applies where there has been a change in the judge assigned, whether before or after the filing of the note of issue. Any prior deadline is superseded at the time of the assignment, if the judge has a rule about the timing of summary judgment motions, or else by any subsequent order setting forth such timing. It is axiomatic that, if the time to file under the new judge has run prior to the assignment, the Appleyard Rule is inapplicable (see Crawford v Liz Claiborne, Inc., 11 NY3d 810, 813 [2008]).

All parties to an action are on notice of all NYSCEF filings and must always be familiar with and abide by the assigned judge's part rules. This court's part rules require all summary judgment motions to be filed within 60 days of the filing of the note of issue. As of January 23, 2023, at 2:09 p.m., all parties were on notice of the assigned judge having changed to Eric Schumacher of this court. This was 24 days after the filing of the note of issue. Further the eCourts entry concerning the scheduled February 22, 2023 discovery conference also appeared online before the parties' 60 days had run. There can be no mistaking that all parties were on notice of the reassignment to this court by means of NYSCEF and eCourts at least 36 days prior to their deadline for filing summary judgment motions under this part's rules. As such, the motion is untimely and, applying the Appleyard Rule to the facts of this case, there is no good cause shown as to the untimeliness of the motions.

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CONCLUSION

Accordingly, it is

ORDERED that the court’s decision and order on this motion filed at NYSCEF doc no. 82 is vacated and is amended and superseded by this order; and it is further

ORDERED that the motion is denied as untimely; and it is further

ORDERED that, within five days of entry, plaintiff shall serve a copy of this order with notice of entry on defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad.

The foregoing constitutes the decision and order of the court.

4/11/2024

DATE


ERIC SCHUMACHER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE