

# New York Commercial Division Round-Up

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## [Untimely Filing Of Motion To Dismiss Does Not Warrant Automatic Dismissal Where Motion Is Meritorious And Opposing Party Will Not Be Prejudiced](#)

By: [Sean J. Kirby](#)

In [Brown, et al. v. Noble, Inc., et al., Index No. 600876/2010 \(Sup. Ct., NY County, Dec. 2, 2010\)](#) (“Brown v. Noble”), Justice Bernard Fried granted defendant Thomas Caruso’s (“Caruso”) motion to dismiss plaintiffs Robert Brown and RB Group LLC’s (“Plaintiffs”) complaint, even though the Motion was filed approximately 1 week late.

In June 2009, in connection with a loan, defendant Noble, Inc. (“Noble”), executed a promissory note (the “Note”) in favor of plaintiff Robert Brown (“Brown”). Caruso was the signatory on the Note as the President of Noble, and the Note required Noble to make monthly interest payments to Brown from July 2009 through June 2010. In July 2009, Brown also entered into an accounts receivable purchase agreement (the “Purchase Agreement”) with Noble, which Caruso also signed as the President of Noble. While Caruso signed both the Note and the Purchase Agreement on behalf of Noble, neither the Note nor the Purchase Agreement imposed any obligations on Caruso. This action arose out of Noble’s alleged failure to make the requisite payments under the Note and the Purchase Agreement.

On April 7, 2010, Plaintiffs served their complaint upon defendants Noble and Caruso, asserting six causes of action: (i) breach of contract, (ii) unjust enrichment, (iii) breach of implied covenant of good faith and fair dealing, (iv) promissory estoppel, (v) fraudulent misrepresentation, and (vi) indemnity. The parties stipulated that defendants’ time to respond to the complaint was extended until May 31, 2010 which, by virtue of Memorial Day, meant that defendants’ response was due on June 1, 2010. However, Caruso did not serve the Motion until June 7, 2010, thereby making the Motion untimely.

While Justice Fried ultimately granted the Motion on all causes of action because Plaintiffs failed to plead and/or submit any evidence that Caruso had any individual obligations under either the Note or the Purchase Agreement, the Court first had to decide whether the late filing of the Motion mandated a denial of the Motion. In reaching the decision that the untimely filing of the Motion did not warrant automatic denial, Justice Fried relied on the First Department’s decision in [Riddick v. City of New York](#), 4 A.D.3d 242, 245 (1st Dep’t 2004). In [Riddick](#), the First Department affirmed a Supreme Court decision granting summary judgment, even though the motion for summary judgment was untimely filed, because the motion was meritorious and the opposing party did not suffer any prejudice from the late filing. [Riddick](#), 4 A.D.3d at 245.

Applying [Riddick](#), Justice Fried held that the untimely filing of the Motion did not warrant automatic dismissal because the Motion was meritorious (Caruso was not a party to the Note or the Purchase Agreement) and it would be “contrary to the interests of judicial economy to deny the [M]otion and allow meritless causes of action to continue, simply because Caruso served the motion several days after his time to respond expired.” [Brown v. Noble](#) at p. 4 (citing [Riddick](#), 4 A.D.3d at 245). Justice Fried also found that Plaintiffs failed to identify any prejudice they would suffer as a result of the complaint being dismissed against Caruso because

the action will continue against Noble, the party which is actually a signatory on the Note and Purchase Agreement. Finally, Justice Fried found that Plaintiffs' argument that the late filing mandated denial of the Motion was unsupported by the case law cited by Plaintiffs' because, in those cases, the motions were not denied solely on the bases of untimeliness. [\*Brown v. Noble\*](#) at p. 4 (citing [\*Specht v. Lanzuter Benevolent Assoc.\*](#), No. 105143/2008, 2010 WL 1047677 (Sup. Ct., NY County, Mar. 17, 2010); [\*Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.\*](#), No. 603259/2003, 2005 WL 5351322 (Sup. Ct., NY County, Apr. 4, 2005)).

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