

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 20843/00
IBRAHIM ELSLAM,	Motion
Plaintiff,	Date December 11, 2007
-against-	
	Motion
QUEENS SURFACE CORP., THE CITY OF	Cal. No. 9
NEW YORK, NEW YORK CITY TRANSIT	
AUTHORITY, MANHATTAN AND BRONX	Motion
SURFACE TRANSIT OPERATING AUTHORITY,	Sequence No. E005
NEW YORK CITY DEPARTMENT OF	
TRANSPORTATION AND ANDREW GERDAU,	
Defendants.	

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition.....	6-8

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff, Ibrahim Elslam's motion for an Order restoring this matter to the trial calendar is hereby granted. The case was stricken from the trial calendar by Honorable Martin J. Schulman by Order dated September 6, 2006 and entered on October 20, 2006. Said Order directed all parties to complete discovery and motion practice in an expeditious manner and then to restore the case to the trial scheduling calendar by Stipulation. It is undisputed that this Order was served upon attorneys for plaintiff with Notice of Entry on December 7, 2006. Pursuant to plaintiff's Affidavit of Service, plaintiff served the instant motion to restore on November 13, 2007.

CPLR 3404 states that cases that are marked off the calendar in supreme court or county court are deemed abandoned and shall be dismissed if not restored to the calendar within one year. As the case was marked off the trial calendar on September 6, 2006,

plaintiff's case was deemed abandoned, and subsequently dismissed on September 6, 2007 after it had not been restored within the year. In order to have the case restored, a plaintiff must show "a meritorious cause of action, a reasonable excuse for the failure to timely restore, lack of intent to abandon the matter, and lack of prejudice to the opposing party" (*Kranz v. Braverman*, 15 AD3d 451, 451-452 [2d Dept 2005] [citations omitted]; see also, *Curtin v. Grand Union Company*, 124 AD2d 918 [3d Dept 1986]; *New York City Transit Authority*, 238 AD2d 543 [2d Dept 1997]).

MERITORIOUS CAUSE OF ACTION

Plaintiff maintains that it has set forth a meritorious cause of action by including in its motion papers an Affidavit of Merit from plaintiff, a Summons and Verified Complaint, and a Verified Bill of Particulars, all detailing plaintiff's action for personal injury. Defendants', Queens Surface Corps.' and Andrew Gerdau's opposition papers make no argument that plaintiff does not have a meritorious cause of action as they are completely silent on this issue.

The Court finds that plaintiff has set forth a meritorious cause of action by including in its motion papers an Affidavit of Merit from plaintiff, a Summons and Verified Complaint, and a Verified Bill of Particulars, which set forth a viable cause of action for negligence on the part of defendants, resulting in serious personal injuries.

REASONABLE EXCUSE FOR FAILURE TO TIMELY RESTORE

Plaintiff contends that it has a reasonable excuse for the delay in making the motion to restore. They state that defense counsel was uncooperative from the moment the case was marked off the calendar, and maintain that they made many phone calls to the defense counsel in an attempt to resolve the outstanding discovery issues. They further assert that the great majority of calls were not returned and that the attorney's they spoke to within defense counsel's office rarely had any knowledge or authority concerning the file. Furthermore, they maintain that they reasonably relied upon the written statement of Rosemarie Klie, Esq. dated July 12, 2007 that she would sign the Stipulation to Restore once discovery was completed. Defendants maintain that the plaintiff and or his attorneys have delayed the action for three and a half years, arguing that plaintiff failed to provide defendants with discovery first requested on April 8, 2004 until September 2007. Defendants' papers do not directly

address plaintiff's purported reasonable excuse for the two month delay in making the motion to restore. Defendants simply argue that they believe plaintiff's counsel made them wait three and a half years for discovery, and so the Court should not condone the conduct of plaintiff's counsel.

The Court finds that plaintiff has demonstrated a reasonable excuse for the two month delay in making the motion to restore. The Court finds that plaintiff's counsel reasonably relied upon the written statement of Rosemarie Klie dated July 12, 2007, wherein she stated "I will sign a Stipulation restoring this action to the trial calendar only after all discovery has been provided." It is a reasonable excuse that plaintiff relied upon the written assurance from defense counsel and continued with discovery rather than make a motion to restore. Plaintiff demonstrated that it made sufficient efforts to complete discovery, and have demonstrated that all discovery is complete except for a further deposition of plaintiff, which plaintiff's counsel has made sufficient efforts to try to schedule. Courts have accepted pure oversight as a reasonable excuse, and in the instant case, plaintiffs evidenced that they were working diligently (*Evans v. New York City Housing Authority*, 262 AD2d 123 [1st Dept 1999]). Accordingly, plaintiff has demonstrated a reasonable excuse for the delay.

LACK OF INTENT TO ABANDON TO ABANDON THE MATTER

_____ Plaintiff asserts that there has been no intent to abandon the case in that they have been working to restore the case almost since the day it was marked off the calendar. Since the time the case was marked off the calendar, they have allegedly made numerous phone calls, prepared and served pleadings, corresponded with defense counsel, and provided additional medical records and authorizations. Plaintiff has also prepared and forwarded Stipulations to Restore the case to the defense counsel. Defendants' opposition papers make no argument that plaintiff does not have a meritorious cause of action as they are completely silent on this issue.

The Court finds that plaintiff demonstrated that it had no intent to abandon the case. Plaintiff demonstrated that after the motion was struck from the calendar it: prepared and served an Amended Verified Bill of Particulars; prepared and forwarded proposed Stipulations to Restore; made numerous phone calls and follow-up phone calls to defense counsel in order to resolve outstanding discovery issues (including the scheduling of a further deposition of plaintiff); forwarded all medical records

in their possession regarding plaintiff's subsequent accident, as well as authorizations allowing defense counsel to obtain same; prepared and forwarded Stipulations to Restore the case, and corresponded with defense counsel by letter; *See, Kranz, supra*, wherein the Court held that the plaintiffs' proposed stipulations to restore the action to the trial calendar demonstrated that the plaintiffs did not intend to abandon the matter; *See, Curtin, supra*, wherein the Court held that correspondence between plaintiff's counsel and an expert and defense counsel during the year before the case dismissed was sufficient activity to evidence a lack of intent to abandon the case; *See, Pryor v. Long Island Railroad*, 40 AD3d 726 (2d Dept 2007) wherein the Court held that the fact that the parties continued to conduct discovery after the case was marked off the calendar showed a lack of intent to abandon the case.

LACK OF PREJUDICE TO THE OPPOSING PARTY

Plaintiff argues that there is no prejudice to the defendant, and maintains that it has provided all of the discovery defendant is entitled to and more. Plaintiff maintains that they forwarded to defendant a list of dates on which they would produce their client for a further deposition and have made at least eight phone calls attempting to schedule the EBT, but defendant refuses to cooperate. Plaintiff also cites case law stating that the mere passage of time does not constitute prejudice, stating that the motion is being made just two months after the passing of the year requiring dismissal pursuant to CPLR 3404. Defendants' opposition papers make no argument that they would be prejudiced if the case were to be restored as they are completely silent on this issue.

The Court finds there is nothing in the record to indicate that the defendants have been prejudiced by the relatively brief delay in making the motion to restore (*see, Curtin, supra; see, also, Evans, supra*). As plaintiff has demonstrated that restoration would not be unduly prejudicial, this prong has been satisfied.

Accordingly, as plaintiff has presented a meritorious cause of action, a reasonable excuse for the failure to timely restore, lack of intent to abandon the matter, and lack of prejudice to the opposing party, the plaintiff's motion to restore is granted.

The foregoing constitutes the decision and order of this Court.

Dated: January 7, 2008

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Howard G. Lane, J.S.C.

