206 A.D.2d 460
Supreme Court, Appellate Division,
Second Department, New York.

Rajko KOPILAS, et al., Respondents,

v.

Bess PETERSON, etc., et al., Appellants.

July 18, 1994.

Synopsis

Appeal was taken from order of the Supreme Court, Queens County, Lane, J., which granted motion to restore personal injury action to the calendar. The Supreme Court, Appellate Division, held that plaintiffs did not rebut presumption of abandonment which arose from dismissal for failure to prosecute.

Reversed.

West Headnotes (1)

[1] **Pretrial Procedure** Proceedings

Plaintiffs did not rebut presumption of abandonment which attached when case was automatically dismissed for failure to prosecute where there was no activity for 17 months and no showing of adequate excuse, although there was an agreement to restoring consent at the time that the matter was marked off the calendar. McKinney's CPLR 3404.

23 Cases that cite this headnote

Attorneys and Law Firms

****563** Picciano & Scahill, P.C., Mineola (Francis J. Scahill, of counsel), for appellants.

Robert A. Skoblar, New York City, for respondents.

Before SULLIVAN, J.P., and PIZZUTO, SANTUCCI and FRIEDMANN, JJ.

Opinion

MEMORANDUM BY THE COURT.

***460** In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the ***461** Supreme Court, Queens County (Lane, J.), dated January 7, 1993, which granted the plaintiffs' motion to restore the case to the calendar.

ORDERED that the order is reversed, on the law, with costs, and the plaintiffs' motion is denied.

Preliminarily, we note that the plaintiffs have failed to demonstrate that the defendants did not comply with the time limitation set forth in CPLR 5513(a) regarding the filing of a notice of appeal.

Turning to the merits, it is well-settled that "[a] party seeking to restore a case to the trial calendar after it has been dismissed pursuant to CPLR 3404 must demonstrate the merits of the case, a reasonable excuse for the delay, the absence of an intent to abandon the matter, and the lack of prejudice to the nonmoving party in the event that the case is restored to the trial calendar" (*Civello v. Grossman,* 192 A.D.2d 636, 596 N.Y.S.2d 464; *see also, Hewitt v. Booth Mem. Med. Center,* 178 A.D.2d 401, 577 N.Y.S.2d 104; *Gray v. Sandoz Pharms.,* 158 A.D.2d 583, 551 N.Y.S.2d 551; *Hillegass v. Duffy,* 148 A.D.2d 677, 539 N.Y.S.2d 426; *Denver v. American Home Prods. Corp.,* 138 A.D.2d 670, 526 N.Y.S.2d 485; *O'Dell v. Stornelli,* 98 A.D.2d 957, 470 N.Y.S.2d 204). In the case at bar, the plaintiffs have met none of these criteria.

At the time this matter was marked off the calendar, the parties' attorneys entered into a stipulation to restore the case to the calendar on consent. Thereafter, however, there ensued a 17–month period, with no activity whatsoever regarding the case, before the plaintiffs' attorney contacted the defendants' attorney to request that he sign a stipulation to restore. The plaintiffs have offered no adequate excuse for this delay. Although the agreement to restore on consent is some indication that the plaintiffs did not intend to abandon the action, the agreement alone is an insufficient ground upon which to predicate restoration, especially since there was no activity in the case during the period it was off the calendar (*see, Bergan v. Home for Incurables,* 124 A.D.2d 517, 518, 508 N.Y.S.2d 434; *Escobar v. Deepdale Gen. Hosp.,* 172 A.D.2d 486, 567 N.Y.S.2d 842). Accordingly, the plaintiffs have failed to rebut the presumption of abandonment which

attaches when a matter has been automatically dismissed pursuant to CPLR 3404 (*see, Escobar v. Deepdale Gen. Hosp., supra,* at 486, 567 N.Y.S.2d 842).

Moreover, the plaintiffs failed to submit an affidavit of merit demonstrating a meritorious cause of action in support of the motion to restore (*see, Terranova v. Gallagher Truck Center, Inc.,* 121 A.D.2d 621, 503 N.Y.S.2d 650). Nor have the plaintiffs shown that the defendants will not be prejudiced by the restoration of this matter to the ***462** trial calendar (*see, Civello v. Grossman, supra,* 192 A.D.2d at 636, 596 N.Y.S.2d 464; *Hewitt v. Booth Mem. Med. Center, supra,* 178 A.D.2d at 401, 577 N.Y.S.2d 104). Under these circumstances, the Supreme Court improvidently ****564** exercised its discretion in granting the plaintiffs' motion to restore.

All Citations

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