Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18238
Y/hu

_____AD3d_____ Submitted - January 2, 2008

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2007-03419 DECISION & ORDER

Great Plains Capital Corporation, etc., appellant,
v Narinder Bindra, d/b/a Banc Enterprises,
et al., respondents.

(Index No. 11895/05)

Salamon Davis (Peter Seideman, Port Washington, N.Y., of counsel), for appellant.

James D'Angelo, Huntington, N.Y., for respondents.

In an action, inter alia, to recover on a line of credit agreement and a personal guaranty, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Warshawsky, J.), dated March 5, 2007, as denied that branch of its motion which was to vacate a prior order of the same court dated October 23, 2006, granting the defendants' unopposed oral application to dismiss the action for failure to prosecute, and directing dismissal of the action with prejudice.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the plaintiff's motion which was to vacate the prior order dated October 23, 2006, is granted, and the order dated October 23, 2006, is vacated.

On October 18, 2006, the plaintiff's attorney failed to appear for a court-ordered deposition of the defendant Narinder Bindra. On the same day, the defendants' attorney made an oral application before the Supreme Court to dismiss the action based on the "failure to prosecute." The Supreme Court granted the defendants' oral application and issued an order dated October 23, 2006,

directing dismissal of the action with prejudice. By notice of motion dated January 3, 2007, the plaintiff moved, inter alia, to vacate the order dated October 23, 2006. The Supreme Court denied that branch of the plaintiff's motion which was to vacate.

The dismissal of the action with prejudice was a nullity since the defendants' oral application to dismiss the action was made without notice to the plaintiff and an opportunity to be heard (*see Xand Corp. v Reliable Sys. Alternatives Corp.,* 35 AD3d 849, 850; *Pelaez v Westchester Med. Ctr.,* 15 AD3d 375). Accordingly, that branch of the plaintiff's motion which was to vacate the order dated October 23, 2006, directing dismissal of the action with prejudice, should have been granted.

MASTRO, J.P., FISHER, FLORIO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court