

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

D27054  
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Submitted - April 7, 2010

FRED T. SANTUCCI, J.P.  
THOMAS A. DICKERSON  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2009-04805

DECISION & ORDER

Hristos Leinas, appellant, v Long Island Jewish  
Medical Center, respondent.

(Index No. 26152/94)

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Arnold E. DiJoseph, P.C. (Arnold E. DiJoseph III of counsel), New York, N.Y., for  
appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success, N.Y. (Christopher Simone and  
Scott Fusaro of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, the plaintiff  
appeals from an order of the Supreme Court, Queens County (O'Donoghue, J.), entered January 27,  
2009, which denied his motion, in effect, to vacate the dismissal of the action pursuant to CPLR 3404  
and to restore the action to the trial calendar.

ORDERED that the order is affirmed, with costs.

This case was first marked off the trial calendar on June 18, 2001, because the  
plaintiff's counsel of record was engaged in another trial. After the first restoration to the trial  
calendar, the case was marked off again on January 5, 2004, due to the medical condition of the  
plaintiff's expert witness. After the second restoration, the case was marked off on June 11, 2007,  
because of a conflict between the plaintiff's trial attorney and the plaintiff's expert witness. On March  
26, 2008, the plaintiff moved a third time to restore the action to the trial calendar, but was not ready  
to proceed because his trial attorney was unable to obtain another expert witness; that motion  
ultimately was withdrawn. Pursuant to CPLR 3404, the action was dismissed on June 11, 2008. On  
August 22, 2008, the plaintiff moved a fourth time, inter alia, to restore the action to the trial

April 20, 2010

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calendar. In the order appealed from, the Supreme Court denied the motion.

A case marked off the trial calendar pursuant to CPLR 3404 and subsequently dismissed after one year may be restored to the trial calendar provided that the plaintiff demonstrates the existence of a meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant (*see Strancewilko v Martin*, 50 AD3d 671; *Williams v D'Angelo*, 24 AD3d 538; *Basetti v Nour*, 287 AD2d 126, 131). Here, the plaintiff failed to demonstrate a reasonable excuse for his 14-month delay in obtaining either a new expert witness or a new trial attorney (*see Tate v Peninsula Hosp. Ctr.*, 255 AD2d 503, 504; *Carter v City of New York*, 231 AD2d 485, 486; *Roland v Napolitano*, 209 AD2d 501; *Panchon v Brooklyn Hosp.*, 179 AD2d 742, 743). Under the circumstances of this case, the plaintiff failed to rebut the presumption of abandonment which attaches when a matter has been automatically dismissed pursuant to CPLR 3404 (*see Krichmar v Queens Med. Imaging, P.C.*, 26 AD3d 417, 419; *Kalyuskin v Rudisel*, 306 AD2d 246, 247; *Tate v Peninsula Hosp. Ctr.*, 255 AD2d at 504). Furthermore, since more than 15 years have passed between the date the alleged malpractice was committed and the date of the motion under review, the defendant would be prejudiced if the action was restored to the trial calendar (*see Bornstein v Clearview Props., Inc.*, 68 AD3d 1033, 1035; *Krichmar v Queens Med. Imaging, P.C.*, 26 AD3d at 419; *Costigan v Bleifeld*, 21 AD3d 871).

SANTUCCI, J.P., DICKERSON, BELEN and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court