

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

D28517
G/nl

_____AD3d_____

Submitted - September 22, 2010

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
RANDALL T. ENG
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2009-09692

DECISION & ORDER

Leomaris Santana, respondent, v Nelson Vargas, et al.,
appellants.

(Index No. 23407/03)

Domenick Napoletano, Brooklyn, N.Y., for appellants.

David J. Hernandez, Brooklyn, N.Y., for respondent.

In an action to impose a constructive trust upon certain real property, the defendants appeal from an order of the Supreme Court, Kings County (Schmidt, J.), dated July 21, 2009, which granted the plaintiff's motion to restore the action to the trial calendar.

ORDERED that the order is affirmed, with costs.

Contrary to the defendants' contention, the action was not marked "off" or stricken from the trial calendar within the meaning of CPLR 3404 (*see Freehill v ITT Sheraton Corp.*, 74 AD3d 876; *Long-Waithe v Kings Apparel Inc.*, 10 AD3d 413, 414). Rather, the Supreme Court's order dated June 1, 2007, indicates that the case was marked "settled" after the parties reached a tentative agreement. Accordingly, CPLR 3404 is inapplicable (*see Long-Waithe v Kings Apparel Inc.*, 10 AD3d at 413; *Baez v Kayantas*, 298 AD2d 416), and the plaintiff was not required to demonstrate a reasonable excuse, meritorious cause of action, lack of intent to abandon, and lack of

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prejudice in order to have the matter restored to the active trial calendar (*see Long-Waithe v Kings Apparel Inc.*, 10 AD3d at 414).

RIVERA, J.P., COVELLO, ENG, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court