

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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MOUNTAIN SIDE ENTERPRISES, LLC, and
GMD INDUSTRIES, INC,

Index No.: 4070/03
Motion Date: 3/12/08
Motion Cal. No.: 23
Motion Seq. No.: 4

Plaintiffs,

-against-

SIS DEVELOPMENT CORPORATION and
MASCON RESTORATION, INC.,

Defendants.

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MASCON RESTORATION, INC.,

Third Party Plaintiff,

-against-

JJH CONSTRUCTION,

Third Party Defendant.

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The following papers numbered 1 to 19 read on this motion by plaintiffs Mountain Side Enterprises, LLC and GMD Industries, Inc., for an order, pursuant to CPLR § 3404, vacating the dismissal of the action and restoring the case to the trial calendar; and on this cross-motion by third party defendant JJH Construction for an order denying plaintiff’s motion to restore, and dismissing the third-party complaint on the ground that it is barred by laches.

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Notice of Motion-Affidavits-Exhibits.....	1 - 6
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Upon the foregoing papers, it is ordered that the motion and cross-motion are resolved as follows:

This is a negligence action seeking damages against defendant SIS Development Corp. (“SIS Development”), the owner of property located at 129-06 18th Avenue, College Point, New York, at which defendant Mascon Restoration (“Mascon”) was engaged in demolition and renovation. Plaintiff Mountain Side Enterprises, LLC (“Mountain Side”), the owner of the adjacent building located at 129-20 18th Avenue, College Point, New York, and plaintiff GMD Industries, Inc. (“GMD”), a tenant who leased and maintained a glass fabrication business on the property owned by Mountain Side, commenced this action to recover damages arising from the loss of real and personal property, and the disruption of business resulting from the flooding caused by the demolition and renovation that exposed and damaged the foundation of Mountainside’s property. Mascon commenced a third party action against third party defendant JJH Construction (“JJH”), its subcontractor.

By order of this Court dated July 27, 2004, this Court consolidated for trial this action with a companion action pending in this Court under Index No. 29309/03, entitled *American Office Services, Inc. v. Mountain Side Enterprises, LLC, SIS Development Corporation and Mascon Restoration, Inc.*¹ Thereafter, the instant action was stricken from the calendar on April 4, 2005, the date that it appeared before the trial part. It is upon the foregoing that Mountain Side and GMD (collectively “plaintiffs”) move to restore this action to the active calendar.² JJH cross-moves for, inter alia, dismissal of the third-party action on the basis of laches.

“CPLR § 3404 creates a rebuttable presumption that an action marked off the trial calendar and not restored within one year has been abandoned (see, Sanchez v. Denkberg, 284 A.D.2d 446, 726 N.Y.S.2d 873).” Krichmar v. Queens Medical Imaging, P.C., 26 A.D.3d 417, 418 (2nd Dept. 2006); see, M. Parisi & Son Const. Co., Inc. v. Long Island Obs/Gyn, P.C., 39 A.D.3d 819 (2nd Dept. 2007); Builders Apartment Corp. Condominium v. Gingold, 37 A.D.3d 635, 831 N.Y.S.2d 448 (2nd Dept. 2007). And, “CPLR § 3404 dismissals are accomplished automatically upon the passage of one year after being stricken, by operation of law (citations omitted).” Mills v. Pisani, 23 A.D.3d 1044 (4th Dept. 2005); see, Neidereger v. Hidden Park Apartments, Inc., 306 A.D.2d 392 (2nd Dept. 2003); Sarot v. Yusufov, 301 A.D.2d 512 (2nd Dept. 2003); Angelucci v. City of New York, 297 A.D.2d 648 (2nd Dept. 2002); Nunez v. County of Nassau, 265 A.D.2d 312 (2nd Dept. 1999). Thus, by operation of law, the instant action was dismissed in April 2006, and this motion to restore is being made almost three years after the matter was marked off the calendar, and almost two years after its automatic dismissal.

¹ By Order dated July 22, 2005 (Dollard, J.), Mountain Side was granted a default judgment against defendant SIS Development.

² American Office Services, Inc., the plaintiff in the companion action, also moved for restoration of its action, as result of the vacatur of the note of issue by order of the court dated March 30, 2007 (Weinstein, J.). That motion, which was submitted for decision as number one on the March 12, 2008 calendar, was disposed of by order of this Court dated April 10, 2008.

“A plaintiff seeking to restore a case to the trial calendar after it has been dismissed pursuant to CPLR § 3404, must demonstrate 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 (citations omitted).” Krichmar v. Queens Medical Imaging, P.C., 26 A.D.3d 417, 418 (2nd Dept. 2006); see, M. Parisi & Son Const. Co., Inc. v. Long Island Obs/Gyn, P.C., 39 A.D.3d 819 (2nd Dept. 2007); Builders Apartment Corp. Condominium v. Gingold, 37 A.D.3d 635, 831 N.Y.S.2d 448 (2nd Dept. 2007); Levine v. Agus, 28 A.D.3d 719 (2nd Dept.2006); Williams v. D'Angelo, 24 A.D.3d 538 (2nd Dept. 2005); Magnone v. Gemm Custom Brokers, Inc., 17 A.D.3d 412 (2nd Dept. 2005).

Here, counsel for plaintiffs alleges that he did not become aware that the matter had been stricken from the calendar until April 2007, when he appeared in the trial part with defense counsel for defendant Mountain Side in the companion action. His lack of awareness allegedly was based upon his April 4, 2005 representation to the Trial Part that this action had been consolidated with the companion action for a joint trial, and his understanding that the joint trial of the actions was stayed pending completion of discovery in the second action. He further alleges that since April 2005, plaintiffs have been actively engaged in the litigation process of the companion action, in which Mountain Side is a named defendant, and had been copied on all correspondence in that action, including discovery motions. Plaintiffs further argue that although all discovery herein was complete and ready for trial at the time the two actions were consolidated for trial, they assumed that the trial of the instant action was stayed, not marked off, until discovery was complete in the second action. Plaintiffs thus allege that there is a reasonable excuse for the delay in moving to restore, there was no intent to abandon the action, and defendants have not been prejudiced. This Court agrees that the first prong of the two-prong test for restoration of an action following a CPLR § 3404 dismissal has been satisfied. Nothing submitted in the opposition papers compels a different conclusion.

The evidence submitted on this motion also is sufficient to demonstrate that plaintiffs have a meritorious cause of action. Plaintiffs submit the affidavit of George Rodriquez, their principal, who speaks to the negligence of defendants and the resulting damage to their real and personal property. Also submitted is the affidavit of John W. Walter, plaintiffs' expert, who attests to defendants' negligent excavation and construction of the property adjacent to plaintiffs' property that caused damage to the foundation of plaintiffs' building, which resulted in flooding. Accordingly, as plaintiffs have demonstrated 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 defendants, who have been actively involved with the prosecution of both actions, plaintiffs' motion to restore the action to the trial calendar hereby is granted, and that branch of the cross-motion by JJH for an order denying the motion to restore is denied. See, Johnson v. Greenberg, 35 A.D.3d 380 (2nd Dept. 2006).

JJH further cross moves for an order dismissing “the third-party complaint, without prejudice, pursuant to CPLR § 1010, on the grounds that maintenance of the third-party defendant action is barred by laches, would unduly delay the determination of plaintiff's action and would prejudice the substantial rights of the third party defendant, JJH Construction.” The third party complaint, which was served in both the instant and companion actions by Mascon, seeks indemnification and/or apportionment against JJH, the subcontractor on the excavation and demolition project at issue in both actions. JJH contends that the delay in the commencement of the third party action against it until

February 2005, two years after the commencement of the action, is prejudicial to it because it cannot adequately defend against the claims asserted against it without the benefit of pre-trial discovery.

In Annanquartey v. Passeser, 260 A.D.2d 517, 517-518 (2nd Dept. 1999), the Appellate Division, Second Department, discussed CPLR § 1010, the applicable statutory provision, and stated:

‘CPLR 1010 provides a safety valve for cases in which the third-party claim ‘will unduly delay the determination of the main action or prejudice the substantial rights of any party’ (Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 1010, at 134, quoting from CPLR 1010; see, Kelly v. Yannotti, 4 A.D.2d 767, 165 N.Y.S.2d 710). In the instant case, the plaintiff in the main action does not claim that he will be unduly delayed by the appellants' impleader of Mobile (citations omitted). Nor, if trial of the main action is stayed pending completion of disclosure by Mobile, can Mobile claim any prejudice by reason of the appellants' delay in bringing their third-party action for indemnity (citation omitted). Additionally, Mobile should be afforded an adequate opportunity to conduct its discovery in the third-party action.

Similarly, in Villatoro v. Talt, 269 A.D.2d 390 (2nd Dept. 2000), the Second Department ruled, notwithstanding the delay in commencing the third-party action, “since the actions involve common factual and legal issues, a single trial is appropriate in the interest of judicial economy and to avoid the possibility of inconsistent jury verdicts (citations omitted).” The Court added that a “short stay of 60 days so as to complete discovery in the third-party action will not unduly prejudice the plaintiffs in the main action.” Id.

Here, although JJH, by its attorney, states conclusory that delay has prejudiced it, not one factual allegation was proffered to substantiate the claim of prejudice with respect to either preparing a defense or to demonstrating any impairment to a substantial right. JJH asserts that it “is entitled to conduct its own pre-trial discovery,” and that the denial of that right would be “irreparably prejudicial to the movant.” In opposition, Mascon, after setting forth that the instant action has been consolidated for trial with the companion action, and involves the identical parties including JJH, correctly asserts that JJH “has had more than enough time to conduct discovery” with regard to the companion action, “which is duplicative of the discovery necessary to determine liability in the instant case.” Mascon further alleges that it provided JJH “with copies of all documentary discovery and transcripts of depositions that were conducted in this matter. Further, Mascon provided the third-party defendant with responses to each of its discovery demands.” Under such circumstances, it would be difficult indeed for JJH to establish a basis for dismissal of the third party complaint for the reasons asserted. Any claimed prejudice to it by reason of Mascon’s delay in bringing its third-party action for indemnity or contribution is curable by affording JJH an adequate opportunity to conduct any discovery in the instant third-party action which is nonduplicative of the discovery already conducted in the third-party action in the companion action. Accordingly, this Court finds no basis for dismissal of the instant third-party complaint.

Accordingly, the motion by plaintiffs Mountain Side Enterprises, LLC and GMD Industries, Inc., to restore this action to the trial calendar hereby is granted, and the cross motion by third party defendant JJH Construction for denial of restoration and dismissal of the third party complaint, is denied in its entirety. The parties are directed to complete all outstanding discovery, including any discovery to be conducted by third party defendant JJH Construction which is not duplicative of the discovery already conducted in this and the companion action pending under Index No. 29309/03, within sixty (60) days of the date of service of a copy of this decision and order with notice of entry, which shall be served upon the herein defendants and third-party defendant, the parties in the aforementioned companion action, and the Clerk of the Trial Term Office. The parties shall appear ready for the trial of this action, which has been joined for trial with the companion action pursuant to the July 27, 2004 order of this Court, in the Trial Scheduling Part on August 19, 2008.

Dated: April 14, 2008

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J.S.C.