SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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THE CITY OF NEW YORK,

Index No. 44318/91

Plaintiff,

-against-

STRATEGIC DEVELOPMENT CONCEPTS, INC., formerly known as AROL DEVELOPMENT CORPORATION,

Defendant

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Joan A. Madden, J.

The City of New York ("the City") moves to vacate the dismissal of this action pursuant to CPLR 3404, and to restore it to the court calendar. Defendant Strategic Development Concepts, Inc, formerly known as Arol Development Corporation ("SDC") opposes the motion, which is granted for the reasons below.

Background

This action arises out SDC's lease of the Bronx Terminal Market ("Market") from the City pursuant to a sixty-nine year lease and development contract dated February 9, 1983, entitled the Second Amendment and Restatement of Lease ("Lease").[1] Under

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[1]As noted in the decision, this action is one of three separate, but related, actions involving the Lease. This action seeks damages for SDC's alleged failure to pay rent; Strategic Development Concepts, Inc, f/k/a Arol Development Corp. v The City of New York, Index No. 344489/91, is for damages in connection with the City's failure to maintain and repair the viaduct on the premises; and The City of New York v Strategic Development Concepts, Inc. f/k/a Arol Development Corp., Index No. 45777/92 arises out of SDC's alleged failure in 1992 to repair a structure on the premises known the WH-1 Building. After settlement negotiations broke down in April 2000, the City submitted three motions in connection with each of the three actions. In addition to this motion to restore, the City

the Lease, SDC is required to make certain improvements to the Market, which is a wholesale food market located south of Yankee Stadium. The Market contains several buildings, including a six-story structure built originally as a refrigerated warehouse, known as the WH-1 Building. The WH-1 Building was originally surrounded by a viaduct structure which provided access to the market. The second floor of the WH-1 Building was used as a loading dock for trucks making deliveries to the Market via the viaduct. By 1991, the viaduct had fallen into disrepair and in or about April 1995, the City demolished it based on asserted concerns for the public safety.

In this action, which was commenced in 1991, the City alleges that SDC owes millions of dollars in back rent from the beginning of the lease term in 1983. In its answer, SDC denies that it owes back rent, asserting, inter alia, that it has taken credits against rent due to the City in accordance with various provisions of the Lease.

Two other actions were commenced in the early 1990's regarding the Lease. Prior to the commencement of this action, SDC filed Strategic Development Concepts, Inc, f/k/a Arol Development Corp. v The City of New York, Index No. 344489/91, in

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submitted a motion to restore Index No. 45777/92 to the court's calendar (motion seq. no. 002). The City has also moved to amend its answer to assert additional counterclaims in Index No. 34489/91 (motion seq. no. 006).

which it alleged that the City breached the Lease by failing to maintain the viaduct ("the Viaduct Case"). By decision and order dated January 28, 1994, SDC was granted partial summary judgment in the Viaduct Case. The Court found that the City, as opposed to SDC, was obligated under the Lease to maintain, repair or replace the viaduct, and that City was in default of its obligations under the Lease. This decision and order was affirmed on appeal. The City demolished the viaduct in 1995 after SDC's request for injunctive relief was denied.

In addition, in 1992, the City brought an action against SDC based on an October 13, 1992 notice of default alleging SDC's failure to maintain and repair the WH-1 Building (The City of New York v Strategic Development Concepts, Inc. f/k/a Arol Development Corp., Index. No. 45777/92)("the WH-1 Case").[2]

On October 12, 1993, the parties to this action entered into a preliminary conference order requiring that a note of issue be filed by June 13, 1994. In 1993, the City served, and SDC responded to, the City's First Set of Interrogatories and Document Requests. The City also took the deposition of Christian Olsen, the property manager for SDC, on four separate days between 1994 and 1996. Moreover, according to the City's

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[2]The WH-1 Case was marked off the calendar in July 1994 and dismissed one year later pursuant to CPLR 3404, and this Court has denied the City's recent motion to vacate the dismissal and restore it to the court's calendar.

attorney, Majorie Landa ("Landa"), some of the extensive discovery conducted in the Viaduct Case in 1997 and 1998 related to this action.

On March 18, 1997, this action was marked off the calendar, after the City failed to answer a clerk's calendar call. A year later, this action was automatically dismissed pursuant to CPLR 3404. In August 1997, after this action was marked off, and with the consent of SDC, the City amended its complaint to include a caption reflecting the new name of SDC and to update the period during which the City sought rent arrears. In September 1997, SDC served and filed an answer. In December 1998, the parties began settlement discussions aimed at resolving all disputes, including those in this action. These discussions broke down in April 2000. Shortly thereafter, the City alleges it firt became aware that this case had been marked off and dismissed, and by notice of motion dated June 16, 2000, it made this motion to restore this action.

The City argues that restoration is proper here as it has a meritorious cause of action for rent arrears, it did not intend to abandon the action, it did not learn that the action was marked off until settlement negotiations ended, and that as there has been discovery in this action and the note of issue has not been filed, SDC will not be prejudiced by the delay.

SDC counters that the City abandoned this action after

summary judgment was granted in SDC's favor in the Viaduct Case and the decision affirmed on appeal, and that the City's failure to file a note of issue in accordance with the preliminary conference order establishes that it did not intend to pursue this action. SDC also asserts that City has provided insufficient proof as to the merits of this action, and that this action is time-barred, as it was dismissed in March 1998. SDC further argues that SDC has been prejudiced by the three-year delay in restoring this action as one of the individuals who drafted and negotiated the 1983 Lease has died and the other, David Buntzman, the President and Chief Executive Officer of SDC, is 92 years-old.

Discussion

A case pending in this court which is marked "off" on a clerk's call and not restored within one year thereafter, "'shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.'" Ronsco Constr. Co. v 30 East 85th Street Co., 219 A.D.2d 281 (1st Dept 1996) quoting CPLR 3404. Here, the court's records indicate that the case was marked off on March 18, 1997. Thus, pursuant to CPLR 3404, this action was deemed abandoned and dismissed on March 18, 1998.

However, the statute only creates a presumption of abandonment which may be rebutted by proof that the litigation is in progress. See, e.g., Ramputi v Timko Contracting Corp., 262

A.D.2d 26, 27 (1st Dept 1999)(presumption of abandonment rebutted where plaintiff provided evidence that it participated in discovery during the period that the action was marked off). To succeed on a motion to restore, a plaintiff must demonstrate (1) the existence of a meritorious case of action, (2) a reasonable excuse for the delay, (3) lack of an intent to abandon, and(4) an absence of prejudice to the nonmoving party in the event the action is restored. Zabari v City of New York, 242 A.D.2d 15 (1st Dept 1998). Here, the City has established its entitlement to restore this action to the active calendar.

As to the merits of the action, the City has submitted sufficient proof to warrant restoration. Although various provisions of the Lease may entitle SDC to substantial credits against rent, particularly based on the demolition of the viaduct,[3] the City submits excerpts of Mr. Olsen's deposition testimony which suggests that the amount of these credits has not been established. See, Zabari v City of New York, 242 A.D.2d, at 17 ("a deposition transcript is an adequate substitution for an affidavit of merits"). In addition, SDC is wrong when it argues

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[3] For instance, SDC relies on Article 14 of the Lease relating to condemnation of the premises. Paragraph 14.3.1 provides that "if there shall be a partial taking of the Premises, then this lease shall terminate as of the date of such taking as to the part so taken and shall continue in full force and effect as to the remainder of the premises under the lease, except that Lessee shall be entitled to a reduction of in the Basic rent, additional rent, and other charges payable under the Lease...."

the City's claims are time-barred based on a dismissal under CPLR 3404. See, e.g., Fiumefreddo v Champion Trucks Rental, Inc., 194 A.D.2d 346 (1st Dept 1993)(action restored fourteen years after plaintiff sustained injuries that provided the basis for his claim).

Next, the City has established a lack of an intent to abandon this action through its attention to this action during the period after it was marked off the calendar. See, Weiss v City of New York, 247 A.D.2d 239, 241 (1st Dept 1998)(a "plaintiff's attention to outstanding matters during the interim sufficiently evinced his continued interest in the litigation"). Specifically, the City filed an amended complaint after this action was marked off and engaged in settlement discussions. Moreover, in 1997 and 1998, the City pursued discovery in the Viaduct Case related to this action.

Furthermore, no real prejudice has been showed resulting from the three-year delay in restoring this action. Notably, there has already been discovery in this case, the note of issue has not yet been filed, and further discovery may be ordered. Moreover, although he is 92 years-old, SDC does not claim that Mr. Buntzman would be unable to testify, and in fact, the City notes that he recently testified for two days in the Viaduct Case. And, significantly, SDC does not claim that there are no other witnesses available with knowledge regarding the relevant

the Lease provisions.

Under these circumstances, the City's inadvertence in realizing this action had been marked off should be excused, and the motion to restore the case to the active calendar should be granted.[4] "[A] client should not be deprived of [its] day in court by his attorney's neglect or inadvertent error, especially where the other party cannot show prejudice...[and] the complaint has merit." Paoli v Sullcraft Manufacturing Co., 104 A.D.2d 333, 334 (1st Dept 1984).

Conclusion

In view of the above, it is

ORDERED that the motion is granted and this action is restored to the active calendar in Part 11, and the parties are directed to appear for a conference in Part 11 on May 3, 2001.

DATED: April 12, 2001

J.S.C.

[4] The City argues in reply that CPLR 3404 does not apply to this action because it was not on the trial calendar at the time it was marked off. While the majority of cases discussing CPLR 3404 involve actions marked off the trial calendar, the City is incorrect that this action cannot be dismissed under the statute because it was marked off before the note of issue was filed. See, Siegel, New York Practice, § 376, at 602 (3d ed. 1999).