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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN BRANSTEN Justice PART 6

CIRILA CALANZA,

Plaintiff,

- and -

LENOX HILL HOSPITAL and CHRISTINE HUANG, M.D.,

Defendants.

INDEX NO. 116509/02
MOTION DATE 02/20/07
MOTION SEQ. NO. 01

The following papers, numbered 1 to 3 were read on this motion to restore to calendar

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to vacate the order dismissing the complaint of plaintiff Cirila Calanza ("Ms. Calanza") and to restore the case to the trial calendar is granted.

On December 7, 2004, Judicial Hearing Officer Ira Gammerman dismissed this action for plaintiff's failure to prosecute. Affirmation in Support of Motion ("Aff."), at ¶ 10. Defendants Lenox Hill Hospital and Christine Huang, M.D. served the Decision with notice of entry on January 31, 2005. Affirmation in Opposition ("Opp."), at ¶ 13.

To succeed on a motion restore an action more than one year after it is dismissed, plaintiffs must demonstrate: (1) a meritorious claim; (2) a reasonable excuse for the delay; (3) an intent not to abandon the action; and, (4) a lack of prejudice to defendants. *Nunez v. Resource Warehousing and Consol.*, 6 A.D.3d 325, 326 (1st Dept. 2004); *Muscarella v. Herbert Constr. Co., Inc.*, 2 A.D.3d 112, 113 (1st Dept. 2003); *McClusky v. Ferriter*, 292 A.D.2d 244, 245 (1st Dept. 2002); *Costabile v. Hilton Hotel Corp.*, 291 A.D.2d 361 (1st Dept. 2002); *Leonardelli v. Presbyt. Hosp. in the City of New York*, 288 A.D.2d 105, 106 (1st Dept. 2001); *Aguilar v. Djonvic*, 282 A.D.2d 366 (1st Dept. 2001).

Dated: 4-3-07 (see page 8)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED:

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

The judgment of whether to restore is addressed to the sound discretion of the trial court, who must consider the "totality of the circumstances" in determinating if plaintiff has met this burden. *Leonardelli v. Presbyt. Hosp. in the City of New York*, 288 A.D.2d, at 106; *Krantz v. Scholtz*, 201 A.D.2d 784, 785 (3d Dept. 1994), *lv. dismissed*, 83 N.Y.2d 902. New York Courts have established a strong public policy favoring resolution of disputes on the merits. *Kaufman v. Bauer*, 36 A.D.3d 481 (1st Dept. 2007). Therefore, although plaintiff must meet all four requirements to succeed on a motion to restore, when plaintiff complies, restoration is generally liberally granted. *McClusky v. Ferriter*, 292 A.D.2d, at 245; *see also*, Siegel, New York Prac. § 108, at 197 (4th ed. 2005).

Here, Ms. Calanza has demonstrated compliance with all four requirements.

To prove that her claim is meritorious, Ms. Calanza submits the affirmation of Joshua Fink, M.D., ("Dr. Fink") a New-York physician. Aff., Ex. E, at ¶¶ 1; *see, Kaufman v. Bauer*, 36 A.D.3d, at 481 (affidavit by physician required in medical malpractice case); *Nunez v. Resource Warehousing and Consol.*, 6 A.D.3d, at 327 (affidavit, taken with verified complaint, bill of particulars and medical records, establishes meritorious cause of action). Dr. Fink opines to a reasonable degree of medical certainty after review of the records and testimony in this case that defendants departed from accepted standards of medical care in treating Ms. Calanza. Aff., Ex. E, at ¶¶ 1-4.

In particular, Dr. Fink opines that defendants negligently failed to diagnose plaintiff's appendicitis despite symptoms of decreased appetite, abdominal pain, fever, and elevated white blood-cell count. Aff., Ex. E, at ¶ 4. He states, moreover, that defendants mis-diagnosed Ms. Calanza with gastroenteritis. Aff., Ex. E, at ¶ 5. Dr. Fink concludes that defendants should have performed repeat abdominal examinations, taken Ms. Calanza's complete medical history, and instructed Ms. Calanza to return to the emergency room if her pain worsened. Aff., Ex. E, at ¶ 6. Finally, he avers that defendants proximately caused Ms. Calanza to suffer peritonitis and a perforated appendix. Aff., Ex. E, at ¶ 7.

Ms. Calanza has also demonstrated a reasonable excuse for her delay in prosecuting this action, namely, that her counsel David L. Taback ("Mr. Taback") was engaged on another trial when this case was dismissed for failure to proceed. Aff., at ¶ 6; *see also*, New York Court Rules § 125.1(a) ("engagement of counsel shall be ground for adjournment"). Indeed, before the case was dismissed Mr. Taback submitted an affidavit of engagement providing,

> "I have been directed by Judge Dollard in Supreme Court, Queens County to select a jury on Monday, October 18, 2004 in the case of Roger McMillan v. Wilfredo Recientes, M.D., Index Number 13401/97. * * * Deponent is a sole practitioner, and accordingly, there is no one available to commence jury selection on this Calanza case. * * * It is respectfully requested that this Calanza case be adjourned * * *."

Aff., Ex. B, at ¶¶ 3,5; *see*, New York Court Rules § 125.1(e)(1) (outlining requirements for affidavit of engagement); *see also*, *McClusky v. Ferriter*, 292 A.D.2d, at 245 (proper affidavit of engagement sufficient to establish reasonable excuse for default).

Additionally, in 2005 Ms. Calanza made efforts to restore this case to the trial calendar. Mr. Taback avers that on November 9, 2005, he sent paralegal Vidal Andino ("Mr. Andino") to file motion papers seeking to vacate the dismissal. Aff., at ¶ 7. Mr. Andino did not file the papers and lied to Mr. Taback about it, telling Mr. Taback the motion was pending before the Court. *Id.* Upon discovery of this and other similar misdeeds, Mr. Taback fired Mr. Andino. Aff., at ¶ 12.

Mr. Andino's outrageous behavior is, likewise, a reasonable excuse for plaintiff's default. The Appellate Division, First Department stated, "This Court has consistently recognized that law office failure may constitute a reasonable excuse for delay in moving to restore a case to the calendar." *Kaufman v. Bauer*, 36 A.D.3d, at 481; *accord, Achampong v. Weigelt*, 240 A.D.2d 247, 248 (1st Dept. 1997).

Furthermore, Ms. Calanza has demonstrated her intent not to abandon this action. To be sure, defendants were aware of Ms. Calanza's intent to pursue the action because they were served with copies of the 2005 motion to restore. Aff., at ¶ 7. Additionally, plaintiff served defendants with CPLR 3101(d) expert disclosure in September of 2005 – further evidencing her intent to litigate this action. *See*, Aff., Ex. F, at 1.

Finally, defendants have not shown that they would be prejudiced by restoration of the action. All discovery is complete and the case is ready to proceed to trial. *See, Muscarella v. Herbert Constr. Co., Inc.*, 2 A.D.3d, at 113 (defendants not prejudiced because all discovery is complete); *Leonardelli v. Presbyt. Hosp. in the City of New York*, 288 A.D.2d, at 106. Moreover, contrary to defendants' assertions, the "mere passage of time does not establish prejudice, especially in a medical malpractice action where proof of alleged malpractice will for the most part consist of medical records * * *." *Kaufman v. Bauer*, 36 A.D.3d 481; *accord*, *Nunez v. Resource Warehousing and Consol.*, 6 A.D.3d, at 327.

Based on Ms. Calanza's submissions sufficiently demonstrating her entitlement to restoration of her claims against defendants and strong public policy favoring resolution of cases on the merits, *see, Kaufman v. Bauer*, 36 A.D.2d, at 481; *McClusky v. Ferriter*, 292 A.D.2d, at 245, Ms. Calanza's action will be restored.

Defendants' assertions do not mandate a different result.

To begin, the case on which defendants principally rely for the proposition that Ms. Calanza's expert affidavit is insufficient to show merit, *Kaufman v. Bauer*, 8 Misc. 3d 60 (App. Term, 1st Dept. 2005), has since been reversed. *See*, *Kaufman v. Bauer*, 36 A.D.3d, at 481. In overruling the lower court, the Appellate Division, First Department stated, "the

showing of merit required on a motion to restore is less than that required to defend a motion for summary judgment." *Id.*

Defendants are also incorrect in averring that Mr. Taback's affidavit of engagement is deficient. New York Court Rules § 125.1 – governing the requirements for an affidavit of engagement – does not require that the affidavit include the dates on which the other actions were set for trial. The statute merely advises that "the court shall consider the affidavit of engagement and *may* make such further inquiry as it deems necessary." New York Court Rules § 125.1(c)(2) (emphasis added).

What is more, had the affidavit contained information about the case on which Mr. Taback was engaged, *McMillan*, as defendants allege it should have, it would have been even more apparent that *McMillan* properly received priority for trial. The index number makes clear that *McMillan* was commenced in 1997, more than four years before commencement of this case. Moreover, the Note of Issue in *McMillan* was filed May 20, 2002, whereas the Note of Issue in this case was filed more than 18 months later, on December 31, 2003.

Lastly, defendants' analysis of CPLR 5015 is erroneous; Ms. Calanza will not be precluded from making this motion to restore because she did not appeal the dismissal and more than one year has elapsed since she was served with notice of entry. Although CPLR 5015(a) provides that the court may relieve a party from dismissal "if such motion is made within one year after service of copy of the judgment or order with written notice of its entry

upon the moving party," the one year is not, as defendants suggest, a statute of limitations. "The court has inherent discretionary power to vacate a default in the interests of justice and retains this power even though the allotted year has expired." Siegel, New York Prac. § 108, at 197 (4th ed. 2005) (discussing CPLR 5015[a]).

In the end, Ms. Calanza has satisfied the requirements to restore her case and defendants have not demonstrated sufficient prejudice to oppose Ms. Calanza's motion. In the interests of resolving this complicated medical malpractice case on the merits, therefore, the dismissal is vacated and plaintiff's case is restored.

Because this case was dismissed more than two years ago and plaintiff's counsel is responsible for the extended delay in prosecuting this action, however, Mr. Taback's office is directed to pay all costs, expenses and attorney's fees suffered by defendants in opposing this motion to restore. The matter is hereby referred to a referee to hear and report as to the amount of fees, expenses and costs incurred by defendants. *See*, *McClusky v. Ferriter*, 292 A.D.2d, at 244 (ordering costs and attorney's fees on motion to restore and sending matter to referee to determine amount).

Accordingly, it is

ORDERED that Ms. Calanza's motion to restore this action to the trial calendar is granted; and it is further

ORDERED that the parties are to appear for a pre-trial conference on April 24, 2007, at 9:30am; and it is further

ORDERED that the parties are to appear for trial on May 21, 2007. If the May 21, 2007 date does not work for anyone, an alternative May or June 2007 date should be discussed by counsel as soon as possible. Within 14 days of this Decision and Order, counsel is to inform the Court of any lack of feasibility of the scheduled date and jointly propose an alternate trial date; and it is further

ORDERED that plaintiff's counsel is directed to pay the costs, attorney's fees and expenses incurred by defendants in opposing this motion; and it is further

ORDERED that the issue of the amount of fees, costs and expenses incurred by defendants in opposing this motion is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that plaintiff's counsel shall serve and file a copy of this order with notice of entry on the Clerk of the Judicial Support Office for the purpose of arranging a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 3, 2007

ENTER

Hon. Eileen Bransten