

Union Bank of Switzerland v Forest Elec. Corp.

2007 NY Slip Op 33989(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0103630/2000

Judge: Marilyn Shafer

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

UNION BANK OF SWITZERLAND, FISHER-BANK LANE
COMPANY and FISHER BROTHERS MANAGEMENT CO.,

INDEX NO. 103630-00

Plaintiffs,

-against-

MOTION SEQ. NO. 004

FOREST ELECTRIC CORP., INSURANCE COMPANY
OF NORTH AMERICA, ESS & VEE ACOUSTICAL
CONTRACTORS, PLAZA CONSTRUCTION CORP.,
and CHRISTOPHER CARRIQUE,

Defendants.

The following papers, numbered 1 to 7 were read on this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion — Affidavit — Exhibits	1
Affirmation in Opposition	2
Memorandum of Law In Opposition	3
Affidavit in Opposition	4
Affidavit in Opposition	5
Reply Affirmation	6

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion by plaintiffs Union Bank of Switzerland, Fisher-bank Lane Company and Fisher Brothers Management Co., for an order restoring the case to the active calendar for

the purpose of completing discovery is granted.

Introduction

This is a motion by third party plaintiffs to restore to the active calendar an insurance coverage action, marked off as “disposed” in 2002, concerning an accident which occurred in 1994. The motion is granted in spite of the lengthy passage of time. The plaintiffs herein bear no responsibility for the progress of the proceedings and have never evidenced an intention to abandon their claims.

Background

Christopher Carrique was an employee of Ess & Vec Acoustical Contractors in 1994 when he fell off a ladder. He initiated an action against the owner and operator of the premises in which the accident occurred, Fisher-Park Lane Co. and Fisher Brothers Management Co., who initiated a third party action against Union Bank of Switzerland, their tenant, Ess & Vee, and Forest Electric Corp., the electrical contractor. Union Bank initiated a declaratory action for indemnification against their general contractor, Plaza Construction Corp., Plaza’s insurer, Insurance Company of North America and the Fisher defendants. Union Bank subsequently amended its complaint to re-name the Fisher defendants as plaintiffs.

The parties entered into negotiations in 2001 and agreed to settle the action for \$20,000, \$5000 of which was to be paid by the plaintiffs herein. The action was marked

“disposed” on Feb. 8, 2002. Pending motions were deemed “moot/academic” by this Court in April 3, 2002.

The settlement fell through and litigation resumed. A Note of Issue was filed in January, 2007.

Discussion

Defendants Insurance Company of America and Forest Electric oppose plaintiffs’ motion to restore its complaint alleging failure to comply with the requirements of CPLR 3404, Dismissal of abandoned cases, citing to a four pronged test enunciated by the Courts with respect to restoring abandoned cases to the calendar after passage of more than a year. (*Rodriguez v Middle Atlantic Auto Leasing, Inc.*, 122 AD2d 720 [1st Dept 1986]). Dismissal pursuant to Rule 3404 is the equivalent of a default (*Siegel, NY Practice*, §376), referencing, by its terms, cases “marked off, struck from the calendar or unanswered.”

The case at bar was marked off when, in good faith, all parties believed that the matter was settled. Where, as here, a case is marked “disposed” through no fault of the plaintiffs, the dismissal is a nullity. (*Fillias v Hyon Mun Cho*, 296 AD2d 356 [1st Dept 2002][reversing the trial court’s refusal to restore the action to the calendar]; *Beringer v BCP Mgt Corp*, 280 AD2d 414 [1st Dept 2001][“Under the circumstances, the usual prerequisites for restoration were not applicable.”]).

In light of the inapplicability of Rule 3404, we need not reach the merits of the plaintiffs’ claim, which are properly challenged in a motion for summary judgment.

Finally, in light of the extensive and on-going proceedings in this matter, the defendants' claims of prejudice appear disingenuous. The parties' statements have been preserved in discovery and mediation.

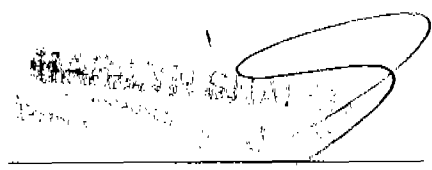
We have considered the other arguments raised by the parties and find them without merit.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs Union Bank of Switzerland, Fisher-bank Lane Company and Fisher Brothers Management Co., for an order restoring the case to the active calendar for the purpose of completing discovery is granted.

This reflects the decision and order of this Court.

Dated: 12/4/07



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE