

Gosek v Lunt Theater Co.
2010 NY Slip Op 31841(U)
July 2, 2010
Supreme Court, New York County
Docket Number: 106990/95
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 106990/1995

GOSEK, MIROSLAW

vs.

LUNT THEATRE COMPANY

SEQUENCE NUMBER : 007

RESTORE ACTION TO CALENDAR

INDEX NO. _____

MOTION DATE _____

MOTION SEC. NO. _____

MOTION CAL. NO. _____

FILED
JUL 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

this motion to/for _____

PAPERS NUMBERED
1, 2
3, 4
5

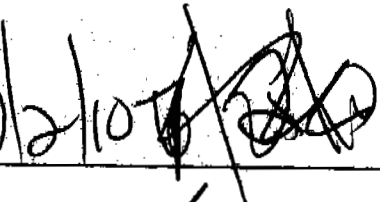
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

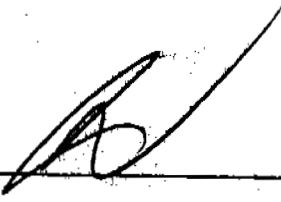
Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by plaintiff* to restore *this action to the trial calendar is denied* in accordance with the attached memorandum *decision*

Dated: 7/2/10 


JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
MIROSLAW GOSEK,

Plaintiff,

-against-

LUNT THEATER COMPANY and LUNT
NEDERLANDER CORPORATION,

Defendants.
-----X

LUNT THEATER COMPANY and LUNT
NEDERLANDER CORPORATION,

Third-Party Plaintiffs,

-against-

KAY CONSTRUCTION CORP.,

Third-Party Defendant.
-----X

KAY CONSTRUCTION CORP.,

Fourth-Party Plaintiff,

-against-

T&S MASONRY, INC.

Fourth-Party Defendant.
-----X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, plaintiff moves for an order restoring this action to the trial calendar and setting a date certain for trial. For the following reasons, this motion is denied.

At the outset the court notes that, while in the affirmation in support of the within motion, plaintiff seeks leave to renew pursuant to CPLR 2221, as alternative relief, such relief was not requested in the notice of motion, and is not properly before the court. Moreover, plaintiff failed to move by order to show cause and failed to supply all previously submitted papers and therefore, any motion to renew would be deemed defective. *See People v Jenkins*, 39 AD2d 924, 925 (2d Dept 1972); *Rubin v Dondysh*, 147 Misc 2d 221, 222 (Civ Ct, Queens County 1990),

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DECISION/ORDER

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rearg denied 147 Misc 2d 221 (Civ Ct, Queens County 1990), *app dismissed* 153 Misc 2d 657 (App Term 2d Dept 1991); *Wekar v. City of New York*, NYLJ, Feb. 29, 2000, at 26 col 3 (Sup Ct, New York County); *Mayor v. Mayfair Rlty. Corp.*, NYLJ, Nov. 7, 1997, at 26, col 2 (Sup Ct, New York County). Further, plaintiff failed to satisfy the criteria for renewal in that no new facts or additional facts which were in existence at the time of the original motion, but were then unknown to the movant, and were therefore not brought to the court's attention, have been asserted; nor was an excuse for not having presented those facts on the original motion supplied. *See William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22 (1st Dept 1992), *appeal denied in part, appeal dismissed in part* 80 NY2d 1005, *reargument denied* 81 NY2d 782; *Mangine v. Keller*, 182 Ad2d 476 (1st Dept 1992).

BACKGROUND

Plaintiff Miroslaw Gosek (Gosek) commenced this action on March 14, 1995, over fifteen (15) years ago, as a result of injuries that he had sustained on April 21, 1992, over eighteen (18) years ago, when he fell off of a ladder during the course of his employment as a construction worker. *See* Notice of Motion, Exhibit A (complaint). There is evidently some dispute as to whether Gosek was employed at the time he was injured by third-party defendant Kay Construction Corp. (Kay), or by fourth-party defendant T&S Masonry, Inc. (T&S). *See* Hoover Affirmation in Opposition, Exhibits B (third-party complaint) and C (fourth-party complaint). In either case, however, Gosek was injured in a building known as the Lunt-Fontanne Theater, located at 205 West 46th Street in the County, City and State of New York, and owned and operated by co-defendants the Lunt Theater Company and Lunt Nederlander Corporation (the Lunt defendants). *See* Notice of Motion, Exhibit A.

On or about June 19, 1998, Gosek filed a note of issue. *Id.*; Exhibit B. On May 20, 1999, this court (Heitler, J.) so-ordered a stipulation by which this action was marked off of the court's calendar. *See* Glenn Affirmation in Opposition, Exhibit C. Thereafter, on June 8, 2000, over ten

(10) years ago, this court (Toker, J.) dismissed this action for neglect to prosecute. *Id.*; Exhibit D. Over one year later, on or about August 15, 2001, Gosek moved to vacate that dismissal and sought the identical relief sought herein, namely to restore this action to the court's calendar. *Id.*; Exhibit E. However, on November 26, 2001, this court (Abdus-Salaam, J.) issued a decision that denied Gosek's motion and stated, in pertinent part, as follows:

[T]his action was deemed abandoned over one year ago. Plaintiff has failed to demonstrate a meritorious claim and has not offered any excuse for the delay in seeking to restore this action to the trial calendar. Thus, plaintiff has not made the requisite showing necessary to obtain an order vacating the dismissal of the complaint.

See Notice of Motion, Exhibit F. It does not appear that plaintiff appealed any of the above decisions. Approximately nine (9) years later, Gosek now moves, again, for an order to vacate the dismissal of his complaint, and to restore this action to the court's trial calendar (motion sequence number 007); such motion is denied, as detailed below.

DISCUSSION

The court notes that movant seeks the identical relief sought in or about August 15, 2001, which was denied, by order dated November 26, 2001. Thus, this motion is more properly a motion to reargue, which is untimely and therefore denied. *See* CPLR 2221 (d)(3).

Even were the Court to consider this untimely motion, it would be denied for the reasons stated below. Gosek first argues that the court should vacate its dismissal of his complaint "in the interests of justice," on the ground that the court incorrectly based said dismissal on CPLR 3404. *Id.*; Budin Affirmation, ¶¶ 20-32. Gosek argues, instead, that that statute should not have been applied, because the parties were still engaged in discovery after this action was marked off of the court's calendar on May 20, 1999, and that this matter should, therefore, have been deemed to have returned to "pre note of issue status," rather than deemed to have been "abandoned." *Id.* Gosek further argues that those cases in which a note of issue has been stricken, may be restored pursuant to 22 NYCRR 202.21 (f), which provides that:

Motions to reinstate notes of issue vacated pursuant to this section shall be supported by a proper and sufficient certificate of readiness and by an affidavit by a person having first-hand knowledge showing that there is merit to the action, satisfactorily showing the reasons for the acts or omissions which led to the note of issue being vacated, stating meritorious reasons for its reinstatement and showing that the case is presently ready for trial.

Finally, Gosek argues that, in his prior motion, he presented evidence which fulfilled all of the foregoing criteria. *See* Notice of Motion, Budin Affirmation, ¶¶ 20-32.

In response, the Lunt defendants argue that 22 NYCRR 202.21 (f) is inapplicable because it only applies in situations where a plaintiff's note of issue has been vacated or stricken by the court, whereas the stipulation that Justice Heitler so-ordered on May 20, 1999, specifically provided that Kay's motion to vacate Gosek's note of issue was withdrawn. *See* Defendants' Memorandum of Law, at 8-9 (pages not numbered). T&S Masonry joins in this argument. *See* Hoover Affirmation in Opposition, ¶¶ 24-25. Gosek's reply papers do not further address the argument. Upon review of the within submissions, including the history of this case and in particular in that the note of issue was not in fact ever stricken, Lunt defendants' and T&S Masonry's reading of the law is correct.

In *Travis v Cuff* (28 AD3d 749 [2d Dept 2006]), from which Gosek derived his original argument, the Appellate Division, Second Department, clearly based its decision to apply 22 NYCRR 202.21 (f), instead of CPLR 3404, on the fact that the trial court had vacated the plaintiff's note of issue. Here, because the court did not vacate or strike Gosek's note of issue, the holding of *Travis v Cuff* is factually inapposite. Therefore, the court rejects Gosek's first argument.

Gosek next argues that the court should vacate its dismissal of his complaint pursuant to the rules that govern CPLR 3404. *See* Notice of Motion, Budin Affirmation, ¶ 33. Under that statute:

A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs

for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

However, as the Appellate Division, First Department, observed in *Leonardelli v Presbyterian Hosp. in City of New York* (288 AD2d 105, 105-106 [1st Dept 2001]):

Although a case which has been marked off or stricken from the calendar and not restored within one year is deemed abandoned and is dismissed, the statute only creates a rebuttable presumption of abandonment. A party may restore a case to the trial calendar after it was dismissed pursuant to CPLR 3404, upon a showing of: (1) a meritorious claim, (2) a reasonable excuse for the delay, (3) an absence of prejudice to the adverse party, and (4) a lack of intent to abandon the case. The underlying legislative intent of CPLR 3404 was to strike "actually dead" cases, and consequently we look, not to technicalities, but rather to the totality of the circumstances [internal citations omitted].

Here, Gosek argues that he has met all three of the *Leonardelli* criteria. See Notice of Motion, Budin Affirmation, ¶ 33. This court disagrees.


In the within motion, while Gosek has attached an affidavit of merit, such affidavit is unsigned and therefore has no relevance; plaintiff has, thus, failed to establish a meritorious claim to warrant restoration. Moreover, in seeking restoration, noticeably absent is an explanation as to why plaintiff waited over eight and one-half (8 ½) years, from the date of the November 26, 2001 denial of his first motion to restore, to seek the within requested relief. Such inexcusable delay is extremely prejudicial to the parties, and is further evidence of plaintiff's intent to abandon this case. Accordingly, Gosek's motion is denied, in its entirety.

Accordingly, for the foregoing reasons, it is

ORDERED that plaintiff's motion to restore this case to the trial calendar is denied; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy, upon all parties, with notice of entry.

Dated: New York, New York
July 2, 2010


Hon. Doris Ling-Cohan, J.S.C.