

**Riversea Contr., Inc. v New York City Health &  
Hosps. Corp.**

2013 NY Slip Op 30106(U)

January 17, 2013

Supreme Court, New York County

Docket Number: 114205/2008

Judge: Kathryn E. Freed

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.

SCANNED ON 1/23/2013

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 114205/2008

RIVERSEA CONTRACTING

vs.

NEW YORK CITY HEALTH *CAL: #52*

SEQUENCE NUMBER : 001

RESTORE ACTION TO CALENDAR

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_


Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**

JAN 23 2013

NEW YORK  
COUNTY CLERK'S OFFICE

  
HON. KATHRYN FREED, J.S.C.  
JUSTICE OF SUPREME COURT

Dated: 1-17-13

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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: Part 5

-----X  
RIVERSEA CONTRACTING, INC.,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

Defendant.

DECISION/ORDER

Index No.: 114205/2008

Seq. No.: 001

PRESENT:

Hon. Kathryn E. Freed

J.S.C.

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....4-5.....
STIPULATIONS.....	.....
OTHER.....	.....

**FILED**

JAN 23 2013

NEW YORK  
COUNTY CLERK'S OFFICE

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff seeks an order restoring the instant matter to the active calendar. No opposition has  
been submitted by defendants.

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the  
motion.

Factual and procedural background:

The instant matter emanates from a breach of contract. Plaintiff won three bids to complete  
work for defendant on three projects: WIC project, Rehab. Project and the Laundry Room project.

Pursuant to a written contract, plaintiff commenced work on said projects on May 31, 2006. During its performance on said projects, defendant requested that plaintiff perform additional work at the facility located at 506 Lenox Avenue, New York, New York. Plaintiff submitted written proposals for the additional work and received approval to proceed with the work. The projects were subsequently completed, enabling defendants to utilize the facilities. However, defendant failed to pay various invoices and the sum of \$181,134.30 remains outstanding.

The action was subsequently commenced by Summons and Complaint on October 22, 2008. Defendant submitted its Answer and a discovery schedule was agreed to and so ordered on March 26, 2009. Several compliance conferences followed with depositions ordered to be completed by June 30, 2010. Subsequent to the last compliance conference held on May 27, 2010, the parties continued negotiations which culminated in a settlement conference held in September 2010. The conference was concluded with agreement on a figure which did not include materials and costs.

Jonathan Becker, Esq., Supervising Attorney in the Office of the Corporation Counsel, "insisted" that plaintiff file a Notice of Claim for the specific amount of the materials and costs claimed by plaintiff. Subsequent to the substitution of plaintiff's counsel in November 2010, plaintiff filed its Notice of Claim on May 5, 2011. Plaintiff's counsel and Kathleen Norton, Esq., of Corp. Counsel, engaged in efforts at settlement, to no avail. During their most recent conversation in January 2012, Ms. Norton requested additional time to discuss a possible disposition with her superiors. Not hearing back from Ms. Norton, plaintiff's counsel decided to resume litigation of the matter. However, the Motion Support Office informed plaintiff's counsel that the instant matter had been marked as "disposed of due to settlement."

Plaintiff now asserts that the matter has not been disposed of because it was not marked "dismissed," pursuant to CPLR §3404, but was merely marked "settled." As such, plaintiff argues

that it need not prove a meritorious defense, a reasonable excuse for prosecuting the action, a lack of intent to abandon said action and a lack of prejudice to defendant. Plaintiff further argues that even if it was required to prove the aforementioned criteria, it would be more than able to do so.

Plaintiff argues that its action is meritorious in that it has timely filed notices of claim accompanied by receipts supporting its expenditures for costs related to defendant. Additionally, it has filed this action and has participated in discovery and settlement negotiations in a good faith effort to resolve it. Plaintiff notes that defendant has not filed any motion claiming that plaintiff does not have an unresolved or un-meritorious claim necessitating a trial on the merits of said claim.

Plaintiff also argues that it has a reasonable excuse for the delay, in that it has participated in extensive negotiations with defendant's counsel before and after the filing of its Notice of Claim for the cost of the materials. Plaintiff also argues that its lack of intent to abandon the matter is proven by the lack of any judgment or orders in the court's file supporting the alleged disposition of the matter, the lack of notice served on it pertaining to any judgment or final disposition, and the lack of any stipulation of settlement bearing its signature. Plaintiff further argues that defendant will not suffer any prejudice if the instant matter is restored to the calendar because it participated in settlement negotiations long after the matter was marked off the calendar.

Conclusions of law:

CPLR§3404 provides in pertinent part that "a case in the supreme court or 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....."

Dismissal pursuant to CPLR§3404 raises only a rebuttable presumption of abandonment. The presumption may be overcome by establishing a lack of intent to abandon the action and

conformance with the criteria for vacating a default: a reasonable excuse for the delay, the merit of the complaint and the absence of prejudice to the opposing part ( Rodriguez v. Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720 [1<sup>st</sup> Dept. 1986], *lv dismissed* 69 N.Y.2d 874 [1987]; Katz v. Robinson Silverman Pearce Aronsohn & Berman LLP, 277 A.D.2d 70 [1<sup>st</sup> Dept. 2000]; Weiss v. City of New York, 247 A.D.2d 239, 240 [1<sup>st</sup> Dept. 1998]; Douglass v. Brew's Restaurant, 280 A.D.2d 345 [1<sup>st</sup> Dept. 2001] ).

In the case at bar, the Court finds that plaintiff has sufficiently established all of the aforementioned criteria. The Court understands that plaintiff's delay in pursuing prosecution of the case was based on its good faith efforts to negotiate a settlement with representatives of defendant, who apparently were not diligent in their efforts to accomplish same. Indeed, restoral of this case to the calendar would not cause defendant to suffer any prejudice, an finding evidenced by its failure to submit any opposition to the instant motion.

In accordance with the aforementioned, it is hereby

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

ORDERED that, within 20 days from the entry of this order, plaintiff is to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office ( Room 158), and it is further

ORDERED that the parties are directed to appear for conference on March 26, 2013, in Room 301, 80 Centre Street, at 2:00 P.M. and it is furthered

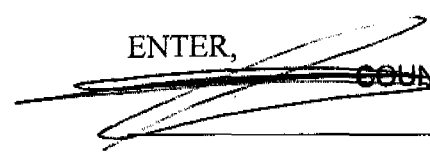
ORDERED that this constitutes the decision and order of the Court.

DATED: January 17, 2013

JAN 17 2013

**FILED**

JAN 23 2013

ENTER,  NEW YORK COUNTY CLERK'S OFFICE

Hon. Kathryn E. Freed  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**