

**Harvey v JP Morgan Chase Bank, N.A.**

2014 NY Slip Op 32216(U)

August 7, 2014

Sup Ct, New York County

Docket Number: 100106/11

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY**  
**PRESENT: Hon. DORIS LING-COHAN, Justice** **PART 36**

-----X  
WILLIAM HARVEY AND NINA HARVEY,  
Plaintiff, Index No. 100106/11  
-against- Motion Seq. No. 007

JP MORGAN CHASE BANK, N.A. AND  
WILLIAM CULLEN, **DECISION/ORDER**

Defendants.  
-----X

The following papers numbered 1 to 8 were considered on this motion vacate this court's prior order dated April 11, 2013<sup>1</sup> and restore this case to "active" status:

<u>Papers</u>	<b>FILED</b>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<b>AUG 08 2014</b>	<u>1, 2, 3, 4, 5</u>
Answering Affidavits - Exhibits _____		<u>6, 7</u>
Replying Affidavits _____		<u>8</u>

**Cross-Motion:** [ ] Yes [X] No COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, and in the interest of justice, it is ordered that this motion by plaintiffs to vacate the order of this court dated April 11, 2013, which dismissed this case for failing to comply with, *inter alia*, a conditional order striking plaintiffs' pleadings dated February 22, 2013, and to restore this case to "active" status is granted, provided that plaintiffs comply with the below conditions.

In conditionally vacating the prior dismissal of this case, this court recognizes that there is a strong public policy in this state for resolving cases on their merits, rather than on default, absent demonstrable prejudice. *See Elemerly Corp. v. 773 Assoc.*, 168 AD2d 246, 247 (1<sup>st</sup> Dept 1990). Here, defendants, have not demonstrated, nor alleged, any prejudice.

Moreover, while the April 11, 2013 order indicates that plaintiffs failed to comply with this court's prior order dated February 22, 2013, in that a note of issue was not filed by March 29, 2013, plaintiffs have supplied proof that a note of issue had been filed on March 19, 2013. Additionally, with respect to the deposition of plaintiff Nina Harvey, which had yet to be completed at the time

<sup>1</sup> While plaintiffs seek to vacate the order of this court which they allege was signed on April 15, 2013, the order which plaintiffs seek to vacate was signed on April 11, 2013 and filed with the County Clerk's Office on April 15, 2013.

the April 11, 2013 dismissal order was issued, plaintiffs explain that plaintiff Nina Harvey does not plan to go forward with her loss of consortium claim, and she will be filing a notice of discontinuance as to her claims, upon restoration of this case to "active" status.

Further, plaintiffs have asserted both a sufficient excuse for their default in complying with this court's prior orders and have asserted a meritorious claim in this personal injury action, to warrant restoration to the court's calendar. *See id.* at 247. Specifically, with respect to a sufficient excuse for their defaults, plaintiffs' have supplied a detailed attorney affirmation and an affidavit from plaintiffs' counsel's paralegal, sufficiently explaining their defaults in complying with this court's prior orders, which include issues resulting from Super Storm Sandy, as well as law office failure. Further, plaintiff Harvey has supplied an affidavit that details an alleged meritorious claim for negligence against defendants, in causing him to slip and fall on ice, at the entrance of Chase Bank, on January 5, 2008. Plaintiff Harvey asserts that as a result of such fall, he sustained a tear in his left shoulder, necessitating surgical intervention. As such, a sufficient basis has been supplied to restore this case to "active" status, provided that plaintiff complies with the following.

Nevertheless, as it is undisputed that plaintiffs' did in fact violate several court orders with respect to the completion of discovery and defendants have "been forced to incur significant costs litigating plaintiffs' ...efforts to vacate [the April 11, 2013] order, the restoration of this case is conditioned upon plaintiffs paying defendants' attorneys' fees, charged to oppose the within motion, not to exceed \$2,500 (for each defendants' attorneys' fees), upon presentation of affirmations by defendants' counsel, as to the amount of hours expended, his/her normal hourly fee, years of practice and experience etc. *See Figdor v. City of New York*, 33 AD3d 560 (1<sup>st</sup> Dept 2006). It is noted that plaintiffs' counsel concurs that, an "appropriate sanction for any [prior] deficiencies attributable to counsel would be a reasonable monetary fine". ¶3, Ofshtein Affirmation in Support of Motion to Vacate and Restore.

Moreover, the Appellate Division, First Department, in *Figdor, supra*, directed that defendant's answer be struck, unless it paid a sanction of \$10,000, for its failure to comply with discovery orders, and stated:

"Defendant's response to the myriad discovery orders.... has been inexcusably lax. While discovery has trickled in with the passage of each compliance conference, the cavalier

attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence. We take this opportunity to encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure future compliance.”

[internal citations omitted, emphasis supplied].

Court orders must be obeyed for the court system and process to have any effect. As stated by the Court of Appeals : “In *Kihl v. Pfeffer* (94 NY2d 118, 123 [1999] ), we affirmed the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames, observing that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Brill v. City of New York*, 2 NY3d 648, 653 (2004).

Based upon the above, it is

ORDERED that plaintiffs’ motion is granted and the decision/order of this court dated April 11, 2013 dismissing this case is vacated, provided that plaintiffs comply with the following conditions:

- (1) **Within 30 days of entry of this order**, plaintiffs shall serve a copy of this order upon all parties; within 30 days of receipt of a copy of this order, defendants shall serve upon plaintiffs’ affirmations by counsel, detailing the amount billed to oppose the within motion (not to exceed \$2,500 for each defendants’ attorneys’ fees), as well as the amount of hours expended, his/her normal hourly fee, years of practice and experience etc. **Within 21 days of receipt of such affirmations**, plaintiffs shall pay the requested amount, or confer (via telephone or in person) with defendants’ counsel, and attempt to agree on the amount of fees. If counsel are unable to agree on the amount of defendants’ attorneys’ fees, **within 14 days of counsel conferring**, plaintiff shall supply this court with defendants’ affirmations, and a detailed affirmation opposing such fees; such submissions shall be sent to the

court in an envelope with a copy of this order attached to the outside of the envelope; and

- (2) **Within 45 days of entry of this order, plaintiff Nina Harvey shall serve upon all parties a notice of discontinuance of the claims she asserted in this lawsuit.**

It is further

ORDERED that within 10 days of satisfaction of the above conditions, plaintiffs shall provide proof to this court and letter detailing their compliance, in an envelope, with a copy of this order attached to the outside of the envelope, and the court will issue an order, directing the Clerk of Trial Support to restore this proceeding to "active" status; such letter and proof shall be sent to the court in an envelope with a copy of this order attached to the outside of the envelope.


**FILED**

AUG 08 2014

Dated: \_\_\_\_\_



COUNTY CLERK'S OFFICE  
NEW YORK



Hon. Doris Ling-Cohan, JSC

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST  REFERENCE

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