

**Board of Directors of 133 Essex St. Condominium v
Evanford LLC**

2024 NY Slip Op 31730(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 112906/2007

Judge: Mary V. Rosado

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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: <u>HON. MARY V. ROSADO</u> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> BOARD OF DIRECTORS OF 133 ESSEX STREET CONDOMINIUM, <p style="text-align: right;">Plaintiff,</p>	PART 33M INDEX NO. <u>112906/2007</u> MOTION DATE <u>12/22/2023</u> MOTION SEQ. NO. <u>021</u>
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- v -

EVANFORD LLC, CALABRESE INVESTORS LLC, "JOHN
DOE #1 THRU JANE DOE #25", BLACK LABEL
RESIDENTIAL, LLC, 31 ROCKAWAY AVENUE, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 021) 268, 271, 273, 280, 283, 286, 291, 293, 294

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, Defendants Black Label Residential LLC ("Black Label") and 31 Rockaway Avenue LLC's ("Rockaway") (together "Movants") motion for an Order vacating this Court's December 5, 2023 Order and holding Plaintiff in default (NYSCEF Doc. 273), or, in the alternative, directing Plaintiff Board of Directors of 133 Essex Street Condominium ("Essex") to pay for Movants' legal fees incurred in preparing for trial, is denied in its entirety.

I. Background

This matter was scheduled to begin trial on December 4, 2023 (NYSCEF Doc. 280 at ¶ 16). Jury selection began on November 27, 2023 and concluded on November 28, 2023 (NYSCEF Doc. 291 at 2). On the even of trial, Plaintiff's attorney, David Jacoby, experienced severe medical issues¹ and became incapable of continuing his representation of Plaintiff (NYSCEF Doc. 271 at ¶¶ 10-12). As a result of Mr. Jacoby's medical issues, on December 4, 2023 Plaintiff made an oral

¹ For the sake of Mr. Jacoby's privacy, the court will not elaborate on the nature of his medical issues, but found them severe enough to warrant this action being marked off the trial calendar.

motion seeking a mistrial or continuance of the trial, which the Court denied (NYSCEF Doc. 283 at 27).

The next day, on December 5, 2023, Mr. Jacoby brought a motion by order to show cause requesting a “continuance of the trial of this action, or in the alternative, a new trial of this action in the interest of justice” (NYSCEF Doc. 268). On December 5, 2023 this Court issued an Order denying Mr. Jacoby’s motion for continuance or a new trial, and marked the matter off the trial calendar (NYSCEF Doc. 273). On December 5, 2023 the Court stated on the record that while the order to show cause was being denied, this matter was being marked off the calendar for the purpose of helping Plaintiff obtain new counsel to handle this matter (NYSCEF Doc. 291, Exhibit 1 at pp. 16-17).

On December 22, 2023 Movants brought the instant motion for an Order, pursuant to CPLR 2221(a) and CPLR 5015(a), vacating this Court’s December 5, 2023 Order (NYSCEF Doc. 273), holding Plaintiff in default and dismissing Plaintiff’s action with prejudice pursuant to NYCRR 202.27, or, in the alternative, directing Plaintiff to pay for Movants’ legal fees incurred in preparing for trial (NYSCEF Doc. 286).²

II. Discussion

a. Movants’ Motion for an Order Vacating this Court’s December 5, 2023 Order is Denied.

It is well established that “each court has inherent power to control its own calendar and the disposition of business before them... [which is] necessary to regulate the proceedings, promote and foster order and decorum and to further the administration of justice” (*Hochberg v Davis*, 171 AD2d 192, 194 [1st Dept 1991]). Further, New York adopts a “strong public policy

² Although Movants failed to attach an affirmation in support of the instant motion, Movants Affirmation in Support of Motion Sequence 20 (NYSCEF Doc. 280), which sought the same relief until its withdrawal by Stipulation dated January 17, 2024 (NYSCEF Doc. 305), will be considered in support of the instant motion.

preference for deciding cases on the merits” (*Rosario v General Behr Corp.* 217 AD3d 641, 642 [1st Dept 2023]).

The First Department has held that the disability of a party’s attorney constitutes a reasonable excuse for that party’s default (*see Zabari v City of New York*, 242 AD2d 15 [1st Dept 1998] holding that “[u]nquestionably, the disability of a party’s attorney may serve as a reasonable excuse for a party’s delay in moving for restoration”). Moreover, “[e]ven if the entire period of counsel’s delay was not excusable, ‘[a] client should not be deprived of his day in court by his attorney’s neglect or inadvertent error...’” (*Nicholas v Casherlard Restaurant*, 249 AD2d 187, 190 [1st Dept 1998] quoting *Sanchez v Javind Apt. Corp.* 246 AD2d 353, 355 [1st Dept 1998]).

Here, Plaintiff failed to proceed at trial on December 5, 2023 due to the medical issues of its counsel (NYSCEF Doc. 271). The Court finds that it would go against the interest of justice to punish Plaintiff in this case for the sudden illness of Plaintiff’s counsel, which did not manifest until the eve of trial. It is for this very reason that the Court, in its decision from the bench on December 5, 2023, marked this matter off the calendar for the purpose of helping Plaintiff obtain new counsel to handle this matter (NYSCEF Doc. 291, Exhibit 1 at pp. 16-17). As such, Movants’ motion for an Order vacating this Court’s December 5, 2023 Order (NYSCEF Doc. 273) is denied.

b. Movants Motion, Made in the Alternative, for an Order Directing Plaintiff to Pay Movants’ Legal Fees Incurred in Preparing for Trial is Denied.

It is well established that “[a]ttorneys’ fees are generally considered incidental to litigation, and each party is presumed responsible for his or her own attorneys’ fees unless an award is authorized by agreement[,], statute or court rule” (*Dupuis v 424 E. 77th Owners Corp.* 32 AD3d 720, 722 [1st Dept 2006]).

Movants contend that they are owed reasonable attorneys’ from Plaintiff pursuant to 22 NYCRR 130-1.1 (NYSCEF Doc. 293 at 5). 22 NYCRR 130-1.1 states in relevant part that a court,

in its discretion, may award costs and fees resulting from frivolous conduct. 22 NYCRR 130-1.1 (c)(2) specifies that conduct is frivolous if “it is undertaken primarily to delay or prolong the resolution of the litigation.”

Here, as discussed above, Plaintiff’s failure to go forward at trial on December 5, 2023 was not due to any frivolous attempt to delay the resolution of this litigation, but rather to the medical issues of Plaintiff’s counsel and the desire to avoid prejudice to Plaintiff. As such, Movants’ request for attorneys’ fees is denied.

Accordingly, it is hereby,

ORDERED that Defendants Black Label Residential LLC and 31 Rockaway Avenue LLC’s motion for an Order vacating this Court’s December 5, 2023 Order, or, in the alternative, directing Plaintiff Board of Directors of 133 Essex Street Condominium (“Essex”) to pay for Movants’ legal fees incurred in preparing for trial, is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Board of Directors of 133 Essex Street Condominium shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>5/17/2024</u> DATE					<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	