

Kabaj v Hartman

2025 NY Slip Op 33885(U)

July 23, 2025

Supreme Court, Queens County

Docket Number: Index No. 720612/2019

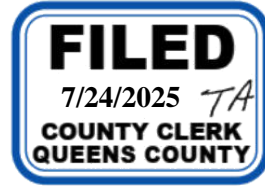
Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



-----X
AGUSH KABAJ,

Index No. 720612/2019

Plaintiff,

Part MDP

-against-

Motion Date: July 2, 2025

CHRISTOPHER HARTMAN, M.D.,

Calendar No. 6

Defendant.

Sequence No. 4

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The following papers numbered EF-90 to EF-112 read on this application by defendant CHRISTOPHER HARTMAN, M.D. for an Order dismissing this action with prejudice pursuant to CPLR §3404, and this cross-motion by plaintiff AGUSH KABAJ for an Order restoring this action to the trial calendar pursuant to CPLR §3404.

Papers
Numbered

- Order to Show Cause, Affirmation, Exhibits.....EF90-EF98
- Adjournment Request.....EF100
- Letter.....EF101
- Notice of Cross-Motion, Affirmation, Exhibits.....EF104-EF111
- Affirmation in Opposition.....EF112

Upon the foregoing papers and oral argument, it is ordered that this application and this cross-motion is determined as follows:

Defendant Christopher Hartman, M.D.’s application for an Order dismissing this action with prejudice pursuant to CPLR §3404 is denied. Plaintiff Agush Kabaj’s cross-motion for an Order restoring this action to the trial calendar pursuant to CPLR §3404 is granted, solely to the extent that this action is restored for trial to begin jury selection on Monday, November 3, 2025, and plaintiff’s failure to appear ready for trial will result in dismissal with prejudice.

Plaintiff commenced this medical malpractice action by filing a Summons and Complaint on December 10, 2019, and issue was joined by defendant via the filing of his Answer on January 27, 2020. Plaintiff filed the Note of Issue on November 19, 2021, and defendant’s summary judgment motion was denied by Honorable Peter J. O’Donoghue’s Court Order dated September

12, 2022. It is noted plaintiff's counsel moved to withdraw, which was granted by Court Order dated September 30, 2024, and a notice of appearance was filed by new counsel for plaintiff on November 18, 2024. However, plaintiff's counsel then moved to withdraw, which was granted by Court Order dated May 2, 2025. It is further noted this matter was scheduled for jury selection April 8, 2024. The parties appeared for a pretrial conference on March 20, 2024 and agreed to mark this case off the trial calendar due to plaintiff's expert witness' unavailability. The undersigned ordered plaintiff to make a motion to restore this action to the trial calendar within the year, otherwise this matter would be deemed abandoned and a dismissal Order would be issued. The undersigned's May 2, 2025 Order also directed plaintiff to appear either personally with an affidavit of merit or by new counsel on June 24, 2025, otherwise the case would be dismissed without prejudice. On June 24, 2025, plaintiff failed to appear personally or by new counsel. However, counsel for defendant made an oral application to stay dismissal without prejudice in light of the instant motion to dismiss plaintiff's Complaint with prejudice pursuant to CPLR §3404. Defendant's oral application was granted, and the pending motion to dismiss was scheduled for July 2, 2025. Plaintiff retained new counsel who filed a notice of appearance on June 27, 2025, and the instant cross-motion filed three days later on June 30, 2025.

Defendant argues plaintiff's Complaint must be dismissed because plaintiff neglected to prosecute this action pursuant to CPLR §3404. Defendant argues more than one year has passed since this case was marked off the trial calendar and plaintiff failed to make a motion to restore within the year. Defendant further argues plaintiff failed to present a medical affirmation of merit, any pretrial documentation, or expert disclosures. Defendant argues Dr. Hartman was prepared to proceed with jury selection on two separate dates and has been prejudiced by the delay because he has been denied the opportunity to defend himself and his professional reputation for the past six years. Based upon the foregoing, defendant argues plaintiff's Complaint must be dismissed.

Plaintiff opposes the application and cross-moves to restore this action to the trial calendar. Plaintiff argues he provided his expert witness exchange dated February 27, 2023, and identified Michael S. Brodherson, M.D. as his trial expert and the affirmant in opposition to defendant's summary judgment motion. Plaintiff also presented the affirmation of Ralph Emerson Duncan, M.D. as his affirmation of merit and as part of his urology expert witness exchange for trial. While plaintiff acknowledges his cross-motion is beyond the one-year deadline, plaintiff argues his conduct shows there was never any intent of abandoning this action. Plaintiff also argues defendant is not prejudiced by the delay, as he is in the exact same position he would have been with regard to his defense had plaintiff complied with the one-year deadline. Based upon the foregoing, plaintiff argues the action should be restored to the trial calendar. Defendant opposes plaintiff's cross-motion and argues this action is automatically dismissed pursuant to CPLR §3404, and plaintiff failed to demonstrate this action should be restored to the trial calendar in light of his failure to comply with the one-year deadline.

A plaintiff seeking to restore a case to the trial calendar more than one year after it has been marked off must demonstrate the existence of a potentially meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant. (*Patriarca v. Oreckinto*, 185 A.D.3d 710, 710 [2d Dept. 2020].)

Defendant's application to dismiss this action with prejudice is denied, and plaintiff's cross-motion to restore this action to the trial calendar is granted, solely to the extent plaintiff must appear ready for trial on Monday, November 3, 2025. Although plaintiff conceded the motion to restore was made past the one-year deadline, the court can exercise its discretion to restore the action given the strong public policy in favor of resolving cases on the merits. (*See Matter of Brennan v. County of Rockland*, 205 A.D.3d 911 [2d Dept. 2022]; *see also Kahgan v. Alwi*, 67 A.D.3d 742, 743 [2d Dept. 2009][holding that the court retains discretion to grant a motion to restore a case to the trial calendar after the one-year period has expired].)

Contrary to defendant's argument, plaintiff met his burden in establishing all four prongs to restore the action. Plaintiff demonstrated a potentially meritorious cause of action through his production of Dr. Duncan's affirmation of merit. Plaintiff also exchanged disclosure of two expert witnesses. Plaintiff demonstrated a reasonable excuse for the delay, as he had two prior attorneys who moved to be relieved as counsel. (*See Levine v. Agus*, 28 A.D.3d 719, 721 [2d Dept. 2006] [holding the plaintiff's excuse of law office failure for the delay in moving to restore, "which was occasioned by the matrimonial difficulties experienced by the assigned attorney" was reasonable].) Plaintiff also demonstrated lack of intent to abandon this action and demonstrated diligence in pursuing prosecution of this action. Both times plaintiff's attorney moved to be relieved as counsel, plaintiff retained the services of a new attorney. Plaintiff's new counsel filed a notice of appearance and made the instant motion within three days of being retained. Plaintiff also demonstrated lack of prejudice to defendant Dr. Hartman, as this matter is still on the trial calendar and defendant is essentially in the same posture had plaintiff made the motion within the year.

It is also noted that despite the alleged fifteen-month delay, this matter was stayed twice upon plaintiff's counsel being relieved. The first stay was for a period of thirty days upon service of the undersigned's September 30, 2024 Order from October 11, 2024 through November 11, 2024. The second stay began on April 7, 2025, as the Order to Show Cause to be relieved as counsel included language staying the case pending determination of the application. The undersigned's Order determining the application was issued on May 2, 2025 and served on plaintiff with Notice of Entry on May 6, 2025. Therefore, the stay was in place until June 6, 2025.

Defendant's argument that this matter should have been dismissed on June 24, 2025 is without merit. When the matter was called during the calendar and the Court noted plaintiff had not appeared and did not present a medical affirmation, defendant made an oral application to stay

dismissal without prejudice and chose to seek a decision on the pending motion. The Court granted defendant’s oral application and plaintiff made the instant cross-motion less than one week later. Based upon the foregoing, plaintiff demonstrated this action should be restored to the trial calendar in the interests of justice and resolving cases on their merits. However, this cross-motion is granted, solely to the extent that plaintiff must be ready for trial as previously scheduled on Monday, November 3, 2025, and failure to appear ready for trial will result in dismissal with prejudice.

Accordingly, defendant Christopher Hartman, M.D.’s application for an Order dismissing this action with prejudice pursuant to CPLR §3404 is denied. Plaintiff Agush Kabaj’s cross-motion for an Order restoring this action to the trial calendar is granted, solely to the extent that plaintiff must be ready for jury selection on Monday, November 3, 2025 and failure to appear and be prepared for trial will result in dismissal with prejudice. The parties shall appear for a trial conference on Wednesday, August 6, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: July 23, 2025

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.

