

Benjamin v Teixeira
2010 NY Slip Op 07986
Decided on November 9, 2010
Appellate Division, First Department
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Decided on November 9, 2010

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3557 7464/04

[*1]Nicole Benjamin, Plaintiff-Appellant,

v

Julio Teixeira, M.D., et al., Defendants-Respondents, Elliot Goodman, M.D., et al., Defendants.

Stephen D. Chakwin, Jr., New York for appellant.

Widowski & Steinhart, LLP, New York (Esther S. Widowski of counsel), for Julio Teixeira, M.D., and Montefiore Medical Center respondents.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Rolando Chumaceiro, M.D., respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered June 29, 2009, which, in this action alleging medical malpractice, denied plaintiff's motion to restore her case to the trial calendar, and dismissed the complaint as abandoned, unanimously affirmed, without costs.

A party seeking to have a case restored to the trial calendar must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the action and the absence of prejudice to the opposing party (*see e.g. Kaufman v Bauer*, 36 AD3d 481, 482 [2007]).

Here, plaintiff, who brought this motion more than one year after the action had been struck from the trial calendar, failed to make the requisite showing as she offered no excuse for the delay (*see Almanzar v Rye Ridge Realty Co.*, 249 AD2d 128 [1998]). Plaintiff's conclusory claim of law office failure, made for the first time on appeal, is not supported by the record (*cf. Kaufman*, 36 AD3d at 483). Furthermore, the lack of any activity in the action between the time it was struck from the trial calendar and the current motion fails to show a lack of intent to abandon the action (*see Okun v Tanners*, [11 NY3d 762](#) [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 9, 2010 [*2]

CLERK