

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 508

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

\_\_\_\_\_  
NICOLE BENJAMIN

Index No. 7469/09

-against-

Hon. HOWARD R. SILVER

\_\_\_\_\_  
JULIO TEIXEIRA MD

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion.  
Noticed on \_\_\_\_\_ and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH  
MEMORANDUM DECISION FILED HERewith.

RECEIVED  
BRONX COUNTY CLERK'S OFFICE

MAY 6 - 2009

PAID

NO FEE

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: MAY 1 2009

Hon. [Signature]  
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - STP

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NICOLE BENJAMIN,

Plaintiff,

-against-

Index No.: 7464/04

JULIO TEIXERA, M.D., et al.

Defendants.

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HON. HOWARD R. SILVER

The plaintiff, Nicole Benjamin, moves by Order to Show Cause for an Order, pursuant to CPLR§3404, restoring the above matter to the trial calendar. Plaintiff's motion is denied and plaintiff's complaint is dismissed as abandoned, pursuant to CPLR§3404.

This is an action by plaintiff seeking to recover damages for personal injuries allegedly sustained as a result of medical malpractice which allegedly occurred in August, 2001. On March 3, 2008 this action was marked off calendar. Pursuant to 22 NYCRR §202.21 and CPLR §3404 plaintiff was required to move to restore this action to the trial calendar within one (1) year of its being marked off.

A plaintiff who has failed to move to restore an action within one year after it is stricken or marked off the trial calendar can rebut the presumption of abandonment raised by CPLR §3404 by establishing (1) a lack of intent to abandon the action; (2) a reasonable excuse for the delay (failure to timely move to restore); (3) the merits of his/her claim; and (4) the absence of prejudice to the opposing party. *Kaufman v Bauer*, 36 A.D.3d 481, 830 N.Y.S.2d 23 (1<sup>st</sup> Dept.

2007); *Nunez v. Resource Warehousing and Consolidation*, 6 A.D.3d 325, 775 N.Y.S.2d 310 (1<sup>st</sup> Dept. 2004); *Katz v. Robinson Silverman Pearce Aronsohn & Berman LLP*, 277 A.D.2d 70, 717 N.Y.S.2d 13 (1<sup>st</sup> Dept. 2000). The sufficiency of a proffered excuse and an affidavit of merits of the party's claim rests within the sound discretion of the Court *Goldman v Cotter*, 10 A.D.3d 289, 291, 781 N.Y.S.2d 28 (1<sup>st</sup> Dep't 2004), citing *Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 258. All a party is required to do is demonstrate the existence of issues of fact sufficient to establish a meritorious defense or claim if proven at trial. *Loris v S & W Realty Corp.*, 16 A.D.3d 729, 790 N.Y.S.2d 579 (3<sup>rd</sup> Dept. 2005), citing *Frank v Martuge*, 285 A.D.2d 938, 939, 728 A.D.2d 315 (3<sup>rd</sup> Dept. 2001).

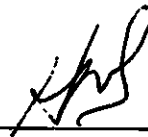
Contrary to the contentions of plaintiff's counsel, plaintiff's application to restore this action to the trial calendar was not made within one (1) year. Counsel's supporting affirmation states that the within matter was marked off the trial calendar on March 3, 2008. An Order to Show Cause is deemed made when served. CPLR§2211. Plaintiff's affidavit of service indicates that the Order to Show Cause was served on March 18, 2009, more than one year after the action was marked off calendar. Also contrary to the contentions of plaintiff's counsel, this action was not marked off the trial calendar due to pending summary judgment motions. Both counsel for the respective defendants dispute this and state that the case was marked off due to the fact that plaintiff was not ready to proceed to trial. Defense counsel's contentions are supported by copies of the Justice Ruiz's Decisions/Orders, dated July 9, 2007, deciding the summary judgment motions almost eight months prior to this action being marked off.

Plaintiff has not proffered an excuse, justifiable or otherwise, for her delay and failure to timely move to restore this action to the trial calendar or demonstrated a lack of intent to abandon

the action. Consequently, plaintiff motion is denied and plaintiff's complaint is dismissed as abandoned pursuant to CPLR§3404.

Settle Order.

Dated: MAY 1 2009

A handwritten signature in black ink, appearing to be 'J.S.C.', written above a horizontal line.

J.S.C.