SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

PROHEALTH CARE ASSOCIATES, L.L.P.,

Plaintiffs,

-against-

EVAN SHAPIRO, M.D.,

Defendant.

Decision and Order

MOTION SUBMITTED: April 30, 2012
MOTION SEQUENCE:02
INDEX NO.: 000120-04

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Memorandum of Law in Opposition	3
Affidavit in Support	4
Reply Memorandum in Support	5

The motion brought by the Defendant, Evan Shapiro, M.D., for an order pursuant to CPLR 3404 "restoring the instant action * * * and directing Referee Schellace to conduct [a] hearing on attorneys[']s fees due Defendant" is granted to the extent that the case may have been "marked off" the calendar. In any event, the hearing on attorneys' fees will take place as indicated herein.

Background

In an order dated January 16, 2008, the court (Warshawsky, J.) stated:

Court Attorney/Referee Frank Schellace is directed to conduct a hearing to determine reasonable attorney's fees due the defendant pursuant to contracts that existed between the defendant and plaintiff during his employment by them. Said

agreements provided that if there was litigation between the parties, the prevailing party would be entitled to legal fees.

The court has previously ordered that the Referee determine the attorney's fees as they related to the successful defense by the defendant of the first and second causes of action. In light of the decision of the Appellate Division, Second Judicial Department dated December 18, 2007, the court now directs the Referee to hear and report his findings for reasonable attorney's fees due to defendant for the entirety of the plaintiff's action.

In an order dated December 24, 2008 Justice Warshawsky stated that:

the attorney's fees hearing before Referee Frank Schellace shall commence on Thursday, February 5, 2009 at 9:30 a.m. and shall continue from day-to-day until completed.

It is undisputed that the parties appeared before Referee Schellace on February 5, 2009 for the hearing/trial.[1] It is not clear whether the hearing was commenced or if any testimony was taken or whether the matter was adjourned.

According to the Plaintiff, at Defendant's request, the matter was adjourned on February 13, 2009, however no marking or record indicates the date to which the matter was adjourned. A review of the website of court calendars and appearances maintained by the Office of Court Administration ("E Courts") indicates only that the matter was referred to Referee Schellace on September 8, 2011.

Notwithstanding, correspondence between Referee Schellace and counsel includes the following relevant e-mails (Exhibit "C" to Motion):

April 14, 2011
Dear Referee Schellace:

You may recall that I have been substituted in as counsel for Evan Shapiro in this matter. I am writing in the hopes of getting the attorney's fees hearing back on the calendar and scheduling the continuation of the

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[1] Attorneys' fees were sought in the pleadings and made part of a damages award rendered after trial. The court ordered a "hearing" on attorneys' fees, however, the hearing is a necessary adjunct to and part of the trial.

hearing. I have spoken numerous times with plaintiffs counsel to ascertain dates convenient for their office and client but to date I have not been provided with same. They are however aware of my intentions with respect to this correspondence and have acquiesced to my sending same.

I appreciate your courtesy in this matter and am available at your discretion. Should you seek to contact me by phone, the direct line is (631)697-3702.

Sincerely,
Andrew Donner

April 19, 2011
Counsel,

By reason of the delay this matter had been marked abandoned. I am deeming your E-mail communication as an application to restore it to the calendar. I am directing all counsel to provide me with 3 proposed dates for a conference. The failure to comply with this directive will result in the Court scheduling a conference date which cannot be adjourned.

Hon. Frank Schellace

April 19, 2011
Dear Honorable Frank Schellace:

In response to your order I am writing to suggest Tuesday April 26, Thursday April 28 or Tuesday, May 3 for conference. If those dates are not convenient for Your Honor or opposing counsel, I will make certain to be available on the earliest date the court is available. I greatly appreciate your courtesy in this matter.

Sincerely,
Andrew S. Donner (counsel for Evan Shapiro)

April 21, 2011
Your Honor:

On behalf of ProHealth, we propose the following dates for the conference: April 26 (after 10:30 a.m.); May 11 (before 11:30 a.m. or after 2:00 p.m.), and May 20 (before noon).

> Also, I have copied ProHealth's co-counsel, Eliot Bloom, on this e-mail, and respectfully request that Mr. Bloom be included on all future correspondence.
>
> Respectfully yours,
> Jordan M. Freundlich, Esq.

Apparently, subsequent to April 21, 2011, there were appearances before Justice Warshawsky at which the issue of "abandonment" was discussed, without resolution or determination.

Defendant asserts that there was never any intention to abandon the claim for attorneys' fees and that any delays in the process were caused by attempts at settlement, his attorney's death and a subsequent attorney's disbarment. Plaintiff contends that the claim was abandoned and that (Affirmation in Opposition at p.6, ¶ 16):

> [o]n February 2, 2012, the parties appeared before Referee Schellace. At this time, Referee Schellace advised the parties that the matter was abandoned, and that his email of April 19, 2011 constitutes his Order and pursuant to that Order, the matter was dismissed. He thereafter directed Defendant to make a timely motion to restore to Justice DeStefano.

The Court's Determination

Whether the case could have been "marked off", stricken from the calendar or dismissed under the circumstances presented is unclear. Nevertheless, the branch of the motion to restore the case to the calendar is granted to the extent that the case may have been "marked off" or stricken.

The court notes that dismissal of cases based on a calendar default or want of prosecution generally occurs under CPLR 3216, CPLR 3404 or 22 NYCRR 202.27. CPLR 3216 [Want of prosecution], applies to cases that are not on the trial calendar and allows for dismissal upon the occurrence of certain conditions, including the failure to timely comply with a written demand to file a note of issue.

CPLR 3404 [Dismissal of abandoned cases] states that: "A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call,

and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order."

22 NYCRR 202.27 [Calendar defaults] provides that: "(b) At any scheduled call of a calendar or at a pretrial conference * * * [and a party defaults in a manner designated herein] * * * the judge presiding shall note the default on the record and enter an order * * * grant[ing] judgment by default * * * dismiss[ing] the action * * * [or] if no party appears * * * strik[ing] the action from the calendar."

At bar, the April 19, 2011 e-mail correspondence from Referee Schellace contains his assertion that the case was marked "abandoned" and that he was deeming counsel's April 14 e-mail an application to "restore". According to Plaintiff, however, subsequent to that time, Referee Schellace stated that the April 19 e-mail constituted an order, and pursuant to that order, the case was dismissed.

Significantly, the Referee's April 19 e-mail appears to implicitly reference CPLR 3404, though it incorrectly recites that the case was marked "abandoned". The plain language of the statute allows for a case to be "marked off" and following a one-year period of inactivity, it shall be –by the lapse of time– "deemed abandoned" and dismissed. The distinction between being "marked off" and "marked abandoned" is critical because of the automatic dismissal which occurs by operation of law and because of the "ease" of restoration within the one-year period prior to abandonment/dismissal and the higher standard necessary for restoration outside the one-year period and subsequent to abandonment/dismissal.[2]

As noted, neither the e-mail correspondence nor the parties' other submissions or the E-courts website, provide any indication that the case was ever "marked off", stricken or dismissed. The sole basis for the conclusion that the case was disposed of in some manner (apparently pursuant to CPLR 3404) is the April 19 e-mail and that e-mail provides no information as to when, whether or how the case was "marked off" so that it might later be deemed abandoned and dismissed. Adding to the confusion is the representation by Plaintiff regarding the Referee's February 2, 2012 statement that the case was dismissed *pursuant to* the April 19 e-mail. In no way would dismissal via the April 19 e-mail be authorized or even referable to CPLR 3404; nor

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[2]When a case is "marked off", restoration under CPLR 3404 is required as a matter of right if application therefor was made within one year of the dismissal (*see Smith v Avis Rent A Car Sys*, 308 AD2d 673 [2d Dept 2003]). In contrast, 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" (*Agli v O'Connor*, 92 AD3d 815 [2d Dept 2012]).

would dismissal be authorized in such manner under CPLR 3216 or 22 NYCRR 202.27.

Under the circumstances, the court concludes that the case was never "marked off" calendar or stricken, which makes CPLR 3404 inapplicable. The other statute and rule referenced herein, respectively, CPLR 3216 and 22 NYCRR 202.27, are, likewise inapplicable. Furthermore, even assuming that the April 19 e-mail could be considered as "marking the case off" pursuant to CPLR 3404–by virtue of the incorrect use of the word "abandoned", considering that the application to restore was made within a year of that date, it would be granted, in any event.

Accordingly, it is hereby ordered that: the motion to restore is granted to the extent that the case may have been "marked off"; the hearing on attorneys' fees shall commence before Referee Schellace on June 20, 2012 and shall continue day to day until completion.

This constitutes the decision and order of the court.

Dated: May 31, 2012

Hon. Vito M. DeStefano, J.S.C.