# NY CLS CPLR R 3404

Current through 2025 released Chapters 1-207

***New York***

***Consolidated Laws Service*** **>**

***Civil Practice Law And Rules (Arts. 1 — 100)*** **>**

***Article 34 Calendar Practice; Trial Preferences (§§ 3401 — 3410)***

## R 3404. Dismissal of abandoned cases.

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.

## History

Add, L 1962, ch 308, eff Sept 1, 1963.

Annotations

## Notes

**Prior Law:**

Earlier rules: RCP 302.

**Advisory Committee Notes:**

This rule is derived from subd 2 of RCP 302 without change of substance. The reference to terms has been omitted. See notes to CPLR rule 3402. Subd 1 of former rule 302 was actually a time limitation on the entry of default judgments and has been treated in the provisions governing defaults. See CPLR § 3215(c). The phrase “neglect to prosecute” is used to conform

to CPLR § 205, so that a dismissal under this rule will not provide a six-month period to begin a new action which would otherwise be barred by the statute of limitation.

## Commentary

**EXPERT ANALYSES:**

By Howard F. Strongin.

Although the statute contains mandatory language that an action marked off or struck from the calendar and not restored within one year *shall* be deemed abandoned and *shall* be dismissed, the aggrieved plaintiff is not left without any avenues to have the case restored beyond the one year time period. The literal reading of the statute has been interpreted to merely create a presumption of abandonment and not an automatic dismissal. Rodriguez v Middle Atlantic Auto Leasing, Inc. (1986, 1st Dept) 122 App Div 2d 720, 511 NYS2d 595, app dismd 69 NY2d 874, 514 NYS2d 723, 507 NE2d 317.. It has been held that a plaintiff may rebut this presumption by showing that: (1) the plaintiff possesses a meritorious cause of action; (2) defendant would not be prejudiced by restoration of the case to the trial calendar; (3) the plaintiff has an acceptable excuse for the delay; and (4) plaintiff did not intend to abandon the action. Carabello v Salkowitz (1994, 2d Dept) 209 App Div 2d 466, 621 NYS2d 878, motion to strike gr (App Div, 2d Dept) 621 NYS2d 879.. The practitioner is well-advised, however, that these criteria are subjective and, therefore, it calls for the exercise of judicial discretion. One should not, both as a matter of practice and quite frankly to guard one's malpractice exposure, rely on either your adversary's willingness to stipulate to restore to the calendar, or the court's willingness to routinely grant leniency if this deadline is missed.

It should be noted, however, that the courts have granted some leniency where the delay beyond the one-year period has been *de minimis.* One court has held that a plaintiff has up to six months beyond the one year period to excuse a dismissal under this section. Lobello v New Rochelle Hosp. Medical Ctr. (1993, 1st Dept) 199 App Div 2d 134, 605 NYS2d 77.. Once the

delay extends beyond the six months, it is highly unlikely that a court will restore the case to the calendar. The courts have generally held that restoration of a case at this point would unfairly prejudice the defendant. Hewitt v Booth Memorial Medical Center (1991, 2d Dept) 178 App Div 2d 401, 577 NYS2d 104.; Krantz v Scholtz (1994, 3d Dept) 201 App Div 2d 784, 607 NYS2d 183, app dismd 83 NY2d 902, 614 NYS2d 383, 637 NE2d 274..

Judicial discretion has been exercised in those situations where the plaintiff has shown a sufficient excuse for the delay. These criteria are satisfied where the plaintiff is not responsible for the delay such as where the defendant fails to comply with plaintiff's discovery requests in a timely fashion. Merrill Lynch, Pierce, Fenner & Smith, Inc. v Tinter (1993, 1st Dept) 198 App Div 2d 113, 603 NYS2d 157.. Note, however, that law office failure, no matter how innocent, will not satisfy this test. Robinson v New York City Transit Auth. (1994, 2d Dept) 203 App Div 2d 351, 610 NYS2d 296..

Inasmuch as it is the plaintiff's burden to justify the delay and submit what amounts to sufficient excuses for the delay, defense counsel is well-advised to put plaintiff to his proofs and insure that the merits of the plaintiff's cause(s) is (are) adequately supported by affidavits on the liability, and damages aspects. See, Wulster v Rubinstein (1987, 2d Dept) 126 App Div 2d 545, 510 NYS2d 668, Testers Question: Additional History. app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, vacated 70 NY2d 723, 519 NYS2d 642, 513 NE2d 1303..

A dismissal pursuant to CPLR § 3404. must be contrasted to a situation where a note of issue and certificate of readiness were vacated as prematurely filed. See Nunez v Goodman (1992, 1st Dept) 186 App Div 2d 521, 589 NYS2d 160. and Kaplan v Elkind (1993, 2d Dept) 192 App Div 2d 643, 596 NYS2d 456.. In situations where the note of issue and statement of readiness is vacated the case was never on the calendar to begin with.

Perhaps the easiest way to restore an action to the trial calendar is a stipulation executed by all parties. Though courts are supportive of such stipulations, one court has held that a stipulation is not sufficient in and of itself to restore the matter; rather, the stipulation was merely evidence which rebutted the presumption of abandonment. Escobar v Deepdale General Hosp. (1991, 2d

Dept) 172 App Div 2d 486, 567 NYS2d 842.. For obvious reasons, a mere oral agreement by a defendant not to oppose a motion to restore has been held to be inadequate to rebut the presumption of abandonment. Bergan v Home for Incurables (1986, 1st Dept) 124 App Div 2d 517, 508 NYS2d 434..

The policy reasons behind CPLR § 3404 is not to deny a litigant his rightful day in court, but rather to clear from the court's docket those cases that the plaintiff has in fact lost interest in pursuing. Thus, all evidence probative of "activity" and plaintiff's intentions to pursue a case militate in favor of restoration so long as they are *timely* pursued.

Howard F. Strongin, a graduate of the Cardozo School of Law, is a partner at Lester Schwab Katz & Dwyer where he is responsible for the defense, through trial, of products liability, intentional tort, construction, premises security, and other catastrophic personal injury cases. In addition to Mr. Strongin's practice at Lester Schwab Katz & Dwyer, he is an adjunct lecturer at New York University, Department of Finance Law and Taxation, in the fields of torts, evidence, judgments and appeals, and professional responsibility. Mr. Strongin also serves as an arbitrator in the Civil Court of the City of New York, Queens County. The assistance of Jonathan Cooper, a second year law student at Cardozo School of Law, is gratefully acknowledged.

## Notes to Decisions

**I.Under CPLR**

**A.In General**

**1.Generally**

**2.Dismissal of case, generally**

**3.—Court of Claims proceeding**

**4.—Effect of related federal action**

**5.—Medical malpractice cases**

**6.—Tax matters**

**7.Effect of dismissal**

**8.Presumption of abandonment**

**9.Self-execution of rule**

**B.Vacating Dismissal; Restoring Case To Calendar**

**i.In General**

**10.Generally**

**11.Conditions and terms imposed**

**12.Effect of bankruptcy**

**13.Effect of plaintiff’s death**

**14.Effect of plaintiff’s incarceration**

**15.“Extraordinary circumstances” rule**

**16.Inapplicability of CPLR § 3404 where case was never calendared**

**17.Law office failures, generally**

**18.—Change of law firm affiliation**

**19.—Death of attorney**

**20.—Illness of attorney**

**21.—Inadvertence of attorney, generally**

**22.— —Appellate matters**

**23.— —Calendaring matters**

**24.— —Failure to file**

**25.— —Lost documents**

**26.— —Pre-trial conference matters**

**27.— —Trial matters**

**28.—Relocation of attorney’s office**

**29.—Staff or employee of attorney**

**30.—Substitution of attorney**

**31.Length of inactivity; 1 year or less**

**32.—More than 1 year and up to 3 years**

**33.—More than 3 years and up to 6 years**

**34.—More than 6 years and up to 9 years**

**35.—More than 9 years**

**36.More than 1 dismissal**

**37.Pro se representation**

**38.Settlement negotiations**

**39.Stipulations; consensual removal or dismissal**

**40.Sua sponte dismissal by court**

**ii.Proofs**

**41.Generally**

**42.Abandonment; intent to abandon, generally**

**43.—Insufficient proof of abandonment**

**44.—Insufficient proof of non-abandonment**

**45.—Presumption of abandonment; not rebutted**

**46.— —Rebutted**

**47.—Sufficient proof of abandonment**

**48.Excuse; excusable neglect, generally**

**49.—Insufficient proof of excuse**

**50.— —Attorney-related excuse**

**51.— —Court-related excuse**

**52.— —Inactivity for 3 or more years**

**53.— —Plaintiff-related excuse**

**54.— —Witness-related excuse**

**55.—Sufficient proof of excuse**

**56.— —Attorney-related excuse**

**57.— —Effect of pending appeal**

**58.— —Plaintiff-related excuse**

**59.— —Witness-related excuse**

**60.Merit; meritorious cause of action, generally**

**61.—Insufficient proof of merit**

**62.— —Conclusory affidavits**

**63.— —Insufficiency as to causation**

**64.— —No affidavits of merit**

**65.— —Supporting statements unsworn**

**66.— —Unsubstantiated attorney’s affidavit**

**67.—Sufficient proof of merit**

**68.— —Prima facie merit predicated on affidavits and reports**

**69.Prejudice; lack of prejudice, generally**

**70.—Insufficient proof of prejudice**

**71.—Lack of prejudice**

**72.—Question of prejudice not raised**

**73.—Sufficient proof of prejudice, generally**

**74.— —Delay for 3 or more years**

**75.— —Witness unavailability**

**II.Under Former Civil Practice Laws**

**76.Generally**

**77.Dismissal of cause**

**78.Alternative relief**

**79.Opening default**

**80.—Where default caused by military service**

## I. Under CPLR

### A. In General

#### 1. Generally

CPLR § 3304 does not apply to summary proceedings to recover real property brought under Real P Actions & Pr Law Art 7. Orange County Development Corp. v Self-Service Products of Hinmans Corners, Inc., 80 A.D.2d 712, 437 N.Y.S.2d 739, 1981 N.Y. App. Div. LEXIS 10426 (N.Y. App. Div. 3d Dep't 1981).

In actions for divorce and separation, by a husband and wife respectively, the action for separation was properly held to have been abandoned by the parties where a formal separation, which the parties stated they intended to enter into, was never executed, where the husband took no action to compel the wife to move forward with the action, failed or neglected to move to dismiss for want of prosecution, and did not even attempt to ascertain the status of the action until almost seven years after the parties entered into an interim stipulation for temporary relief. McKean v McKean, 100 A.D.2d 537, 473 N.Y.S.2d 229, 1984 N.Y. App. Div. LEXIS 17510 (N.Y. App. Div. 2d Dep't 1984).

Court improperly dismissed accounting action pursuant to CLS CPLR § 3404 where (1) no note of issue was ever filed, (2) there was no evidence that action had been marked or struck from calendar, and (3) there was no showing that action went unanswered on clerk’s calendar call. Auerbach v Kaufman, 173 A.D.2d 229, 569 N.Y.S.2d 440, 1991 N.Y. App. Div. LEXIS 5580 (N.Y. App. Div. 1st Dep't 1991).

CLS CPLR § 3404 applies to cases marked off calendar on consent of parties, as well as to cases struck due to party's default or neglect. Kassover v Diamonds Run, Ltd., 193 A.D.2d 515, 597 N.Y.S.2d 408, 1993 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 1st Dep't 1993).

Striking of note of issue, which results in automatic dismissal if case is not restored within one year (CLS CPLR § 3404), does not preclude defendant from seeking relief provided by CLS CPLR § 3216 before that year has elapsed. Hansel v Lamb, 227 A.D.2d 838, 642 N.Y.S.2d 407, 1996 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 3d Dep't 1996).

Court properly marked case off calendar for counsel's failure to appear at scheduled conference, conditioning restoration of case to calendar on payment to opposing counsel of sum of $392.50. Summit Waterproofing & Restoration Corp. v Scarsdale Country Estates Owners, 228 A.D.2d 431, 643 N.Y.S.2d 628, 1996 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 2d Dep't 1996).

Prudent procedure for effective calendar control, when cases are unanswered on clerk's calendar call, is not to dismiss cases sua sponte but to mark them "off" under CLS CPLR § 3404, which provides for automatic dismissal for neglect to prosecute if cases are not restored within one year of marking. Stonehill Publ'g v Clancy-Cullen Storage Co., 251 A.D.2d 25, 673 N.Y.S.2d 665, 1998 N.Y. App. Div. LEXIS 6411 (N.Y. App. Div. 1st Dep't 1998).

Circumstances indicated that medical malpractice action was not abandoned where, during more than 3-year lapse between automatic dismissal and plaintiffs' motion to restore, there was activity in form of motion practice and discovery, some of which was delayed due to death of one defendant. Etter v County of Nassau, 261 A.D.2d 571, 690 N.Y.S.2d 712, 1999 N.Y. App. Div. LEXIS 5699 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff, having actively solicited and obtained bankruptcy stay of his malpractice action against defendant law firm, failed to show how any provision or policy of Bankruptcy Code was offended when court took malpractice case off its trial calendar during pendency of stay, and thus malpractice action was properly dismissed as abandoned where plaintiff's did not move to

restore action to trial calendar until 22 months after bankruptcy stay was lifted and 5 months after learning that case had been marked off calendar, and he failed to demonstrate merit of his claim or substantial likelihood of success on merits. Katz v Robinson Silverman Pearce Aronsohn & Berman, L.L.P., 277 A.D.2d 70, 717 N.Y.S.2d 13, 2000 N.Y. App. Div. LEXIS 12000 (N.Y. App. Div. 1st Dep't 2000).

CLS CPLR § 3404, which provides that case marked “off” or struck from calendar and not restored within one year thereafter shall be deemed abandoned and dismissed, should not be applied to cases where no note of issue has been filed, i.e., cases which have not yet reached trial calendar; in pre-note of issue cases, court’s obligation is to give dates for completion of discovery and, if discovery is not completed timely, to impose sanctions under CLS CPLR § 3216, CLS Stds & Adm Policies § 130-2.1 or CLS Sup Ct Rls § 202.27. Appellate Division, Second Department, held that case marked off during discovery phase of litigation by deeming it to be on court’s “calendar” or special “purge” calendar created for purpose of marking cases off, and then automatically dismissed pursuant to CLS CPLR § 3404, was never properly dismissed and, as such, there was no need for motion to restore; while this decision might revive some rather old cases, proper disposition of cases would benefit both Bench and Bar. Lopez v Imperial Delivery Serv., 282 A.D.2d 190, 725 N.Y.S.2d 57, 2001 N.Y. App. Div. LEXIS 5038 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 937, 733 N.Y.S.2d 376, 759 N.E.2d 375, 2001 N.Y. LEXIS 3094 (N.Y. 2001).

Death of estate’s executor precluded further proceedings against estate, including conference at which case was marked off calendar, until successor was appointed; thus, ensuing CLS CPLR § 3404 dismissal of action against estate was nullity, and refusal to restore action to calendar was error as matter of law. Novaro v Jomar Real Estate Corp., 283 A.D.2d 352, 725 N.Y.S.2d 543, 2001 N.Y. App. Div. LEXIS 6264 (N.Y. App. Div. 1st Dep't 2001).

Trial court erred in striking plaintiff arrestee’s malicious prosecution and false arrest action from the calendar pursuant to N.Y. C.P.L.R. 3404 based on the failure of the arrestee’s attorney to attend a pre-note of issue status conference, since it was not proper to apply N.Y. C.P.L.R. 3404

to pre-note of issue cases. Wasilewicz v Vill. of Monroe Police Dep't, 288 A.D.2d 377, 734 N.Y.S.2d 81, 2001 N.Y. App. Div. LEXIS 11315 (N.Y. App. Div. 2d Dep't 2001).

Where the evidence demonstrated that plaintiff individual's personal injury action was marked discontinued as a result of a clerk's error and was not marked off, struck from the calendar, or unanswered on a clerk's calendar call, the case was not subject to the provisions of N.Y. C.P.L.R. 3404 for restoring it to the trial calendar, and the trial court properly granted the individual's motion to restore the action to its prior place on the calendar. Hernandez v City of New York, 290 A.D.2d 416, 736 N.Y.S.2d 604, 2002 N.Y. App. Div. LEXIS 328 (N.Y. App. Div. 2d Dep't 2002).

Where a plaintiff has never filed a note of issue with respect to a defendant, N.Y. C.P.L.R. 3404, which governs restoring cases struck from a trial calendar, is inapplicable. Boricua College v L & T Constr. Co., 294 A.D.2d 170, 742 N.Y.S.2d 228, 2002 N.Y. App. Div. LEXIS 4988 (N.Y. App. Div. 1st Dep't 2002).

Trial court did not err in denying the victim's motion for leave to renew as the victim did not meet her burden to proffer both new facts not presented on the prior motion that would have warranted the grant of restoration, and a reasonable justification for the failure to have presented such facts on the prior motion. St. Claire v Gaskin, 295 A.D.2d 336, 743 N.Y.S.2d 529, 2002 N.Y. App. Div. LEXIS 5725 (N.Y. App. Div. 2d Dep't 2002).

Plaintiff demonstrated a reasonable excuse for the delay in moving to restore the action, as plaintiff's counsel's failure to appear at the status conference constituted law office failure, which should not have inured to the detriment of counsel's innocent client, particularly where the action was meritorious and the opponent of restoration did not demonstrate prejudice. Burgos v 2915 Surf Ave. Food Mart, Inc., 298 A.D.2d 282, 748 N.Y.S.2d 738, 2002 N.Y. App. Div. LEXIS 10153 (N.Y. App. Div. 1st Dep't 2002).

Denial of a seller's motion to restore his counterclaims was error because, inter alia, N.Y. C.P.L.R. 3404 did not apply to pre-note of issue actions and did not provide a basis for dismissal

of such actions. Express Shipping, Ltd. v Gold, 63 A.D.3d 669, 880 N.Y.S.2d 183, 2009 N.Y. App. Div. LEXIS 4345 (N.Y. App. Div. 2d Dep't 2009).

Trial court erred not granting the bank’s motion to restore the 2009 foreclosure action to the active calendar as it was never formally dismissed, thus, the marking-off procedures of N.Y. C.P.L.R. 3404 did not apply and the bank was not required to move to restore within any specified time frame and was not obligated to demonstrate a reasonable excuse and a potentially meritorious claim. Deutsche Bank Natl. Trust Co. v Gambino, 181 A.D.3d 558, 121 N.Y.S.3d 90, 2020 N.Y. App. Div. LEXIS 1535 (N.Y. App. Div. 2d Dep't 2020).

Because it was undisputed that defendants had not joined issue, a note of issue had not been filed, and the matter was never marked “off” the calendar, neither N.Y. C.P.L.R. 3216 nor 3404 could have served as the basis to dismiss the action. Metlife Home Loans v Willcox, 226 A.D.3d 1230, 210 N.Y.S.3d 323, 2024 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 3d Dep't 2024).

Nassau County District Court Rule 14, authorizing the dismissal of an action which remains on the general calendar for more than a year without a notice of trial being filed, has its counterpart in CPLR 3404 and is not inconsistent with the provisions of CPLR 3216. Whitney v Bohack Food Stores, 53 Misc. 2d 1022, 280 N.Y.S.2d 919, 1967 N.Y. Misc. LEXIS 1503 (N.Y. App. Term 1967).

Failure to timely submit proposed interim order cannot justify dismissal of entire action as abandoned under CLS Unif Tr Ct Rls § 202.48 (22 NYCRR § 202.48). Corbett v Zedayko, 139 Misc. 2d 184, 527 N.Y.S.2d 967, 1988 N.Y. Misc. LEXIS 218 (N.Y. Sup. Ct. 1988), aff'd, 151 A.D.2d 941, 545 N.Y.S.2d 216, 1989 N.Y. App. Div. LEXIS 8868 (N.Y. App. Div. 3d Dep't 1989).

N.Y. C.P.L.R. 3404 is applicable to the New York City Civil Court, despite language in the rule limiting it to supreme court and county court cases, as N.Y. City Civ. Ct. Act § 2102 has adopted N.Y. C.P.L.R. 3404 because it does not conflict with the New York City Civil Court Act. Chavez v 407 Seventh Ave. Corp., 807 N.Y.S.2d 785, 10 Misc. 3d 33, 2005 N.Y. Misc. LEXIS 2452 (N.Y.

App. Term 2005), rev'd, 39 A.D.3d 454, 833 N.Y.S.2d 219, 2007 N.Y. App. Div. LEXIS 4172 (N.Y. App. Div. 2d Dep't 2007).

In a context of restoration of a case to a trial calendar, the mere passage of time was held not to establish prejudice. Muriel v St. Barnabas Hosp., 3 A.D.3d 419, 771 N.Y.S.2d 107, 2004 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 1st Dep't 2004).

In a context of restoration of a case to a trial calendar, while a patient's counsel could have been faulted for failing to keep track of the status of a case, such an oversight amounted to law office failure, which was accepted as an excuse for not attending a pretrial conference. Muriel v St. Barnabas Hosp., 3 A.D.3d 419, 771 N.Y.S.2d 107, 2004 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 1st Dep't 2004).

Employer's motion to restore to the calendar a cross claim for common-law indemnification against a car's owner and its driver after it was severed from the main personal injury action and marked off the calendar pursuant to N.Y. C.P.L.R. 3404 was properly granted; restoration is automatic when such a motion is filed within one year. Kohn v Citigroup, Inc., 29 A.D.3d 530, 814 N.Y.S.2d 702, 2006 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div. 2d Dep't 2006).

**2. Dismissal of case, generally**

An action having been stricken from the calendar was, after one year, automatically dismissed "for neglect to prosecute." Homowack Realty Corp. v Gitlin, 25 A.D.2d 703, 268 N.Y.S.2d 178, 1966 N.Y. App. Div. LEXIS 4710 (N.Y. App. Div. 3d Dep't 1966).

Where the complaint was marked "off" the Trial Calendar on April 16, 1967 and placed on the General Docket, and if no action were taken by either of the parties, the case would properly have been subject to automatic dismissal as of April 17, 1968, and, although the respondent on March 4, 1968 by motion on notice obtained an order placing the action back on the Trial Calendar, the respondent's failure to file the order of restoration with the Clerk before April 17, 1968 resulted in the automatic dismissal of the motion by operation of the provisions of CPLR

3404. Campbell v Puntoro, 36 A.D.2d 568, 317 N.Y.S.2d 768, 1971 N.Y. App. Div. LEXIS 4947 (N.Y. App. Div. 4th Dep't 1971).

Defendant in personal injury action, in order to obtain dismissal, was not required to show that it was prejudiced by plaintiffs' 15-month delay in filing complaint. Simons v Sanford Plaza, Inc., 44 A.D.2d 710, 354 N.Y.S.2d 697, 1974 N.Y. App. Div. LEXIS 5205 (N.Y. App. Div. 2d Dep't 1974).

Where pedestrian who brought action to recover for injuries sustained when he was struck by automobile died of unrelated causes after action was commenced and where there was no substitution of his personal representative, court lacked power and jurisdiction to dismiss the complaint as abandoned, rendering dismissal order a nullity. Dorney v Reddy, 45 A.D.2d 754, 357 N.Y.S.2d 21, 1974 N.Y. App. Div. LEXIS 4641 (N.Y. App. Div. 2d Dep't 1974).

Self-executing provision of CPLR § 3404 is inapplicable where there is no evidence that the action has ever been marked off or struck from the calendar or gone unanswered on a clerk's calendar call. Thompson v Thompson, 103 A.D.2d 772, 477 N.Y.S.2d 405, 1984 N.Y. App. Div. LEXIS 19390 (N.Y. App. Div. 2d Dep't 1984).

Petitioner failed to make showing adequate to overcome rebuttable presumption that proceeding seeking review of 1981 determination imposing disciplinary sanctions for misconduct was abandoned for neglect to prosecute it for more than one year after it was removed from court calendar, where petitioner originally initiated CPLR Article 78 proceeding in September 1981, failed to prosecute proceeding and in October 1981 it was striken from calendar with leave to renew, but petitioner waited until March 1983 to apply to clerk of county court for new return date, when proceeding was recalendared. Graham v Scully, 113 A.D.2d 990, 493 N.Y.S.2d 663, 1985 N.Y. App. Div. LEXIS 52609 (N.Y. App. Div. 3d Dep't 1985).

Dismissal of complaint 4 years after case was struck from calendar was unwarranted, since conduct of parties in proceeding with pretrial practice demonstrated lack of intent to abandon action, and no actual prejudice was shown. Chin v Ying Ping Fung, 126 A.D.2d 415, 510 N.Y.S.2d 119, 1987 N.Y. App. Div. LEXIS 41580 (N.Y. App. Div. 1st Dep't 1987).

In proceeding by husband seeking downward modification of maintenance and child support obligations, hearing examiner erred in dismissing wife's cross-petition to enforce support provisions of divorce decree for failure to prosecute, based on wife's default, where wife's counsel appeared 10 minutes late for hearing and found that hearing examiner had already dismissed cross-petition, since (1) 10 minute delay in appearance was de minimis, (2) wife's counsel had attempted to contact husband's counsel to inform him that she might be somewhat late for hearing, (3) witness expected to testify at hearing had been required to go out of town by his employer and wife's counsel expected adjournment for that reason, and (4) wife's allegations clearly demonstrated merits of her claim to enforce support provisions of divorce decree. Cohen v Seletsky, 142 A.D.2d 111, 534 N.Y.S.2d 688, 1988 N.Y. App. Div. LEXIS 11979 (N.Y. App. Div. 2d Dep't 1988).

Court properly granted defendant's motion to strike case from trial calendar and to dismiss complaint where plaintiff failed to show that her almost 5-year delay in prosecution was excusable, that her action was meritorious, or that defendant would not be prejudiced by its restoration. Hipple v Bloom, 149 A.D.2d 406, 542 N.Y.S.2d 972, 1989 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 892, 547 N.Y.S.2d 849, 547 N.E.2d 104, 1989 N.Y. LEXIS 3017 (N.Y. 1989).

Failure of law office secretary to advise counsel of receipt of 90-day demand to file note of issue was adequate excuse in absence of any indication that plaintiffs were not diligently pursuing action or were engaging in dilatory tactics. Jeune v O.T. Trans Mix Corp., 202 A.D.2d 640, 610 N.Y.S.2d 836, 1994 N.Y. App. Div. LEXIS 2979 (N.Y. App. Div. 2d Dep't 1994).

Defendant was not entitled to dismissal under CLS CPLR § 3404, even though action lay dormant for some 20 years, since case had not been marked off court's trial calendar. Smith v Sheen, 216 A.D.2d 147, 628 N.Y.S.2d 280, 1995 N.Y. App. Div. LEXIS 6600 (N.Y. App. Div. 1st Dep't 1995).

Court should not have granted respondents' motion to dismiss petition for failure to prosecute where bulk of delay was due to oversight of previously assigned IAS Court in failing to render

timely decision on merits of petition once it was submitted; although petitioner should have been more vigilant in pursuing his claim, there is no statutory mandate that once having submitted his papers, petitioner was under obligation to remind court of its duty to timely render decisions on submitted matters. Mosher v Ward, 218 A.D.2d 626, 631 N.Y.S.2d 29, 1995 N.Y. App. Div. LEXIS 8932 (N.Y. App. Div. 1st Dep't 1995).

Provision for automatic dismissal of case struck from trial calendar and not restored within year thereafter (CLS CPLR § 3404) did not preclude defendants from serving 90-day demand on plaintiff under CLS CPLR § 3216 within one year of date case was struck from trial calendar. Cascio v O'Daly, 221 A.D.2d 494, 633 N.Y.S.2d 405, 1995 N.Y. App. Div. LEXIS 11972 (N.Y. App. Div. 2d Dep't 1995).

Action was properly dismissed under CLS CPLR § 3404 where Supreme Court, at preliminary conference, had directed that action be transferred to Civil Court under CLS CPLR § 325(d), but that directive was never implemented, apparently due to clerical error, and plaintiff failed to show (1) reasonable excuse for its 5-year inactivity after transfer directive was issued, (2) meritorious cause of action, (3) lack of intent to abandon action, and (4) lack of prejudice to defendant. Amsterdam Leather Bag v New York Prop. Ins. Underwriting Ass'n, 240 A.D.2d 272, 659 N.Y.S.2d 10, 1997 N.Y. App. Div. LEXIS 6574 (N.Y. App. Div. 1st Dep't 1997).

Housing judge’s discretionary refusal to dismiss summary holdover proceeding was improper since landlord was not ready to proceed on scheduled trial date for restored case; language of 22 NYCRR § 208.14(d) providing that court “shall” take some action means that court has no discretion to refrain once party seeking relief has fulfilled statutory requirements. Centennial Restorations Co. v Wyatt, 248 A.D.2d 193, 669 N.Y.S.2d 585, 1998 N.Y. App. Div. LEXIS 2410 (N.Y. App. Div. 1st Dep't 1998).

Defendants in action arising from 2 automobile accidents were entitled to dismissal of complaint for failure to prosecute where plaintiffs failed to show justifiable excuse for not responding to 90-day demand under CLS CPLR § 3216 or to address merits of their causes of action in

opposition to defendants' motion. Ryder v Knopick, 251 A.D.2d 732, 674 N.Y.S.2d 447, 1998 N.Y. App. Div. LEXIS 6480 (N.Y. App. Div. 3d Dep't 1998).

Defendants' motion to dismiss complaint was properly granted where action was "marked off" calendar for plaintiffs' failure to appear at 1993 pretrial conference, plaintiffs took no steps in prosecution of action until 4 years later when they attempted to file note of issue, and their interim prosecution of related but unconsolidated action was insufficient to rebut presumption of abandonment. Laing v Bushin, 255 A.D.2d 113, 679 N.Y.S.2d 144, 1998 N.Y. App. Div. LEXIS 11649 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 957, 694 N.Y.S.2d 634, 716 N.E.2d 699, 1999 N.Y. LEXIS 1324 (N.Y. 1999).

Where no note of issue placing action on court's calendar was filed, court incorrectly dismissed action pursuant to CLS CPLR § 3404; correct procedure to dismiss action required motion under CLS CPLR § 3216. P. Cubed Enters. v Roach, 265 A.D.2d 537, 696 N.Y.S.2d 889, 1999 N.Y. App. Div. LEXIS 10793 (N.Y. App. Div. 2d Dep't 1999).

Defendant was entitled to dismissal of personal injury action for failure to prosecute where plaintiff's disappearance and failure to maintain contact with her attorneys did not justify her failure to respond to 90-day notice under CLS CPLR § 3216. Palermo v County of Nassau, 266 A.D.2d 365, 698 N.Y.S.2d 159, 1999 N.Y. App. Div. LEXIS 11514 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 94 N.Y.2d 938, 708 N.Y.S.2d 353, 729 N.E.2d 1152, 2000 N.Y. LEXIS 560 (N.Y. 2000), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1666 (N.Y. 2000).

Action to recover reduction in condemnation award was abandoned, even though issue had been joined on original complaint, where first amended complaint superseded original complaint and became sole complaint in action, and plaintiff failed to take proceedings to enter judgment against sole named defendant within one year after defendant's default in answering first amended complaint. Hummingbird Assocs. v Dix Auto Serv., 273 A.D.2d 58, 709 N.Y.S.2d 51, 2000 N.Y. App. Div. LEXIS 6375 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2820 (N.Y. 2000).

Defendant was entitled to dismissal of complaint against her for failure to prosecute where (1) in response to defendant's demand under CLS CPLR § 3216, plaintiffs neither filed note of issue within 90 days nor moved to vacate 90-day demand or to extend time within which to file note of issue, (2) plaintiffs did not file response to defendant's motion and thus did not show excuse for delay or meritorious cause of action, and (3) although plaintiffs filed note of issue 3 days before return date on motion, and their attorney appeared in opposition on return date, those actions were insufficient to defeat motion. Burridge v Gaines, 281 A.D.2d 967, 722 N.Y.S.2d 681, 2001 N.Y. App. Div. LEXIS 2716 (N.Y. App. Div. 4th Dep't 2001).

Plaintiff abandoned its claim for damages resulting from defendant's wrongful refusal to comply with plaintiff's original demand that defendant issue all 10,865 shares of stock to plaintiff where (1) according to parties' agreement, master lease would terminate if all 10,856 shares of stock were issued to plaintiff, and (2) after defendant initially resisted plaintiff's original demand, plaintiff modified its position during present litigation to demand only those 8,280 shares allocable to 16 of 22 units. 560 Third Assocs. v Whitehall Tenants Corp., 286 A.D.2d 599, 730 N.Y.S.2d 219, 2001 N.Y. App. Div. LEXIS 8390 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 647, 745 N.Y.S.2d 504, 772 N.E.2d 607, 2002 N.Y. LEXIS 957 (N.Y. 2002).

Defendant was not entitled to dismissal of action as abandoned, absent clear indication that case had ever been "marked 'off' or struck from the calendar or unanswered on a clerk's calendar call" under CLS CPLR § 3404. Fronk v Kam Yeung, 286 A.D.2d 972, 730 N.Y.S.2d 766, 2001 N.Y. App. Div. LEXIS 9087 (N.Y. App. Div. 4th Dep't 2001).

Since CPLR 3404 related to automatic dismissal of cases not restored to the calendar within a year of being marked off, and, thus, was strictly reserved for cases that had already been placed on the trial calendar, plaintiffs' case was improperly dismissed under CPLR 3404 where note of issue had not yet been filed in the case. Promenade v Schindler Elevator Corp., 295 A.D.2d 201, 743 N.Y.S.2d 495, 2002 N.Y. App. Div. LEXIS 7619 (N.Y. App. Div. 1st Dep't 2002).

Trial court erred in granting defendant's motion to dismiss plaintiff's personal injury action, because court's order vacating the note of issue and striking the action from the trial calendar

pending the completion of discovery was not equivalent to an order marking off or striking the case from the trial calendar pursuant to N.Y. C.P.L.R. 3404, but rather placed the action back into pre-note of issue status, and since N.Y. C.P.L.R. 3404 was inapplicable to pre-note of issue cases, that statute did not provide a basis for the court to dismiss the action. Galati v C. Raimondo & Sons Constr. Co., 35 A.D.3d 805, 828 N.Y.S.2d 136, 2006 N.Y. App. Div. LEXIS 15877 (N.Y. App. Div. 2d Dep't 2006).

As there had been no activity since the order granting summary judgment to the parents, thus, the personal injury case had never been marked off the calendar, dismissal was not permitted under N.Y. C.P.L.R. 3404. Schmidt v Mack, 46 A.D.3d 1205, 849 N.Y.S.2d 99, 2007 N.Y. App. Div. LEXIS 13143 (N.Y. App. Div. 3d Dep't 2007).

Motion to dismiss a medical malpractice action was properly denied because (1) the case was not “marked off” or “struck” from the calendar when the court vacated a note of issue, (2) N.Y. C.P.L.R. 3404 did not apply absent an extant and valid note of issue, and (3) the vacatur of the note of issue returned the case to pre-note of issue status and did not constitute a marking off or striking the case from the court's calendar, since a note of issue did not survive the note's own vacatur, as the continuing vitality of the note of issue no longer existed. Bradley v Konakanchi, 156 A.D.3d 187, 64 N.Y.S.3d 815, 2017 N.Y. App. Div. LEXIS 8190 (N.Y. App. Div. 4th Dep't 2017), app. denied, 159 A.D.3d 1509, 70 N.Y.S.3d 103, 2018 N.Y. App. Div. LEXIS 1692 (N.Y. App. Div. 4th Dep't 2018).

In the Second Department, it is axiomatic that N.Y. C.P.L.R. 3404 has no applicability in the absence of an extant and valid note of issue, and the vacatur of a note of issue returns the case to pre-note of issue status and does not constitute a marking off or striking the case from the court’s calendar within the statute’s meaning, as a note of issue does not survive its own vacatur. Bradley v Konakanchi, 156 A.D.3d 187, 64 N.Y.S.3d 815, 2017 N.Y. App. Div. LEXIS 8190 (N.Y. App. Div. 4th Dep't 2017), app. denied, 159 A.D.3d 1509, 70 N.Y.S.3d 103, 2018 N.Y. App. Div. LEXIS 1692 (N.Y. App. Div. 4th Dep't 2018).

N.Y. C.P.L.R. 3404 and its automatic dismissal provision for failure to prosecute are inapplicable to New York City, N.Y., Civil Court cases because of the express language of the rule, which designates its applicability only to supreme court and county court cases. Alpert v Wolf, 194 Misc. 2d 126, 751 N.Y.S.2d 707, 2002 N.Y. Misc. LEXIS 1499 (N.Y. Civ. Ct. 2002).

Trial court erred in denying sellers' motion to restore an action concerning a sale of a publishing business to a company to the trial calendar, because the statute used to dismiss the action, N.Y. C.P.L.R. 3404, was not applicable because a note of issue had not been filed. Behren v Warren, Gorham & Lamont, Inc., 301 A.D.2d 381, 753 N.Y.S.2d 78, 2003 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 1st Dep't 2003).

Plaintiff, in the course of his attempts to have his personal injury action restored, was penalized for his failure to submit an affidavit of merit and for his delay in making a motion to restore, both of which were requirements for the restoration of an action which had been dismissed pursuant to N.Y. C.P.L.R. § 3404; however, § 3404 was inapplicable to plaintiff's delay in filing a note of issue, which was governed instead by N.Y. C.P.L.R. § 3126 and N.Y. C.P.L.R. § 3216(b)(3), the latter of which prohibited the dismissal of his action because he had not been served with a 90-day demand to serve and file a note of issue. Garner v Latimer, 306 A.D.2d 209, 761 N.Y.S.2d 657, 2003 N.Y. App. Div. LEXIS 7456 (N.Y. App. Div. 1st Dep't 2003).

N.Y. C.P.L.R. 3404 was inapplicable where a case was apparently restored to the trial calendar, and a prior note of issue was still in effect; further, N.Y. C.P.L.R. 3216 was clearly intended to apply to cases which had not yet reached the trial calendar, and thus there was no legal basis for dismissal of the case. Chauvin v Keniry, 4 A.D.3d 700, 773 N.Y.S.2d 142, 2004 N.Y. App. Div. LEXIS 2051 (N.Y. App. Div. 3d Dep't), app. dismissed, 2 N.Y.3d 823, 782 N.Y.S.2d 240, 815 N.E.2d 1105, 2004 N.Y. LEXIS 1325 (N.Y. 2004).

Where a note of issue had not been filed under N.Y. C.P.L.R. art. 3404, when plaintiff's personal injury action was marked off the calendar, a 90-day notice had not been filed under N.Y. C.P.L.R. art. 3216, and plaintiff's complaint was not dismissed under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27, the trial court erred in vacating the note of issue and certificate of

readiness. Rogers-Kimpson v City of Yonkers, 7 A.D.3d 601, 777 N.Y.S.2d 143, 2004 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 2004).

When a trial court denied motions for summary judgment because a case had been “marked off” the trial calendar, this was error because the case should not have been marked off the calendar as a note of issue had not been filed. Northpark Assocs., L.P. v S.H.C. Mergers, Inc., 8 A.D.3d 642, 779 N.Y.S.2d 549, 2004 N.Y. App. Div. LEXIS 9287 (N.Y. App. Div. 2d Dep't 2004).

N.Y. C.P.L.R. 3404, regarding the dismissal of abandoned cases, was to be reserved strictly for cases that had reached the trial calendar. Northpark Assocs., L.P. v S.H.C. Mergers, Inc., 8 A.D.3d 642, 779 N.Y.S.2d 549, 2004 N.Y. App. Div. LEXIS 9287 (N.Y. App. Div. 2d Dep't 2004).

**3. —Court of Claims proceeding**

In claims against state by prison inmates who contracted food poisoning, Court of Claims properly denied their motion for extension of time to serve and file note of issue and properly dismissed claims for failure to prosecute where (1) claimants did not send out discovery demands until nearly 5 years after poisoning incident, over 4 years after first claim was filed, and nearly 2 years after issuance of first order to file note of issue, and (2) when served with 90-day demand, claimants waited until one day before it expired to request extension and then failed to show that they genuinely needed extension or that good cause existed for their significant past delay. McCrory v State, 281 A.D.2d 797, 721 N.Y.S.2d 712, 2001 N.Y. App. Div. LEXIS 2485 (N.Y. App. Div. 3d Dep't 2001).

**4. —Effect of related federal action**

Plaintiff’s commencement of related federal action against defendants and his continued defense in related state action were sufficient to show reasonable excuse for his delay in instant action and lack of intent to abandon it, and merit of instant action was shown by plaintiff’s

detailed pleadings in related actions. Weinstock v Handler, 216 A.D.2d 166, 628 N.Y.S.2d 108, 1995 N.Y. App. Div. LEXIS 6560 (N.Y. App. Div. 1st Dep't 1995).

Where vacatur of a note of issue under to 22 NYCRR § 202.21(e) did not bar a patient from further expert witness disclosure, because marking the case off the calendar pursuant to N.Y. C.P.L.R. 3404 did not automatically result in the vacatur of the note of issue; as a result, the trial court should have granted the patient's cross motion for an amended bill of particulars before reinstatement of the note of issue under N.Y. C.P.L.R. 3042(b). Reitman v St. Francis Hosp., 2 A.D.3d 429, 767 N.Y.S.2d 843, 2003 N.Y. App. Div. LEXIS 12841 (N.Y. App. Div. 2d Dep't 2003).

**5. —Medical malpractice cases**

CLS CPLR § 3404, providing for automatic dismissal of action "deemed abandoned," was inapplicable where (1) medical malpractice plaintiff spent 3 years following malpractice hearing locating expert qualified in orthopedic surgery, familiar with polio-induced growth arrest procedures, who was willing to testify on plaintiff's behalf, (2) one such expert was retained by plaintiff but later withdrew as unwilling to testify against his fellow doctors, (3) plaintiff's intention to pursue action remained undiminished, and (4) action was never on court calendar. Lomber v Farrow, 160 A.D.2d 1146, 554 N.Y.S.2d 355, 1990 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 3d Dep't 1990).

Action to recover damages for chiropractic malpractice should not have been restored to trial calendar where (1) 6 years after it was originally commenced, action twice appeared on court's trial calendar but was stricken on both occasions due to plaintiffs' inability to secure appearance of expert witness, (2) period of 7 months elapsed before plaintiffs moved to restore action to trial calendar, allegedly due to misplacement of file after associate handling case left firm, and (3) affidavit from plaintiffs' expert merely contained conclusory recitation of malpractice and neither described alleged injury nor outlined manner in which defendant's actions caused injury. Barton

v Jablon, 181 A.D.2d 755, 581 N.Y.S.2d 101, 1992 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 2d Dep't 1992).

Court properly dismissed medical malpractice action with prejudice and denied plaintiff's motion to vacate that dismissal where plaintiff's attorney twice violated CLS Stds & Admin Policies § 125.1(g) (22 NYCRR § 125.1(g)) by first failing to appear or produce substitute trial counsel even though trial had been scheduled 9 months earlier, and then doing same after court had postponed trial for 4 months, granted several short adjournments, and repeatedly warned attorney that action would be dismissed if he did not appear. Malachi v Good Samaritan Hosp., 245 A.D.2d 492, 666 N.Y.S.2d 721, 1997 N.Y. App. Div. LEXIS 13275 (N.Y. App. Div. 2d Dep't 1997).

Medical malpractice complaint was properly dismissed under CLS CPLR § 3216 for failure to file note of issue where, after parties certified that all discovery and pretrial motions were complete, court directed plaintiffs to serve and file note of issue within 90 days, court's order stated that failure to comply within 90 days might serve as basis for dismissal under § 3216, that order was valid, plaintiffs failed to comply with it by filing note of issue or moving for extension under CLS CPLR § 2004, and plaintiffs did not show reasonable excuse for their noncompliance and meritorious cause of action. Seletsky v St. Francis Hosp., 263 A.D.2d 452, 692 N.Y.S.2d 708, 1999 N.Y. App. Div. LEXIS 7764 (N.Y. App. Div. 2d Dep't 1999).

Dental malpractice action would be dismissed under CLS CPLR § 3216 for failure to prosecute where plaintiff failed to comply with 90-day notice by filing note of issue or by moving, before default date, either to vacate notice or extend 90-day period, and she failed to show justifiable excuse for her delay and that she had meritorious cause of action. Timko v Loreto, 263 A.D.2d 480, 693 N.Y.S.2d 202, 1999 N.Y. App. Div. LEXIS 7878 (N.Y. App. Div. 2d Dep't 1999).

Defendant was not entitled to dismissal of medical malpractice and negligence action for failure to prosecute where delay in filing note of issue was not excessive, plaintiff's excuse for delay—need to find new expert after expert who originally indicated willingness to work on case later refused—was tenable, there was no intent to abandon case, claim was arguably meritorious,

and no prejudice to defendant ensued. Schneider v Meltzer, 266 A.D.2d 801, 700 N.Y.S.2d 237, 1999 N.Y. App. Div. LEXIS 12114 (N.Y. App. Div. 3d Dep't 1999).

Supreme Court had no power to dismiss medical malpractice action for “gross laches” or “failure to prosecute,” even though action was 17 years old, where there was no 90-day demand to file note of issue, neither party cited any unfulfilled discovery demand, and court presented plaintiff with blunt choice of accepting defendants’ proposed settlement or suffering dismissal. Hodge v New York City Transit Auth., 273 A.D.2d 42, 709 N.Y.S.2d 64, 2000 N.Y. App. Div. LEXIS 6346 (N.Y. App. Div. 1st Dep't 2000).

Where plaintiffs in a medical malpractice suit failed to comply with a stipulation to provide complete expert disclosure before restoring the case to the trial calendar, the trial court erred in granting plaintiffs’ motion to restore the case to the calendar and improvidently exercised its discretion in denying the cross motions of defendants, two individuals and a hospital, under N.Y. C.P.L.R. 3404 and N.Y. C.P.L.R. 3126, to dismiss the complaint insofar as asserted against them in view of plaintiffs’ conduct in frustrating disclosure. D'Ecclesiis v Manna, 289 A.D.2d 522, 735 N.Y.S.2d 618, 2001 N.Y. App. Div. LEXIS 13026 (N.Y. App. Div. 2d Dep't 2001).

Dnial of the individuals’ motion to restore a breach of contract action to the trial calendar was improper where the supreme court had no authority to alter the method for restoration, N.Y. C.P.L.R. 3404. Brannigan v Bd. of Educ., 307 A.D.2d 945, 763 N.Y.S.2d 471, 2003 N.Y. App. Div. LEXIS 8685 (N.Y. App. Div. 2d Dep't 2003).

Trial court erred in granting defendants’ motion to strike a personal injury action from the trial calendar and in denying the injured party’s cross motion to vacate the dismissal of the case and restore it to the trial calendar pursuant to N.Y. C.P.L.R. 3404; the case was never properly dismissed, as the injured party properly moved to restore the case, and the case therefore should have remained on the calendar. Smith v Avis Rent A Car Sys., 308 A.D.2d 573, 764 N.Y.S.2d 728, 2003 N.Y. App. Div. LEXIS 9901 (N.Y. App. Div. 2d Dep't 2003).

In reversing, an appeals court granted a patient's motion to restore to a trial calendar her malpractice case alleging a hospital physician wrongfully informed her she had AIDS; there was a valid excuse for not attending a pretrial conference shown by her attorney—office failure, a meritorious case, and no intent to abandon, or demonstrated prejudice to the hospital. Muriel v St. Barnabas Hosp., 3 A.D.3d 419, 771 N.Y.S.2d 107, 2004 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 1st Dep't 2004).

In support of the motion to restore the medical malpractice action to the trial calendar after it had been dismissed under N.Y. C.P.L.R. 3404, the injured parties showed that they had a meritorious cause of action because the physician's affirmation specified departures from the standard of care and opined that the departures were a substantial contributing factor to the injury, and although the affirmation was redacted, the parties' offer to supply the trial court with an unredacted copy for in camera inspection was sufficient to meet their burden of proof. Kranz v Braverman, 15 A.D.3d 451, 790 N.Y.S.2d 192, 2005 N.Y. App. Div. LEXIS 1619 (N.Y. App. Div. 2d Dep't 2005).

Trial court providently exercised its discretion in granting the injured parties' motion to restore the action to the trial calendar after it had been dismissed pursuant to N.Y. C.P.L.R. 3404, as the injured parties demonstrated, in part, a reasonable excuse for the failure to timely restore, lack of intent to abandon the matter, and lack of prejudice to the providers; the injured parties' attorney's law office's failure constituted a reasonable excuse, the parties' agreement to restore the action by stipulation and the injured parties' proposed stipulations to restore the matter to the calendar demonstrated that the injured parties did not intend to abandon it, and the providers were not to be prejudiced. Kranz v Braverman, 15 A.D.3d 451, 790 N.Y.S.2d 192, 2005 N.Y. App. Div. LEXIS 1619 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in failing to grant the patient's motion to vacate the judgment of dismissal for neglect to prosecute where the trial court dismissed the action after vacating the note of issue under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.21(e); the order vacating the note of issue placed the action back into pre-note of issue status, and N.Y. C.P.L.R. 3404 was inapplicable to

pre-note of issue cases, and the preconditions for dismissal under N.Y. C.P.L.R. 3216 were not met. Travis v Cuff, 28 A.D.3d 749, 814 N.Y.S.2d 681, 2006 N.Y. App. Div. LEXIS 4767 (N.Y. App. Div. 2d Dep't 2006).

Because the patient in a medical malpractice action moved to restore her action in a timely manner, N.Y. C.P.L.R. 3404, in conjunction with providing the expert witness information which the doctor and the hospital sought, and in view of the appellate court's determination that doctor and hospital's motions to dismiss should have been denied, the patient's cross motion to restore the action to the trial calendar should have been granted. Johnson v Greenberg, 35 A.D.3d 380, 825 N.Y.S.2d 265, 2006 N.Y. App. Div. LEXIS 14586 (N.Y. App. Div. 2d Dep't 2006).

**6. —Tax matters**

Action was properly dismissed as abandoned where only activity that occurred after it was marked off calendar pursuant to parties' stipulation was plaintiff's partial compliance, 15 months later, with pre-stipulation demands for IRS tax authorizations which, however, had been destroyed in interim. Kougianos v City of New York, 234 A.D.2d 14, 650 N.Y.S.2d 155, 1996 N.Y. App. Div. LEXIS 12223 (N.Y. App. Div. 1st Dep't 1996).

1994 tax certiorari proceedings were not abandoned, even though no notes of issue were filed, where town board of tax assessors entered into stipulation, dated March 30, 1995, which specifically provided that joint trial of 1994 proceedings, scheduled for May 8, 1995, be adjourned sine die, and CLS RPTL § 718(1) provides that "unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the date of the service of petition or petition and notice, the proceeding thereon shall be deemed to have been abandoned...except where the parties otherwise stipulate." Fox Meadow Partners, Ltd. v Board of Assessment Review, 273 A.D.2d 472, 710 N.Y.S.2d 610, 2000 N.Y. App. Div. LEXIS 7358 (N.Y. App. Div. 2d Dep't 2000).

Because a taxpayer's original proceeding was not marked "off" or stricken from the trial calendar pursuant to N.Y. C.P.L.R. 3404, and because N.Y. Real Prop. Tax Law § 718(1) permitted the

parties to extend the time for filing a note of issue by stipulation, restoration of the original and subsequent related proceedings was automatic upon the taxpayer's motion to restore. Matter of Transtechnology Corp. v Assessor, 71 A.D.3d 1034, 897 N.Y.S.2d 494, 2010 N.Y. App. Div. LEXIS 2506 (N.Y. App. Div. 2d Dep't 2010).

In a tax certiorari case involving the assessment of the taxpayer's commercial property wherein a Note of Issue was filed for tax year 1996/97, pursuant to N.Y. C.P.L.R. 3404, the trial court restored the matter to the court calendar as the taxpayer never intended to abandon the case; it established that there was a meritorious cause of action; and, the taxing authorities were not prejudiced. For other tax years for which no Note of Issue was filed, N.Y. C.P.L.R. 3216 governed and the taxpayer was permitted to file Notes of Issue for the cases to permit restoration as well. Transtechnology Corp. v Board of Assessors of County of Nassau, 864 N.Y.S.2d 826, 21 Misc. 3d 215, 240 N.Y.L.J. 10, 2008 N.Y. Misc. LEXIS 4686 (N.Y. Sup. Ct. 2008), aff'd, 71 A.D.3d 1034, 897 N.Y.S.2d 494, 2010 N.Y. App. Div. LEXIS 2506 (N.Y. App. Div. 2d Dep't 2010).

**7. Effect of dismissal**

Order denying motion to vacate dismissal under CLS CPLR § 3404 did not finally determine action within meaning of New York Constitution, and motion for leave to appeal from such order would therefore be dismissed. Paglia v Agrawal, 69 N.Y.2d 946, 516 N.Y.S.2d 658, 509 N.E.2d 353, 1987 N.Y. LEXIS 16473 (N.Y. 1987).

Dismissal of action for "neglect to prosecute" created presumption of abandonment or neglect, which presumption could be rebutted by showing of some activity on plaintiff's part to demonstrate that litigation was actually in progress. Omar v David Fruit & Co., 59 A.D.2d 647, 398 N.Y.S.2d 300, 1977 N.Y. App. Div. LEXIS 13520 (N.Y. App. Div. 4th Dep't 1977).

In a personal injury action in which after the case was stricken and plaintiffs' attorney relieved of his responsibility to represent plaintiffs, plaintiffs' three pro se motions to restore the action, to vacate the judgment dismissal, and to renew the motion to vacate were properly dismissed

where there was a delay of 13 months from the date of entry of the order relieving plaintiffs' counsel until the motion to vacate the automatic dismissal of the case under CPLR § 3404, and where plaintiff did not present any sworn testimony other than his own as to his physical incapacity to diligently proceed. Merrill v Robinson, 99 A.D.2d 578, 470 N.Y.S.2d 960, 1984 N.Y. App. Div. LEXIS 16813 (N.Y. App. Div. 3d Dep't 1984).

Defendant's motion for summary judgment dismissing personal injury action was academic where action was dismissed under CLS CPLR § 3404 and was not restored to trial calendar within one year, and statute of limitations had expired. Schwartz v Mandelbaum & Gluck, 266 A.D.2d 273, 698 N.Y.S.2d 252, 1999 N.Y. App. Div. LEXIS 13059 (N.Y. App. Div. 2d Dep't 1999).

Merits of action would not be reached in interest of justice, despite claim that running of statute of limitations, resulting from noncompliance with proof of service filing requirements, was due to law office failure, where (1) plaintiffs did not file any proofs of service, and because no defendant appeared within 120-day period, action was automatically "deemed dismissed" under CLS CPLR former § 306-b(a), and (2) plaintiffs did not avail themselves of "savings provisions," because they neglected to re-file action within either 120 days under CLS CPLR former § 306-b(b) or 6 months under CLS CPLR § 205(a). Werner v Joyce, 266 A.D.2d 618, 697 N.Y.S.2d 728, 1999 N.Y. App. Div. LEXIS 11234 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff was not entitled to serve second amended complaint naming, as direct defendants, parties that had been joined in original complaint as third and fourth-party defendants, as well as originally named defendant's insurer, where original complaint had been superseded first amended complaint, which was dismissed as abandoned, and thus there was no extant complaint to amend, and plaintiff's sole recourse against additional parties was to start new action. Hummingbird Assocs. v Dix Auto Serv., 273 A.D.2d 58, 709 N.Y.S.2d 51, 2000 N.Y. App. Div. LEXIS 6375 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2820 (N.Y. 2000).

Where matrimonial action was marked off trial calendar on November 19, 1996 and automatically dismissed one year later, arrears under pendente lite child support and maintenance provisions of order dated January 2, 1996 ceased to accrue after November 18, 1997, and thus court erred in continuing order and making enforcement of arrears retroactive to January 1996. Cawthon v Cawthon, 276 A.D.2d 661, 714 N.Y.S.2d 335, 2000 N.Y. App. Div. LEXIS 10689 (N.Y. App. Div. 2d Dep't 2000).

Court properly denied plaintiffs' motion to compel defendants to accept their bill of particulars where (1) case was stricken from trial calendar, not restored within one year, and thus deemed abandoned and automatically dismissed under CLS CPLR § 3404, (2) fact that note of issue might have been stricken on consent was of no moment, and (3) plaintiffs neither specifically sought restoration nor addressed factors relevant to that issue. Gray v Jim Cuttita Agency Inc., 281 A.D.2d 785, 722 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 2499 (N.Y. App. Div. 3d Dep't 2001).

Dismissal under CPLR 3404 ended the period in which a federal statute of limitations was tolled by the state action, and subsequent unsuccessful attempts to have the dismissal order vacated did not further toll the federal statute of limitations. Marczak v McAllister Bros., Inc., 439 F. Supp. 1075, 1977 U.S. Dist. LEXIS 13613 (S.D.N.Y. 1977).

**8. Presumption of abandonment**

CPLR 3404 is not to be rigidly applied in all circumstances. It merely creates a presumption of abandonment and is not to be applied in a case in which litigation is actually in progress. Peterson v Motor Sales Co., 35 A.D.2d 847, 317 N.Y.S.2d 155, 1970 N.Y. App. Div. LEXIS 3359 (N.Y. App. Div. 2d Dep't 1970).

Rule providing for dismissal of action upon failure to file statement of readiness merely creates a rebuttable presumption that the action has been abandoned. Galante v Solon Holding Corp., 46 A.D.2d 636, 360 N.Y.S.2d 252, 1974 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 1st Dep't 1974).

Plaintiff's failure to have case restored to calendar within one year from time it was struck therefrom leads to presumption that case was abandoned. Marine Midland Bank-Eastern Nat'l Asso. v Safari Animal Country, Inc., 110 A.D.2d 1024, 488 N.Y.S.2d 312, 1985 N.Y. App. Div. LEXIS 48903 (N.Y. App. Div. 3d Dep't 1985), overruled in part, McCarthy v Jorgensen, 290 A.D.2d 116, 737 N.Y.S.2d 158, 2002 N.Y. App. Div. LEXIS 842 (N.Y. App. Div. 3d Dep't 2002).

While CLS CPLR § 3404 creates rebuttable presumption that action marked off trial calendar and not restored for period of one year has been abandoned, presumption is rebutted where parties continue to actively litigate matter during such one-year period. Cardinales v Jamaica Hosp., 225 A.D.2d 646, 639 N.Y.S.2d 840, 1996 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 2d Dep't 1996).

In order to rebut presumption of abandonment of cause of action under CLS CPLR § 3404, plaintiff must show meritorious cause of action, reasonable excuse for delay, absence of prejudice to opposing party, and lack of intent to abandon action. Sanchez v Javind Apt. Corp., 246 A.D.2d 353, 667 N.Y.S.2d 708, 1998 N.Y. App. Div. LEXIS 224 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff failed to rebut presumption of abandonment that attaches when matter has been automatically dismissed under CLS CPLR § 3404 where plaintiff engaged in no activity regarding case between date when case was marked off trial calendar and date when he moved to restore it to calendar. McKenna v Solomon, 255 A.D.2d 496, 681 N.Y.S.2d 59, 1998 N.Y. App. Div. LEXIS 12656 (N.Y. App. Div. 2d Dep't 1998).

Motion to dismiss action as abandoned was properly denied where clerk's call was not type contemplated by CLS CPLR § 3404, and no presumption of abandonment arose since action was not marked off calendar. City of New York v Sutphin Trust, 257 A.D.2d 526, 682 N.Y.S.2d 591, 1999 N.Y. App. Div. LEXIS 670 (N.Y. App. Div. 1st Dep't 1999).

Summary holdover proceeding could not be dismissed under N.Y. Comp. Codes R. & Regs. tit. 22, § 208.14 as: (1) although § 208.14 applied to New York Housing Court proceedings, it did

not apply to summary proceedings that had been marked off calendar for discovery; (2) § 208.14 did not provide for the dismissal of an action; and (3) while there was a line of cases holding that when a proceeding had been marked off calendar for over one year, and a motion to restore was made, a four-prong test was to be followed to determine whether the motion should be granted, the presumption of abandonment and the four-prong test necessary to overcome that presumption were not based on § 208.14, but on N.Y. C.P.L.R. 3404, which had been held inapplicable to New York Civil Court cases. Bldg Mgt. Co., Inc. v Meija, 928 N.Y.S.2d 183, 32 Misc. 3d 652, 2011 N.Y. Misc. LEXIS 2626 (N.Y. Civ. Ct. 2011).

**9. Self-execution of rule**

Where the case had been stricken from the calendar in November of 1954 and when no application to restore it had been made within a year automatically dismissed pursuant to CPA § 302, subd 2, now CPLR 3404, a motion pursuant to CPLR 3216 should have been dismissed as academic. The former rule was held to be self-executing and an action was terminated at the end of the one-year period. Levine v Levy, 31 A.D.2d 289, 297 N.Y.S.2d 215, 1969 N.Y. App. Div. LEXIS 4541 (N.Y. App. Div. 4th Dep't 1969), app. dismissed, 28 N.Y.2d 712, 320 N.Y.S.2d 753, 269 N.E.2d 411, 1971 N.Y. LEXIS 1489 (N.Y. 1971).

Where case was stricken from general docket and dismissed for neglect to prosecute, defendants' motions at Special Term to dismiss complaint were unnecessary and moot. Honeoye Falls-Lima Cent. School Dist. v Leo J. Roth Corp., 53 A.D.2d 1044, 386 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 15856 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs whose cause of action to recover for personal injuries was deemed abandoned pursuant to CLS CPLR § 3404 were entitled to consideration of their motion to restore cause of action to calendar when they included prayer in their motion for "other and further relief," even though proper course should have been first to move to vacate "automatic" dismissal of § 3404; despite seemingly definitive language of § 3404, dismissal for failure to restore action within one year after it has been marked off calendar is neither automatic nor self-executing and court

retains discrehtion to grant motion after year has expired. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App. Div. 1st Dep't 1986), app. dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

Husband’s matrimonial action would be deemed abandoned and automatically dismissed by operation of self-executing provisions of CLS CPLR § 3404, even though he had obtained order of restoration prior to expiration of one-year period within which action can be restored, where he did not seek to have order entered until 3 years later. Mamet v Mamet, 132 A.D.2d 479, 518 N.Y.S.2d 5, 1987 N.Y. App. Div. LEXIS 49031 (N.Y. App. Div. 1st Dep't 1987), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 6, 1987 N.Y. LEXIS 18996 (N.Y. 1987), overruled, Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

In plaintiff’s action for judgment declaring that it held absolute and unencumbered title to certain real property, court erred in dismissing defendant’s counterclaims for damages on grounds of neglect to prosecute, notwithstanding defendant’s inordinate delay in filing notice of trial, where (1) original complaint was dismissed after trial, in judgment which provided for counterclaims to be tried “on 30 days notice at any time after entry of this order,” (2) defendant filed notice of trial nearly 10 years later, following numerous court actions and proceedings involving property in issue, and (3) there was no indication that defendant intended to abandon counterclaims; self-executing provision of CLS CPLR § 3404 was inapplicable, since there was no proof that counterclaims were ever marked off or struck from calendar, or unanswered on clerk’s calendar call. Trustees of Freeholders & Commonality v Heilner, 143 A.D.2d 134, 531 N.Y.S.2d 368, 1988 N.Y. App. Div. LEXIS 8423 (N.Y. App. Div. 2d Dep't 1988).

Motion to dismiss complaint pursuant to CLS CPLR § 3404, brought 15 months after trial court had struck matter from trial calendar, should have been granted unconditionally where plaintiff had made no effort to restore matter to calendar during that time, and in response to motion failed to meet criteria normally associated with motion to open default; it is plaintiff’s

responsibility to move to vacate “automatic” dismissal authorized by CLS CPLR § 3404. Perez v New York City Housing Authority, 182 A.D.2d 416, 582 N.Y.S.2d 150, 1992 N.Y. App. Div. LEXIS 5604 (N.Y. App. Div. 1st Dep't 1992).

Despite seemingly definitive language of CLS CPLR § 3404, dismissal for failure to restore action within one year after it has been marked off calendar is neither automatic nor self-executing, since statute creates only presumption of abandonment which may be negated by proof of litigation actually in progress. CCS Communication Control v Patent, 193 A.D.2d 435, 597 N.Y.S.2d 330, 1993 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 1st Dep't 1993).

Court properly granted defendants’ motion to dismiss action under CLS CPLR § 3404 as abandoned where case had remained marked off calendar for more than one year, since case was automatically dismissed for neglect to prosecute. Santiago v Petschauer, 208 A.D.2d 517, 616 N.Y.S.2d 1004, 1994 N.Y. App. Div. LEXIS 9346 (N.Y. App. Div. 2d Dep't 1994).

Although failure to restore matter to calendar after it is automatically marked off pursuant to CLS CPLR § 3404 ordinarily leads to automatic and self-executing dismissal, presumption of abandonment is rebuttable and may be based on parties’ stipulation. Solow v Stuart, 223 A.D.2d 458, 637 N.Y.S.2d 68, 1996 N.Y. App. Div. LEXIS 482 (N.Y. App. Div. 1st Dep't 1996).

Case stricken from trial calendar and not restored within one year is deemed abandoned and dismissed pursuant to CLS CPLR § 3404; dismissal is self-executing and requires no further ministerial action. Meade v L.A. Lama Agency Inc., 260 A.D.2d 979, 689 N.Y.S.2d 302, 1999 N.Y. App. Div. LEXIS 4417 (N.Y. App. Div. 3d Dep't 1999).

Court should have granted plaintiffs’ motion to restore action to calendar because defendant’s death divested court of jurisdiction to dismiss action one year later while substitution of legal representative was pending. Nunez v Goodman, 264 A.D.2d 651, 695 N.Y.S.2d 559, 1999 N.Y. App. Div. LEXIS 9489 (N.Y. App. Div. 1st Dep't 1999).

Motion to dismiss complaint as abandoned was unnecessary, since action that is not restored within one year of date it was marked off calendar is automatically dismissed. Nunez v County of

Nassau, 265 A.D.2d 312, 696 N.Y.S.2d 217, 1999 N.Y. App. Div. LEXIS 9652 (N.Y. App. Div. 2d Dep't 1999).

Under CPLR 3404 a case, whether in Supreme Court or county court, is deemed abandoned if it has remained dormant for a year having been marked “Off” or stricken from the calendar, and this section is automatic and self-executing, directing the court to make an appropriate entry of dismissal without the necessity of any further order. Meyer v Teresi, 60 Misc. 2d 379, 303 N.Y.S.2d 402, 1969 N.Y. Misc. LEXIS 1421 (N.Y. County Ct. 1969).

Summary holdover proceeding would be deemed abandoned and automatically dismissed where it was marked off trial calendar and landlord did not move to restore it to trial calendar until more than one year later. 474 W. 150th St. Realty Corp. v Lewis, 166 Misc. 2d 954, 636 N.Y.S.2d 263, 1995 N.Y. Misc. LEXIS 592 (N.Y. Civ. Ct. 1995).

Upon the injured party’s failure to take any steps to restore the case to the trial calendar, it was automatically dismissed pursuant to N.Y. C.P.L.R. 3404, and the landowner’s subsequent motion to dismiss the complaint, therefore, should have been denied as unnecessary. Neidereger v Hidden Park Apts., Inc., 306 A.D.2d 392, 760 N.Y.S.2d 892, 2003 N.Y. App. Div. LEXIS 7101 (N.Y. App. Div. 2d Dep't 2003).

**B. Vacating Dismissal; Restoring Case To Calendar**

**i. In General**

**10. Generally**

As the application of plaintiff, whose case had been formerly abandoned and dismissed, met the necessary requirements for opening the default and restoring the case to the calendar, it would be treated as an application for such relief. Sal Masonry Contractors, Inc. v Arkay Constr. Corp.,

49 A.D.2d 808, 373 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 4th Dep't 1975).

Appellate Division of Supreme Court could not consider application to restore case to trial calendar after case had been stricken from general docket pursuant to civil practice rule relating to dismissal of abandoned cases where plaintiff filed motion to restore case to trial calendar and failed to file a motion to vacate the default with the showing required on such a motion. Chavoustie v Newark, 52 A.D.2d 1064, 384 N.Y.S.2d 598, 1976 N.Y. App. Div. LEXIS 12986 (N.Y. App. Div. 4th Dep't 1976).

Obligation to restore case to trial calendar after physical examination properly fell to plaintiff and not to defendant. Omar v David Fruit & Co., 59 A.D.2d 647, 398 N.Y.S.2d 300, 1977 N.Y. App. Div. LEXIS 13520 (N.Y. App. Div. 4th Dep't 1977).

In a negligence action to recover damages for personal injuries, the trial court erred in denying plaintiff’s motion to restore the action to the trial calendar and in denying plaintiff’s motion to reargue the prior motion where the earlier dismissal of the case as abandoned was improper in that the case was dismissed on June 1st, even though the record contained an order dated May 29th transferring the action from the county court to the Supreme Court as well as an order of the Supreme Court dated December 19th of the previous year denying a motion by plaintiff for summary judgment and denying a cross-motion by defendant to transfer the action back to the county court. Hoffman v Guisti, 82 A.D.2d 908, 440 N.Y.S.2d 697, 1981 N.Y. App. Div. LEXIS 14623 (N.Y. App. Div. 2d Dep't 1981).

To reverse effect of dismissal under CLS CPLR § 3404, party must move to vacate it, and movant bears burden of showing justification for delay, lack of prejudice to adversary, and that he or she has meritorious cause of action. Mamet v Mamet, 132 A.D.2d 479, 518 N.Y.S.2d 5, 1987 N.Y. App. Div. LEXIS 49031 (N.Y. App. Div. 1st Dep't 1987), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 6, 1987 N.Y. LEXIS 18996 (N.Y. 1987), overruled, Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Appropriate procedure for plaintiff to restore abandoned case to calendar is motion to vacate automatic dismissal of abandoned complaint, not restoral motion. Leone v Bates Plan-A-Home of Sidney, Inc., 144 A.D.2d 759, 534 N.Y.S.2d 751, 1988 N.Y. App. Div. LEXIS 10917 (N.Y. App. Div. 3d Dep't 1988).

Plaintiffs were entitled to restoration of action to “pre-note” calendar, although action had been marked off calendar after plaintiffs failed to appear at scheduled conference, where there was no indication that defendants had appeared at conference or that plaintiffs were ever notified that case had been marked off calendar, parties continued to proceed with discovery after action was marked off calendar, and plaintiffs moved to restore action to calendar as soon as they learned that it had been marked off. Koslov v New York City Housing Authority, 186 A.D.2d 540, 588 N.Y.S.2d 363, 1992 N.Y. App. Div. LEXIS 11150 (N.Y. App. Div. 2d Dep't 1992).

Court properly exercised its discretion in restoring case to trial calendar where requirements of 22 NYCRR § 202.21(f) were satisfied, defendant’s contention that plaintiff made “deliberate and knowing misrepresentation” to court was unsubstantiated, and court, in its prior order, had clearly given plaintiff option of moving again to restore case. Stock Shop v New York Times Co., 223 A.D.2d 426, 637 N.Y.S.2d 39, 1996 N.Y. App. Div. LEXIS 372 (N.Y. App. Div. 1st Dep't 1996).

Party seeking to restore case dismissed under CLS CPLR § 3404 must show reasonable excuse for delay, existence of meritorious cause of action, absence of intent to abandon action, and lack of prejudice to nonmoving party. Lafata v 712 Fifth Ave. Assocs., 238 A.D.2d 552, 657 N.Y.S.2d 947, 1997 N.Y. App. Div. LEXIS 4409 (N.Y. App. Div. 2d Dep't 1997).

Motion to vacate dismissal of action under CLS CPLR § 3404 and to restore action to trial calendar was properly granted on findings of excusable lack of awareness by incoming counsel that case had been marked off calendar, activity during period when case was off calendar sufficient to show lack of intention to abandon it, lack of prejudice to defendants as result of delay in restoring case, and meritorious cause of action. Endres v Mingles Restaurant, 242 A.D.2d 455, 662 N.Y.S.2d 43, 1997 N.Y. App. Div. LEXIS 8747 (N.Y. App. Div. 1st Dep't 1997).

Court erred in denying plaintiff's motion to restore action to trial calendar on ground that affidavit of merit was inadequate where action was not marked off due to any default by plaintiff, motion to restore was not untimely, and there was never intent to abandon action; under circumstances, affidavit of merit was not required. Bonoff v Troy, 244 A.D.2d 260, 664 N.Y.S.2d 442, 1997 N.Y. App. Div. LEXIS 11696 (N.Y. App. Div. 1st Dep't 1997).

Plaintiffs in wrongful death action were properly granted renewal of their prior motion to vacate automatic dismissal under CLS CPLR § 3404 where they offered affidavit of merit and acceptable excuse for failing to previously submit proof of certain facts, and equities of matter and interests of justice were served by allowing renewal. Scott v Brickhouse, 251 A.D.2d 397, 675 N.Y.S.2d 542, 1998 N.Y. App. Div. LEXIS 6584 (N.Y. App. Div. 2d Dep't 1998).

Personal injury plaintiffs' motion to vacate dismissal of action under CLS CPLR § 3404 and to restore matter to calendar was properly granted where it was not clear that case was marked off calendar because of any fault of plaintiffs. Morales v City of New York, 251 A.D.2d 469, 673 N.Y.S.2d 588, 1998 N.Y. App. Div. LEXIS 6955 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff's motion to restore action to trial calendar was properly treated as motion to vacate dismissal of action pursuant to CLS CPLR § 3404. Lebron v New York City Hous. Auth., 257 A.D.2d 541, 685 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1999).

Party seeking to restore case to trial calendar must demonstrate that case has merit, that reasonable excuse for delay exists, that there was no intent to abandon, and that there will be no prejudice to non-moving party if case is restored. Murrell v New York City Transit Auth., 260 A.D.2d 307, 689 N.Y.S.2d 67, 1999 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1st Dep't 1999).

Defendants were not entitled to dismissal of complaint for failure to prosecute, absent allegation or finding that written 90-day demand to file and serve note of issue was served on plaintiffs as required by CLS CPLR § 3216(b); as result of 1967 amendment to CLS CPLR § 3216, courts are prohibited from dismissing action for neglect to prosecute unless statutory preconditions are

met. Carino Italian Style, S.R.L. v Shammah, 266 A.D.2d 1, 697 N.Y.S.2d 609, 1999 N.Y. App. Div. LEXIS 11150 (N.Y. App. Div. 1st Dep't 1999).

In legal malpractice action, court erred in treating plaintiff's motion to vacate dismissal of action as one for reargument or renewal, where no prior motion had been made and plaintiff demonstrated criteria necessary to warrant vacatur of dismissal under CLS CPLR § 3404. Lieber v Vitelli, 270 A.D.2d 396, 704 N.Y.S.2d 892, 2000 N.Y. App. Div. LEXIS 2955 (N.Y. App. Div. 2d Dep't 2000), overruled in part, Lopez v Imperial Delivery Serv., 282 A.D.2d 190, 725 N.Y.S.2d 57, 2001 N.Y. App. Div. LEXIS 5038 (N.Y. App. Div. 2d Dep't 2001)).

Personal injury plaintiff was entitled to vacatur of his default and restoration of action to calendar where he offered sufficient excuse for his unintentional default and proved existence of meritorious claim. Hardy v Schultz, 273 A.D.2d 355, 710 N.Y.S.2d 918, 2000 N.Y. App. Div. LEXIS 7099 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff's motion to vacate automatic dismissal of action under CLS CPLR § 3404 and to restore action to trial calendar was properly denied where plaintiff neither rebutted presumption of abandonment nor offered reasonable excuse for failing to appear on calendar date. Prudential-LMI Commer. Ins. Co. v Forge Heating & Air Conditioning Corp., 273 A.D.2d 454, 712 N.Y.S.2d 355, 2000 N.Y. App. Div. LEXIS 7411 (N.Y. App. Div. 2d Dep't 2000).

In personal injury action against city, court properly granted city's motion to compel plaintiff to appear for physical examination, and properly denied plaintiff's motion to restore action to trial calendar, in light of plaintiff's past failures to comply with court-ordered examinations. Green v City of New York, 281 A.D.2d 515, 721 N.Y.S.2d 834, 2001 N.Y. App. Div. LEXIS 2566 (N.Y. App. Div. 2d Dep't 2001).

On prior appeal from order of Supreme Court which granted plaintiffs' motion to vacate dismissal of their complaint for want of prosecution, appellate court's finding that affirmation of plaintiff's expert was not competent evidence to demonstrate meritorious claim precluded plaintiffs from subsequently attempting to cure this deficiency by making new motion to vacate order of

dismissal and submitting expert's affidavit, since plaintiffs had full and fair opportunity to litigate issue of whether they had meritorious cause of action, and issue was resolved on merits on prior appeal; thus, Supreme Court's granting of plaintiffs' second motion to vacate dismissal violated doctrine of "law of the case." Palo v Latt, 283 A.D.2d 624, 725 N.Y.S.2d 874, 2001 N.Y. App. Div. LEXIS 5509 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 700, 739 N.Y.S.2d 100, 765 N.E.2d 303, 2002 N.Y. LEXIS 61 (N.Y. 2002).

Practice of marking an action off the calendar pursuant to CLS CPLR 3404 is improper if it occurs during the discovery phase of litigation, prior to the filing of a note of issue, and, because a case improperly marked off cannot be deemed dismissed pursuant to CLS CPLR 3404, there is no need for a motion to restore it to the trial calendar and no need for the court to consider whether there is a reasonable excuse for the event which caused the action to be marked off or whether the case is a meritorious action. Farley v Danaher Corp., 295 A.D.2d 559, 744 N.Y.S.2d 709, 2002 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 2d Dep't 2002).

Trial court should have granted plaintiffs' motion to restore without requiring them to meet the standards applicable to a party seeking to restore an action to the trial calendar after it had been dismissed pursuant to CLS CPLR 3404, since there was no authority to mark it off. Murray v T.W. Smith Corp., 296 A.D.2d 445, 744 N.Y.S.2d 901, 2002 N.Y. App. Div. LEXIS 7324 (N.Y. App. Div. 2d Dep't 2002).

The trial court erred in granting plaintiff's motion to, in effect, restore the action to the trial calendar, because a party seeking to restore a case to the trial calendar after it had been dismissed pursuant to CLS CPLR 3404 had to demonstrate the merits of the case, a reasonable excuse for the delay, the absence of any intent to abandon the matter, and the lack of prejudice to the non-moving party, and plaintiff's affidavit failed to specify the nature of the alleged negligence on a city's part, and thus failed to demonstrate the existence of a meritorious claim. Angelucci v City of New York, 297 A.D.2d 648, 747 N.Y.S.2d 181, 2002 N.Y. App. Div. LEXIS 8424 (N.Y. App. Div. 2d Dep't 2002), app. denied, 99 N.Y.2d 642, 760 N.Y.S.2d 92, 790 N.E.2d 265, 2003 N.Y. LEXIS 358 (N.Y. 2003).

Since CPLR 3404 did not apply to an action in the pre-note stage, a trial court erred in applying the test for restoring matters to the trial calendar after an automatic dismissal pursuant to CPLR 3404; there was no basis for denial of plaintiffs' motion to restore their case to active status after they withdrew their note of issue, and no ground for dismissing the action. Andre v Bonetto Realty Corp., 32 A.D.3d 973, 822 N.Y.S.2d 292, 2006 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 2006).

In a personal injury suit where plaintiff was a trustee in bankruptcy, the trial court erred in not vacating an order of dismissal and restoring the suit to the trial calendar under N.Y. C.P.L.R. 5015(a)(5) and 3404. A deposition and photographs showed a meritorious suit; the continuing medical problems of the trustee's debtor provided a reasonable excuse for the delay in restoring the action to the trial calendar; and plaintiff had demonstrated a lack of intent to abandon the action and a lack of prejudice to defendants, given that the action was originally marked off the calendar voluntarily in order to permit further discovery with respect to consequential injuries, the parties had stipulated to extend plaintiff's time to restore the action to the trial calendar, and the parties continued to conduct discovery beyond that period of time. Pryor v Long Is. R.R., 40 A.D.3d 726, 835 N.Y.S.2d 661, 2007 N.Y. App. Div. LEXIS 5959 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff's 2007 motion to renew his 1999 motion to restore the case was barred by laches because plaintiff had a duty to inquire into the status of his 1999 motion, but offered no explanation as to why he waited so long; the 2007 application was not based on matters overlooked or misapprehended in the prior motion pursuant to N.Y. C.P.L.R. 2221(d)(2), nor was it based on new facts not offered on the prior motion, N.Y. C.P.L.R. 2221(e)(2), but, rather, the 2007 motion was an attempt to correct an error in the 1999 papers for which plaintiff was responsible. It was clear that, where a party made a timely motion to restore pursuant to N.Y. C.P.L.R. 3404, but was instructed by the court, after the one-year deadline has passed, to resubmit the papers, the party should have to act diligently to timely rectify his or her error. Garcia v City of New York, 72 A.D.3d 505, 900 N.Y.S.2d 17, 2010 N.Y. App. Div. LEXIS 2938

(N.Y. App. Div. 1st Dep't), app. dismissed, 15 N.Y.3d 918, 913 N.Y.S.2d 644, 939 N.E.2d 810, 2010 N.Y. LEXIS 3894 (N.Y. 2010).

Trial court erred in denying plaintiffs' motion to restore an action to the trial calendar pursuant to N.Y. C.P.L.R. 3404 following plaintiffs' failure to appear at a hearing; since no note of issue had been filed at the time plaintiffs failed to appear for a hearing, dismissal of the action would have been improper pursuant to N.Y. C.P.L.R. 3404, nor was the action dismissed pursuant to N.Y. Unif. R. Trial Ct. § 202.27. Antoniadis v Stamatopoulos, 300 A.D.2d 84, 752 N.Y.S.2d 38, 2002 N.Y. App. Div. LEXIS 12187 (N.Y. App. Div. 1st Dep't 2002).

While it is true that a case which has been "marked off" the calendar and not restored within one year is deemed abandoned and is dismissed without costs pursuant to N.Y. C.P.L.R. art. 3404, where no note of issue has been filed, art. 3404 is inapplicable. Revell v N.Y. Cares Org., Inc., 307 A.D.2d 214, 763 N.Y.S.2d 259, 2003 N.Y. App. Div. LEXIS 8332 (N.Y. App. Div. 1st Dep't 2003).

Where a trial court struck a personal injury case from the trial calendar a second time rather than dismissing the complaint pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, 202.27, and where the challenged determination was not properly appealed pursuant to N.Y. C.P.L.R. 2221, 5701(a)(3), the case was properly restored to the trial calendar pursuant to N.Y. C.P.L.R. 3404. Egwuonwu v Simpson, 4 A.D.3d 500, 771 N.Y.S.2d 725, 2004 N.Y. App. Div. LEXIS 1835 (N.Y. App. Div. 2d Dep't 2004).

Party seeking to restore a case to the trial calendar more than one year after it has been marked "off," and after it has been dismissed pursuant to N.Y. C.P.L.R. 3404, must establish a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the action, and a lack of prejudice to the defendants; the moving party must satisfy all four components of the test before dismissal can be properly vacated Castillo v City of New York, 6 A.D.3d 568, 775 N.Y.S.2d 82, 2004 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 2d Dep't 2004).

Because it is the policy of the state to allow disposition of cases on their merits where possible, courts allow cases to be restored to the trial calendar more than one year after dismissal pursuant to N.Y. C.P.L.R. 3404, as long as the plaintiff establishes: (1) a reasonable excuse for the delay; (2) a meritorious cause of action; (3) a lack of prejudice to defendant should the matter be restored; and (4) an intent not to abandon his action. Plaintiff driver's personal injury case resulting from an automobile accident was improperly denied restoration to the trial calendar where the plaintiff's attorney showed she never received notice of the dismissal, despite continuing mediation of the claim with the defendant for a year after dismissal, where the defendant was not prejudiced by the delay in prosecuting the claim since discovery was complete and the parties were the only witnesses, and where the plaintiff clearly had not abandoned a meritorious claim. Nunez v Res. Warehousing & Consolidation, 6 A.D.3d 325, 775 N.Y.S.2d 310, 2004 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 1st Dep't 2004).

Where a former husband alleged defendant former wife fraudulently conveyed her business to defendant third party, the trial court erred by denying his motion to restore the action to the calendar because the calendar procedures of this article did not apply to this pre-note of issue action, no 90-day notice was ever issued pursuant to N.Y. C.P.L.R. 3216, and no order was issued dismissing the action pursuant to 22 NYCRR 202.27. Behan v Behan, 145 A.D.3d 653, 42 N.Y.S.3d 339, 2016 N.Y. App. Div. LEXIS 8051 (N.Y. App. Div. 2d Dep't 2016).

Rule did not apply because the note of issue had not yet been filed. Wilmington Trust, Natl. Assn. v Mausler, 192 A.D.3d 1212, 143 N.Y.S.3d 713, 2021 N.Y. App. Div. LEXIS 1372 (N.Y. App. Div. 3d Dep't 2021).

**11. Conditions and terms imposed**

Facts adduced warranted granting of plaintiff's motion to restore case to trial calendar upon the payment of costs by plaintiff's attorney personally to each of the two sets of defendants who appeared separately and filed separate briefs on the appeal. Cohen v Tucker, 44 A.D.2d 706, 354 N.Y.S.2d 691, 1974 N.Y. App. Div. LEXIS 5196 (N.Y. App. Div. 2d Dep't 1974).

Where defendant as well as plaintiff continued to treat personal injury action as being in progress long after it was dismissed for failure to file statement of readiness, and personal affidavit submitted by plaintiff indicated he suffered severe and permanent injuries as well as lack of prejudice to the defendant, plaintiff's motion to vacate dismissal and restore case to calendar upon filing new note of issue with statement of readiness would be granted on condition that plaintiff's attorney personally pay $250 costs, half to each of the two respondents. Galante v Solon Holding Corp., 46 A.D.2d 636, 360 N.Y.S.2d 252, 1974 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 1st Dep't 1974).

Where some 18 months had elapsed since medical malpractice case was taken off trial calendar, plaintiff had delayed some nine months in filing stipulation with defendant providing that case be restored to calendar and plaintiff made no showing of merit, trial court did not err in denying motion to restore case to calendar; however, in light of stipulation and fact that defendant had taken physical examination of plaintiff about one year previously, denial should have been without prejudice to plaintiff's further application. Williams v Giattini, 49 A.D.2d 337, 374 N.Y.S.2d 642, 1975 N.Y. App. Div. LEXIS 10908 (N.Y. App. Div. 1st Dep't 1975).

Plaintiff's motion to restore an action to Trial Calendar would be granted, notwithstanding that plaintiff let six months elapse before submitting the appropriate documents, where plaintiff had taken several steps in order to prepare for trial, including pretrial discovery, so that no intent to abandon was demonstrated; however, since the less than due diligence of plaintiff's attorney in failing to move the case to trial could not go unnoticed, granting of the motion would be conditioned upon the personal payment by the attorney to defendant of $1,000. Sygman v Pep Fashions, Ltd., 87 A.D.2d 787, 449 N.Y.S.2d 499, 1982 N.Y. App. Div. LEXIS 16226 (N.Y. App. Div. 1st Dep't 1982).

Restoration may be conditioned upon personal payment of $250 by plaintiffs attorney to each defendant where counsel neglected in failing to keep opponents and court apprised of status of case during almost 40 months between date it was marked off calendar and day he made

motion to restore. Sheehan v Hollywood, 112 A.D.2d 211, 491 N.Y.S.2d 432, 1985 N.Y. App. Div. LEXIS 55960 (N.Y. App. Div. 2d Dep't 1985).

Where plaintiff failed to offer reasonable excuse for delay, but provided proof that his personal injury action had some merit and that defendant had not been prejudiced by delay, court would condition vacatur of automatic dismissal under CLS CPLR § 3404 upon personal payment of $500 by plaintiff's attorney to defendant, and would order that in event condition were not complied with, vacatur of automatic dismissal would be denied. Simon v Avis Rent-A-Car, Inc., 127 A.D.2d 583, 511 N.Y.S.2d 384, 1987 N.Y. App. Div. LEXIS 43053 (N.Y. App. Div. 2d Dep't 1987).

Order restoring personal injury action to calendar would be conditioned on plaintiff's attorney personally paying defendants $1,000, since one-year delay in seeking restoration was attributable solely to plaintiff's counsel. Lee v Sierad, 157 A.D.2d 707, 549 N.Y.S.2d 807, 1990 N.Y. App. Div. LEXIS 488 (N.Y. App. Div. 2d Dep't 1990).

Court would reverse denial of plaintiffs' application to restore action to calendar, on condition that plaintiffs' attorney pay $500 to defendant, notwithstanding egregious law office failure of plaintiffs' attorney, where record established that law office failure was not willful, that action was prima facie meritorious, and that defendant was not prejudiced by delay. Martinez v New York City Transit Authority, 183 A.D.2d 587, 584 N.Y.S.2d 8, 1992 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 1st Dep't 1992).

Court would grant plaintiff's motion to vacate dismissal of action on condition that plaintiff's counsel personally pay $500 to defendant and third-party defendant, although action was dismissed for failure to restore it to calendar within one year, since plaintiff's interest in pursuing litigation was shown by her counsel's letters of inquiry to defendant concerning progress of discovery and need to set timetable for restoring action, and by continued motion practice. Rosado v New York City Housing Authority, 183 A.D.2d 640, 585 N.Y.S.2d 11, 1992 N.Y. App. Div. LEXIS 7367 (N.Y. App. Div. 1st Dep't 1992).

It was abuse of discretion to restore action to trial calendar without affording defendant opportunity to conduct additional discovery, including re-examinations of plaintiff, if necessary, where plaintiff alleged substantial change of circumstances. Gernhardt v New York City Transit Auth., 221 A.D.2d 502, 633 N.Y.S.2d 397, 1995 N.Y. App. Div. LEXIS 12047 (N.Y. App. Div. 2d Dep't 1995).

In restoring plaintiff's action for unpaid carpentry work one year after it was marked off trial calendar, court sufficiently addressed defendant's sole substantive allegation on issue of prejudice, by directing costs of maintaining bond to discharge mechanic's lien for additional year to be assessed against plaintiff on judgment entered after trial. Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff's failure to submit medical authorization until 5 months after case was marked off calendar, instead of within 30 days as conditioned by court, did not warrant denial of her motion to restore case to calendar where she satisfied court's 2 other conditions, and her conduct was not willful, contumacious, deliberate, or in bad faith. Rivera v New York City Health & Hosps. Corp., 231 A.D.2d 621, 647 N.Y.S.2d 797, 1996 N.Y. App. Div. LEXIS 9435 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff's attorney would be required to pay defendant $5,000 as condition to restoring plaintiff's personal injury action to trial calendar after one-year limit set forth in CLS CPLR § 3404 where plaintiff's counsel was negligent, but not willfully in default, in repeatedly failing to learn time and place of his required pretrial court appearances and in failing to follow proper procedures for opposing defendant's efforts to dismiss case. Sanchez v Javind Apt. Corp., 246 A.D.2d 353, 667 N.Y.S.2d 708, 1998 N.Y. App. Div. LEXIS 224 (N.Y. App. Div. 1st Dep't 1998).

Grant of defendants' motion under CLS CPLR § 3216(b)(3) to dismiss medical malpractice action was properly conditioned on plaintiff's failure to serve and file note of issue and certificate of readiness within 90 days after receipt of copy of order and notice of entry where defendants

affirmatively contributed to delay in filing of note of issue. Tu Ying Chen v Nash, 266 A.D.2d 279, 698 N.Y.S.2d 511, 1999 N.Y. App. Div. LEXIS 13063 (N.Y. App. Div. 2d Dep't 1999).

Where plaintiff's counsel did not appear ready to proceed on the scheduled trial date, but submitted an affidavit via one of his firm's partners, which stated that he was engaged in another trial, the case was struck from the trial calendar; the case was restored to the trial calendar upon payment of $500, personally, by plaintiff's counsel as he failed to offer a reasonable explanation as to why he did not appear, why another attorney from his firm did not appear ready to proceed, or why he did not obtain a substitute counsel ready to proceed. Hood v City of New York, 781 N.Y.S.2d 431, 4 Misc. 3d 627, 2004 N.Y. Misc. LEXIS 956 (N.Y. Sup. Ct. 2004).

**12. Effect of bankruptcy**

Motion by plaintiffs to restore personal injury actions to trial calendar was properly denied where actions were stayed by operation of voluntary bankruptcy petition filed by defendant. Cangialosi v Mottoros, 251 A.D.2d 615, 675 N.Y.S.2d 876, 1998 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 2d Dep't 1998).

**13. Effect of plaintiff's death**

It was not improvident exercise of discretion for court to restore medical malpractice action to calendar, even in absence of affidavit of merit by medical expert, where (1) action was marked off calendar by attorney for plaintiff after plaintiff died, and (2) administrator of plaintiff's estate thereafter moved to permit his substitution as plaintiff and to restore action to calendar. Butler v St. John's Episcopal Hosp., 173 A.D.2d 755, 570 N.Y.S.2d 631, 1991 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 2d Dep't 1991), overruled in part, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

Trial court had jurisdiction to consider the motion for leave to substitute the plaintiff's daughter as the plaintiff and, upon substitution, to restore the action thereafter; however, since the

plaintiff's death triggered a stay of all proceedings in the action pending substitution of a legal representative, the trial court should not have directed dismissal of the action, as the order was issued after the plaintiff's death and in the absence of any substitution of a legal representative. Medlock v Dr. William O. Benenson Rehabilitation Pavilion, 167 A.D.3d 994, 92 N.Y.S.3d 64, 2018 N.Y. App. Div. LEXIS 8881 (N.Y. App. Div. 2d Dep't 2018).

**14. Effect of plaintiff's incarceration**

Motion court properly found reasonable excuse for plaintiff's delay in seeking restoration of case to trial calendar and no intent to abandon action, based on unrefuted representation by plaintiff's attorney that case was marked off calendar by another justice because of plaintiff's incarceration, without prejudice to restoration on plaintiff's release; such circumstance, and fact that disclosure was completed before action was marked off, warranted dispensing with usual requirement of some off-calendar litigation. Jackson v New York City Auth., 259 A.D.2d 383, 687 N.Y.S.2d 128, 1999 N.Y. App. Div. LEXIS 3037 (N.Y. App. Div. 1st Dep't 1999).

**15. "Extraordinary circumstances" rule**

When plaintiffs' counsel can not demonstrate extraordinary circumstances, a case that has been involuntarily dismissed can not be restored to the calendar. Bayon v Nardella, 296 A.D.2d 364, 745 N.Y.S.2d 432, 2002 N.Y. App. Div. LEXIS 7031 (N.Y. App. Div. 2d Dep't 2002).

**16. Inapplicability of CPLR § 3404 where case was never calendared**

Court erred in denying plaintiff's motion to restore action to trial calendar where action was never on trial calendar when it was dismissed under CLS CPLR § 3404. Zanani v Savad, 286 A.D.2d 386, 728 N.Y.S.2d 714, 2001 N.Y. App. Div. LEXIS 7987 (N.Y. App. Div. 2d Dep't 2001).

Where complaint of plaintiffs, injured party and others, was dismissed for failure to prosecute their personal injury action, their motion to restore the action, which was purportedly made

pursuant to CLS CPLR 3404, was properly denied, as CLS CPLR 3404 was not applicable since the case never reached the trial calendar. Raffa v Cook, 289 A.D.2d 385, 735 N.Y.S.2d 398, 2001 N.Y. App. Div. LEXIS 12203 (N.Y. App. Div. 2d Dep't 2001).

The trial court properly granted an injured party's motion to return an action to the active calendar; CLS CPLR 3404 was not available to defendants as a defense, as the statute did not apply to actions in which a note of issue had not been filed, and marking a case off a pre-note of issue calendar was simply not a penalty available when a plaintiff failed to appear at a pre-note of issue conference or other pre-note of issue proceeding. Jiles v N.Y. City Transit Auth., 290 A.D.2d 307, 736 N.Y.S.2d 36, 2002 N.Y. App. Div. LEXIS 309 (N.Y. App. Div. 1st Dep't 2002).

Plaintiff's personal injury action was restored after it was "deemed dismissed" under N.Y. C.P.L.R. 3404 because the case was never on the calendar. The restoration motion was granted because no note of issue was ever filed, § 3404 did not apply to this pre-note of issue action, there was no 90-day notice given under N.Y. C.P.L.R. 3216, and there was no order dismissing the complaint under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27. Clark v Great Atl. & Pac. Tea Co., Inc., 23 A.D.3d 510, 806 N.Y.S.2d 633, 2005 N.Y. App. Div. LEXIS 13314 (N.Y. App. Div. 2d Dep't 2005).

In a personal injury case, a property owner could not have plaintiff's complaint dismissed as abandoned under N.Y. C.P.L.R. 3404 for failure to restore the case to the trial calendar within one year because when plaintiff's initial note of issue was stricken, it was as if the note of issue had not been filed and, thus, the rules regarding restoration did not apply; instead, the owner should have filed a 90-day demand under N.Y. C.P.L.R. 3216. Rosario v Ortiz Funeral Home Corp., 839 N.Y.S.2d 674, 16 Misc. 3d 739, 238 N.Y.L.J. 5, 2007 N.Y. Misc. LEXIS 4237 (N.Y. Civ. Ct. 2007), aff'd, 862 N.Y.S.2d 699, 20 Misc. 3d 12, 2008 N.Y. Misc. LEXIS 3179 (N.Y. App. Term 2008).

Trial court erred in denying sellers' motion to restore an action concerning a sale of a publishing business to a company to the trial calendar pursuant to N.Y. C.P.L.R. 3404; the trial court erred in marking the action off the trial calendar when counsel failed to appear for a status conference

pursuant to N.Y. C.P.L.R. 3404, as that statute was not applicable because a note of issue had not been filed. Behren v Warren, Gorham & Lamont, Inc., 301 A.D.2d 381, 753 N.Y.S.2d 78, 2003 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 1st Dep't 2003).

Where vacatur of a note of issue under to 22 NYCRR § 202.21(e) did not bar a patient from further expert witness disclosure, because marking the case off the calendar pursuant to N.Y. C.P.L.R. 3404 did not automatically result in the vacatur of the note of issue; as a result, the trial court should have granted the patient's cross motion for an amended bill of particulars before reinstatement of the note of issue under N.Y. C.P.L.R. 3042(b). Reitman v St. Francis Hosp., 2 A.D.3d 429, 767 N.Y.S.2d 843, 2003 N.Y. App. Div. LEXIS 12841 (N.Y. App. Div. 2d Dep't 2003).

It was error for a supreme court to ignore the precept that N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27, and not N.Y. C.P.L.R. 3404, was the proper vehicle for dismissal of an action where a note of issue was not yet filed. The case was never dismissed and the plaintiffs' motion to restore the case to the active calendar should have been granted. Auguste v Linden Gardens Condo., 8 A.D.3d 414, 778 N.Y.S.2d 509, 2004 N.Y. App. Div. LEXIS 8428 (N.Y. App. Div. 2d Dep't 2004).

**17. Law office failures, generally**

Plea of law office failure was not sufficient to excuse 15-month delay in serving complaint in personal injury action after written demand therefor by defendant. Simons v Sanford Plaza, Inc., 44 A.D.2d 710, 354 N.Y.S.2d 697, 1974 N.Y. App. Div. LEXIS 5205 (N.Y. App. Div. 2d Dep't 1974).

Trial court abused discretion in returning complaint to calendar after it had been dismissed as abandoned where plaintiff's only excuse for delay was negligence of its past and present trial attorneys. Kennedy v Weil-McLain Co. of N.Y., Inc., 47 A.D.2d 804, 365 N.Y.S.2d 92, 1975 N.Y. App. Div. LEXIS 9124 (N.Y. App. Div. 4th Dep't), app. dismissed, 36 N.Y.2d 843, 370 N.Y.S.2d 911, 331 N.E.2d 689, 1975 N.Y. LEXIS 1885 (N.Y. 1975).

Where over two years elapsed between time case was sent to general docket and time that motion was made, in response to which court opened default judgment in negligence action, moving papers attempting to excuse long delay due to fault of counsel or his employee were not sufficient and judgment was improperly opened. Cislo v Di Pasquale, 51 A.D.2d 874, 380 N.Y.S.2d 143, 1976 N.Y. App. Div. LEXIS 11496 (N.Y. App. Div. 4th Dep't 1976).

Once action had been dismissed as abandoned, motion to open default and restore case to calendar required same kind of proof of merit, of lack of prejudice to opposing party and of excusable neglect as had to be shown to open default judgment; motion supported solely by attorney's affidavit asserting that law office failure and lack of communications, constituted excusable neglect, unaccompanied by affidavit of merits indicating viable cause of action by person having knowledge of facts, was inadequate. Glatzer v Porsche Audi, 54 A.D.2d 575, 387 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 13916 (N.Y. App. Div. 2d Dep't 1976).

In an action to recover damages for personal injuries the third-party plaintiff's motion to vacate the clerk's dismissal of the third-party action and to restore such action to the calendar would be denied, since law office failure was insufficient to excuse the failure of the third-party plaintiff to restore the action to the calendar within one year from the time the action was both severed and marked off the calendar. McInerney v Bentley Industries, Inc., 87 A.D.2d 644, 448 N.Y.S.2d 745, 1982 N.Y. App. Div. LEXIS 15972 (N.Y. App. Div. 2d Dep't 1982).

The trial court improperly restored to the trial calendar a negligence action which had been marked off the calendar due to the nonappearance of plaintiff's counsel and which had not been restored within one year, where under those circumstances the action would be presumed abandoned, where plaintiff failed to rebut that presumption by demonstrating the existence of pretrial activity during the intervening year, and where plaintiff's only excuse for the delay amounted to law office failure. Catalfamo v Flushing Nat'l Bank, 91 A.D.2d 967, 457 N.Y.S.2d 337, 1983 N.Y. App. Div. LEXIS 16257 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 968, 1983 N.Y. LEXIS 5245 (N.Y. 1983).

In a wrongful-death action, an order granting plaintiff's motion to restore the action to the trial calendar would be reversed and defendant's cross-motion to dismiss the complaint pursuant to CPLR § 3404 would be granted, where almost two years past between the time that the case was stricken from calendar and the time that plaintiff's attorney moved to restore the case to calendar, the attorney's reason for the delay amounted to law office failure and did not constitute excusable neglect, and plaintiff failed to provide adequate proof that his case had some merit or that his opponent had not been prejudiced by the delay. Monacelli v Board of Education, 92 A.D.2d 930, 460 N.Y.S.2d 598, 1983 N.Y. App. Div. LEXIS 17339 (N.Y. App. Div. 2d Dep't 1983).

It was abuse of discretion to grant medical malpractice plaintiff's motion to vacate default and restore action to trial calendar, although initial failure to appear apparently resulted from lack of communication between attorneys representing plaintiff, where more than 2 years passed between date when case was marked off calendar and date of plaintiff's motion to vacate default. Friedberg v Bay Ridge Orthopedic Associates, P. C., 122 A.D.2d 194, 504 N.Y.S.2d 731, 1986 N.Y. App. Div. LEXIS 59524 (N.Y. App. Div. 2d Dep't 1986).

Under CLS CPLR § 3404, plaintiff who sought to restore case to calendar failed to demonstrate lack of intent to abandon action where his counsel failed to comply with requests for discovery and failed to contact defendant's counsel for 6 years after case was dismissed. Under CLS CPLR § 3404, plaintiff who sought to restore case to calendar failed to show reasonable excuse for his delay where his claim of law office failure due to poor health was unsupported by affidavit from attorney or his treating physician, and lacked proof that disability was continuous throughout period in question. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

Restoration of action to calendar was not warranted based on plaintiff's attorney's claim that outside counsel who covered his appearance at pretrial conference never effectively communicated to him that case was at that time marked off calendar pending receipt of special

referee's report on statute of limitations issue. Rodriguez v Hercules Chem. Co., 228 A.D.2d 319, 644 N.Y.S.2d 229, 1996 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff's bare assertions that its counsel was unable to properly follow up on matter, together with its failure to offer any proof that it was unable to search for new counsel because of illness in family of one of its principals, were insufficient to allow court to find lack of intent to abandon matter, or to show excusable default. JIMCO Restoration Corp. v Miller, 228 A.D.2d 649, 645 N.Y.S.2d 54, 1996 N.Y. App. Div. LEXIS 7436 (N.Y. App. Div. 2d Dep't 1996).

Statement by plaintiff's counsel that his inaction was due to transfer of case to law firm as trial counsel was insufficient to excuse his neglect of case, given that he remained plaintiff's counsel of record to whom court addressed warning letters. Buck v Reed, 231 A.D.2d 821, 647 N.Y.S.2d 581, 1996 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 3d Dep't 1996).

Court properly granted plaintiff's motion to vacate prior order, granted on default, dismissing action for failure to prosecute where plaintiff had been misled by his former attorney as to status of case. Wilson v Misericordia Hosp., 244 A.D.2d 163, 665 N.Y.S.2d 269, 1997 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1997).

Defendants' motions to dismiss action for personal injuries and wrongful death were properly granted where plaintiff failed to respond to defendants' demands for complaint under CLS CPLR § 3012(b) until instant motions to dismiss were made over 8 months later, plaintiff's excuse for her default was conclusory assertion of law office failure, and she failed to submit affidavit of merit. Sarles v Village of Tarrytown, 245 A.D.2d 440, 666 N.Y.S.2d 468, 1997 N.Y. App. Div. LEXIS 13103 (N.Y. App. Div. 2d Dep't 1997).

Action was properly dismissed under CLS CPLR § 3216, and plaintiff's belated motion for leave to file note of issue and have matter restored to trial calendar was properly denied, where plaintiff's conclusory assertions of law office failure were insufficient to excuse his delay of almost one year in complying with court's order to file note of issue, he did not serve affidavit of merit in opposition to motion to dismiss or in support of his motion to restore, and he did not

otherwise show merit of action. Gray v Gray, 266 A.D.2d 261, 698 N.Y.S.2d 262, 1999 N.Y. App. Div. LEXIS 11332 (N.Y. App. Div. 2d Dep't 1999).

Defendants were entitled to dismissal of action under CLS CPLR § 3216 where plaintiff was served with notice to resume prosecution of action and to serve and file note of issue within 90 days, plaintiff did not do so and did not move for extension under CLS CPLR § 2004, its sole excuse was that it had retained “several attorneys during the last several years,” and it did not submit affidavit of merit by person having personal knowledge of facts. Hy-Tech Coatings v Middle Country Cent. Sch. Dist., 266 A.D.2d 264, 698 N.Y.S.2d 277, 1999 N.Y. App. Div. LEXIS 11327 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied personal injury plaintiff’s motion under CLS Gen Mun § 50-e(6) and CLS CPLR § 3025(c) to amend her notice of claim, verified complaint, and bill of particulars to reflect correct date of accident and to restore case to trial calendar where there was unexplained 5-year delay in seeking such relief, there was no explanation for inaction of plaintiff’s former counsel after he learned of date discrepancy at hearing, he repeated incorrect date in verified bill of particulars and notice to admit 3 years after hearing, and amendment would cause defendant clear prejudice. Kotler v City of New York, 266 A.D.2d 355, 697 N.Y.S.2d 530, 1999 N.Y. App. Div. LEXIS 11574 (N.Y. App. Div. 2d Dep't 1999).

**18. —Change of law firm affiliation**

Plaintiff’s motion to open his default and vacate the dismissal of the action for failure to prosecute was denied, where the motion was made some 34 months after the action had been placed on the trial calendar, almost two years after the action was marked “off” for failure to file a statement of readiness, and about 10 months after the automatic dismissal; where plaintiff’s attorney attributed the delay to inadvertence, neglect by a former associate, change of law firms and resultant loss of time in gathering the file in this suit. Renne v Roven, 29 A.D.2d 866, 288 N.Y.S.2d 415, 1968 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 1968).

Denial of motion, inter alia, to restore negligence action to calendar after it was dismissed pursuant to rule governing dismissal of abandoned actions on basis of allegation, as an excuse for failure to file statement of readiness, that prior attorney had been opening his own practice and had been moving into new office was proper, in that it appeared that the default was basically a “Law Office Failure” and that level of activity during period between filing note of issue and filing motion to restore was insufficient to rebut presumption that action had been abandoned. Lee v City School Dist., 57 A.D.2d 566, 393 N.Y.S.2d 583, 1977 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 2d Dep't 1977).

Although CPLR § 3404 creates a presumption that an action is abandoned if it has not been restored to the calendar within a one-year period, the presumption is rebuttable and does not apply where litigation in a case is actually a progress, so that Special Term erred in denying plaintiffs’ motion to vacate the dismissal of the action, which had been granted in light of the long period of delay on the part of plaintiffs’ attorneys in preparing the case for trial where, while there was less than due diligence exercised by plaintiffs’ attorneys in moving the case to trial, even though some period of time could be excused as a result of counsel’s illness and the breakup of a partnership, where there were proceedings in preparation for trial during the period and, under the circumstances, dismissal of the action because of counsel’s inaction would be unjustifiably harsh. Rutger Fabrics Corp. v United States Laminating Corp., 111 A.D.2d 40, 488 N.Y.S.2d 714, 1985 N.Y. App. Div. LEXIS 51188 (N.Y. App. Div. 1st Dep't 1985).

Plaintiff’s counsel established reasonable excuses for delay in moving to restore action to trial calendar based on his role as donor for bone marrow transplant to his brother together with his brother’s ultimate death and ensuing mourning period, breakup of his law partnership and his former firm’s delay in transferring files to him, and decision of his sole employee to review transferred files in alphabetical order rather than chronological order. Zabari v City of New York, 242 A.D.2d 15, 672 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1998).

On motion for restoration of case to trial calendar under CLS CPLR § 3404, failure of plaintiff's counsel to appear at calendar call was adequately explained by dissolution of firm that initially represented plaintiff, closing of their office, and problems in forwarding mail to firm's former partner who had retained litigation. Williams v Rockefeller Ctr. Props., 282 A.D.2d 285, 723 N.Y.S.2d 183, 2001 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 1st Dep't 2001).

**19. —Death of attorney**

Death of plaintiffs' attorney did not constitute valid excuse for 3-year delay in filing note of issue after completion of discovery where matter had already been abandoned for substantial length of time. Ware v Porter, 227 A.D.2d 214, 642 N.Y.S.2d 278, 1996 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1st Dep't 1996).

Death of plaintiffs' attorney did not constitute valid excuse for 3-year delay in filing note of issue after completion of discovery where matter had already been abandoned for substantial length of time. Ware v Porter, 227 A.D.2d 214, 642 N.Y.S.2d 278, 1996 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1st Dep't 1996).

**20. —Illness of attorney**

Although CPLR § 3404 creates a presumption that an action is abandoned if it has not been restored to the calendar within a one-year period, the presumption is rebuttable and does not apply where litigation in a case is actually a progress, so that Special Term erred in denying plaintiffs' motion to vacate the dismissal of the action, which had been granted in light of the long period of delay on the part of plaintiffs' attorneys in preparing the case for trial where, while there was less than due diligence exercised by plaintiffs' attorneys in moving the case to trial, even though some period of time could be excused as a result of counsel's illness and the breakup of a partnership, where there were proceedings in preparation for trial during the period and, under the circumstances, dismissal of the action because of counsel's inaction would be unjustifiably

harsh. Rutger Fabrics Corp. v United States Laminating Corp., 111 A.D.2d 40, 488 N.Y.S.2d 714, 1985 N.Y. App. Div. LEXIS 51188 (N.Y. App. Div. 1st Dep't 1985).

Although illness of attorney may constitute reasonable excuse for default, plaintiffs' claim that their attorney suffered heart attack at some unspecified point in litigation was insufficient to justify delay of approximately 2 ½ years in moving to restore action to trial calendar. Civello v Grossman, 192 A.D.2d 636, 596 N.Y.S.2d 464, 1993 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 2d Dep't 1993).

Court properly denied motion to vacate dismissal pursuant to CLS CPLR § 3404 where (1) 20 years had elapsed since accident, (2) there was no activity in case during year prior to dismissal, and more than one year lapsed between dismissal and plaintiffs' motion to restore action to trial calendar, (3) affidavit of plaintiff's counsel's physician, documenting that attorney suffered from episodic periods of depression for several years following deaths in his family, did not establish reasonable excuse for default, since there was no showing that counsel's disability was continuous throughout entire period in question. Knight v City of New York, 193 A.D.2d 720, 597 N.Y.S.2d 737, 1993 N.Y. App. Div. LEXIS 4938 (N.Y. App. Div. 2d Dep't 1993), app. dismissed, 83 N.Y.2d 800, 611 N.Y.S.2d 135, 633 N.E.2d 490, 1994 N.Y. LEXIS 141 (N.Y. 1994).

Asserted illness of plaintiff's attorney did not constitute reasonable excuse for delay where attorney submitted no medical records to support claim of illness and, in any event, there were associate counsel available. Advanced Ortho-Technology v Orthospec, Inc., 203 A.D.2d 218, 612 N.Y.S.2d 886, 1994 N.Y. App. Div. LEXIS 3178 (N.Y. App. Div. 2d Dep't 1994).

Defendant was not entitled to dismissal of action under CLS CPLR § 3216 where (1) plaintiffs' delay in filing note of issue over 90 days after defendant's demand was not result of their intent to abandon action but of their attorney's debilitating injury, and (2) plaintiffs showed meritorious cause of action. Charnock v Preferred Mut. Ins. Co., 281 A.D.2d 981, 722 N.Y.S.2d 670, 2001 N.Y. App. Div. LEXIS 2720 (N.Y. App. Div. 4th Dep't 2001).

**21. —Inadvertence of attorney, generally**

Inadvertence was insufficient to warrant relief from dismissal for failure to file a statement of readiness within one year and in waiting 19 months before moving to open the default. Bosco v De Pitt's Mountain Lodge, Inc., 28 A.D.2d 717, 281 N.Y.S.2d 497, 1967 N.Y. App. Div. LEXIS 3742 (N.Y. App. Div. 2d Dep't 1967).

Where plaintiff’s only excuse for failure to restore the case to the calendar within the one-year period permitted by CPLR 3404 was that the calendar records kept by their attorneys were incorrectly marked, it was an improvident exercise of discretion to grant an order opening the default. Delmonte v Wozniak, 29 A.D.2d 735, 286 N.Y.S.2d 960, 1968 N.Y. App. Div. LEXIS 4840 (N.Y. App. Div. 4th Dep't 1968).

Plaintiff’s motion to open his default and vacate the dismissal of the action for failure to prosecute was denied, where the motion was made some 34 months after the action had been placed on the trial calendar, almost two years after the action was marked “off” for failure to file a statement of readiness, and about 10 months after the automatic dismissal; where plaintiff’s attorney attributed the delay to inadvertence, neglect by a former associate, change of law firms and resultant loss of time in gathering the file in this suit. Renne v Roven, 29 A.D.2d 866, 288 N.Y.S.2d 415, 1968 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 1968).

Plaintiff’s motion some 22 months after his case was dismissed for failure to answer the calendar call failed to show facts sufficient to excuse his failure to prosecute the action, where plaintiff’s attorney attributed the delay to “inadvertence” in that he “overlooked” the calendar call. Tepperman v Peri, 29 A.D.2d 893, 288 N.Y.S.2d 677, 1968 N.Y. App. Div. LEXIS 4388 (N.Y. App. Div. 2d Dep't), app. dismissed, 22 N.Y.2d 703, 291 N.Y.S.2d 812, 238 N.E.2d 920, 1968 N.Y. LEXIS 1390 (N.Y. 1968).

Inadvertence and confusion between the attorney of record and the trial attorney, characterized as “law office failures” was insufficient excuse to justify default and delay and motion to open

default would be denied. Goldberg v Soifer, 30 A.D.2d 533, 291 N.Y.S.2d 171, 1968 N.Y. App. Div. LEXIS 4076 (N.Y. App. Div. 2d Dep't 1968).

Where plaintiffs had delayed two and one-half years after the dismissal of the action in moving to open their default and restore the case to the calendar for trial, inadvertent fault of counsel, causes associated with “law office failure,” and settlement negotiations that antedated the dismissal by almost 2 years, do not provide a reasonable basis for excusing the delay in prosecution. Pearce v William L. Watson Co., 37 A.D.2d 686, 323 N.Y.S.2d 325, 1971 N.Y. App. Div. LEXIS 3704 (N.Y. App. Div. 4th Dep't 1971).

Although the period of delay was relatively short and there was little apparent prejudice to the defendants, a law office failure to timely vacate a default under N.Y. C.P.L.R. 3404 by a patient’s counsel might be excused; however, the patient failed to demonstrate the existence of a meritorious claim of medical malpractice or lack of informed consent. Sturgess v Zelman, 833 N.Y.S.2d 863, 15 Misc. 3d 487, 237 N.Y.L.J. 49, 2007 N.Y. Misc. LEXIS 436 (N.Y. Sup. Ct. 2007).

**22. — —Appellate matters**

In actions to recover under policies of fire insurance, plaintiffs’ motion to restore the actions to the trial calendar, after they were marked abandoned and automatically dismissed pursuant to CPLR § 3404, would be denied where the only “activity” at the time of dismissal had been the parties’ appeals from the denial of their motions for leave to renew their motions for summary judgment, and where plaintiffs’ failure to perfect their appeals would be insufficient to excuse their failure to restore their actions to the trial calendar within one year from the time the actions were marked off, in that their failure amounted to “law office failure.” Chyx-Cho Realty, Ltd. v New York Property Ins. Underwriting Asso., 91 A.D.2d 620, 456 N.Y.S.2d 800, 1982 N.Y. App. Div. LEXIS 19472 (N.Y. App. Div. 2d Dep't 1982).

In buyer’s action against sellers of residence for fraud and intentional concealment of facts, sellers’ appeal would not be dismissed as abandoned, even though they did not timely comply

with all requirements of CLS Unif Tr Ct Rls § 202.55 (22 NYCRR § 202.55) where some delay was attributable to their inability to obtain trial transcript, and although their attorney's busy work schedule was unpersuasive reason for their subsequent delay in perfecting appeal, buyer acquiesced in that delay by neglecting to move to dismiss appeal until well after appeal was perfected and requirements of § 202.55 were met. Cetnar v Kinowski, 245 A.D.2d 974, 667 N.Y.S.2d 107, 1997 N.Y. App. Div. LEXIS 13627 (N.Y. App. Div. 3d Dep't 1997).

**23. — —Calendaring matters**

Fact that plaintiff's attorneys were under the impression that a calendar answering service was following the case and would notify them of calendar calls as they arose fell within the category of "law office failures" and did not present sufficient excuse to justify opening default. Filippi v Grand Union Co., 30 A.D.2d 532, 291 N.Y.S.2d 194, 1968 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 2d Dep't 1968).

After dismissal for want of prosecution, case should not be restored to calendar where the principal excuse proffered was that a statement of readiness was not filed through clerical error of the attorney and that such oversight was not discovered until some three years later. Bernsohn v State Dormitory Authority, 33 A.D.2d 550, 304 N.Y.S.2d 637, 1969 N.Y. App. Div. LEXIS 3014 (N.Y. App. Div. 1st Dep't 1969).

Contention by attorney that default resulted from the fact that the action was being followed in the firm's "suit record" book under a former calendar number, because a subsequently assigned new calendar number had never been entered in the book, was insufficient to warrant the vacation of a dismissal. McShan v Dilbert's Quality Supermarkets, Inc., 33 A.D.2d 792, 307 N.Y.S.2d 179, 1969 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 2d Dep't 1969), app. dismissed, 26 N.Y.2d 843, 309 N.Y.S.2d 591, 258 N.E.2d 89, 1970 N.Y. LEXIS 1505 (N.Y. 1970).

Affidavit, in support of motion to restore action to foreclose mechanic's lien to trial court after it had been stricken as an abandoned case, offering as the only excuse for default and failure to restore case within one year the fact that deponent did not know that cases had been put on

deferred calendar, an allegedly obvious law office failure, provided no basis on which default could be vacated and affidavit was insufficient. Quick-Way Excavators, Inc. v D.H. Overmyer Co., 44 A.D.2d 740, 354 N.Y.S.2d 468, 1974 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 3d Dep't 1974).

“Law office failure” is generally unacceptable as an excuse for failure to file statement of readiness and to restore action to calendar. Galante v Solon Holding Corp., 46 A.D.2d 636, 360 N.Y.S.2d 252, 1974 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 1st Dep't 1974).

Plaintiff’s counsel’s affidavit, which contained allegations of lack of knowledge that the action had been placed on the deferred calendar, inadvertence and mistake, and a failure by the clerk of court to deliver a copy of the printed calendar to his office, amounted to nothing more than “law office failures” and were insufficient to excuse plaintiff’s default. Adriance v County of Rensselaer, 52 A.D.2d 1002, 383 N.Y.S.2d 658, 1976 N.Y. App. Div. LEXIS 12887 (N.Y. App. Div. 3d Dep't 1976).

Where case was not removed from ready calendar to deferred calendar because it was not disposed of when reached but rather was placed on deferred calendar by plaintiffs’ attorney because he anticipated some difficulty in arranging trial date and where plaintiffs’ attorney resided and practiced outside district and was not familiar with local calendar procedure, and where defendant demonstrated no prejudice as result of delay, Special Term’s exercise of discretion in granting plaintiffs’ motion to vacate dismissal of their actions would not be upset on appeal. Walsh v Hanson, 58 A.D.2d 958, 397 N.Y.S.2d 438, 1977 N.Y. App. Div. LEXIS 13161 (N.Y. App. Div. 3d Dep't), app. dismissed, 42 N.Y.2d 1102, 1977 N.Y. LEXIS 4884 (N.Y. 1977).

Where accident out of which negligence action to recover damages for injuries arose occurred in 1969, statement of readiness and note of issue were filed in 1973, action was struck from calendar in February, 1974, and was automatically dismissed in February, 1975, claim by plaintiffs’ attorneys that they did not become aware of dismissal until December, 1976 did not warrant vacating dismissal and restoring case to calendar. Silverman v Valentine, 59 A.D.2d 777, 398 N.Y.S.2d 843, 1977 N.Y. App. Div. LEXIS 13829 (N.Y. App. Div. 2d Dep't 1977), app.

dismissed, 43 N.Y.2d 646, 1978 N.Y. LEXIS 2556 (N.Y. 1978), app. dismissed, 43 N.Y.2d 844, 402 N.Y.S.2d 813, 373 N.E.2d 993, 1978 N.Y. LEXIS 1763 (N.Y. 1978).

In a negligence action to recover damages for personal injuries, the trial court incorrectly granted plaintiffs' motion to vacate their default in failing to restore the action to the calendar within one year of its having been marked off where, although plaintiffs asserted their attorney's failure to have the case assigned to a calendar watching service as the reason for their default, plaintiffs' motion was not accompanied by affidavits containing facts to that effect. Zito v Morawski, 79 A.D.2d 707, 434 N.Y.S.2d 262, 1980 N.Y. App. Div. LEXIS 14102 (N.Y. App. Div. 2d Dep't 1980), app. dismissed, 53 N.Y.2d 796, 1981 N.Y. LEXIS 3836 (N.Y. 1981).

Court properly denied plaintiffs' motion to restore action to trial calendar where only excuse offered for almost 3-year delay in moving to restore action was that their counsel did not know that matter had been placed on trial calendar and then marked off calendar. Pullem v Town of Babylon, 253 A.D.2d 805, 677 N.Y.S.2d 513, 1998 N.Y. App. Div. LEXIS 9558 (N.Y. App. Div. 2d Dep't 1998).

Court improperly granted plaintiffs' motion to restore action to trial calendar where more than 21 years had elapsed since commission of alleged medical malpractice, matter had been marked off calendar 3 times due to unpreparedness of plaintiffs' counsel, and plaintiffs' latest excuse—that attorney's service inexplicably failed to restore matter to calendar when told to do so—amounted to nothing more than law office failure. Kourtsounis v Chakrabarty, 254 A.D.2d 394, 679 N.Y.S.2d 84, 1998 N.Y. App. Div. LEXIS 11109 (N.Y. App. Div. 2d Dep't 1998), app. dismissed, 93 N.Y.2d 833, 687 N.Y.S.2d 623, 710 N.E.2d 270, 1999 N.Y. LEXIS 167 (N.Y. 1999).

Action, which was marked off calendar after unanswered calendar call, was properly restored to calendar on plaintiffs' attorney's affirmation that he never received notice from court of missed calendar call, and court records consistent with possibility that notice was misdirected to plaintiffs' former attorney. Jean-Louis v 345 Riverside Drive Apt. Corp., 259 A.D.2d 402, 687 N.Y.S.2d 104, 1999 N.Y. App. Div. LEXIS 2805 (N.Y. App. Div. 1st Dep't 1999).

Personal injury action was properly dismissed as abandoned where (1) there was no litigation activity from day after pretrial conference until plaintiff's motion to restore action to trial calendar 3 ½ years later, (2) plaintiff's counsel claimed that he was never told by court and never received notice from his calendar service that case had been marked off trial calendar, but failed to demonstrate reasonable excuse for passively waiting for announcement of trial date for 3*r1/2 years, and (3) defendant's choice not to conduct further medical examination of plaintiff, as allowed by court, did not excuse plaintiff's subsequent inordinate delay. Spivey v Bouteureira, 259 A.D.2d 425, 687 N.Y.S.2d 150, 1999 N.Y. App. Div. LEXIS 2825 (N.Y. App. Div. 1st Dep't 1999).

Court should have restored action to calendar for trial on issue of damages where plaintiff's counsel submitted sufficient evidence to substantiate his explanation for failing to answer calendar call, plaintiff's claim that matter did not appear on relevant published calendars was not refuted, defendant's attorney apparently also did not appear on relevant calendar dates, and merit of plaintiff's claim was established by showing that he was granted summary judgment on issue of liability and summary judgment was affirmed on appeal. Lupoli v Venus Lab., Inc., 264 A.D.2d 820, 695 N.Y.S.2d 598, 1999 N.Y. App. Div. LEXIS 9395 (N.Y. App. Div. 2d Dep't 1999), overruled, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

Patient's motion to vacate a prior order granting podiatrist's motion to dismiss the complaint for failure to prosecute should have been granted because the patient demonstrated, among other things, that her failure to oppose the podiatrist's initial motion was neither willful nor deliberate as her attorney's affirmation established that the failure to diary the return date of the motion was inadvertent and isolated; the patient also demonstrated through the affidavit of her expert that she had a potentially meritorious medical malpractice claim. The patient also demonstrated a reasonable excuse for her delay in moving to restore the action to the trial calendar and her lack of intent to abandon the action and that the podiatrist and a third party would not suffer any

prejudice if the action was restored to the trial calendar. Rocco v Family Foot Ctr., 94 A.D.3d 1077, 942 N.Y.S.2d 607, 2012 N.Y. App. Div. LEXIS 3152 (N.Y. App. Div. 2d Dep't 2012).

In a legal malpractice action, defendants failed to proffer a potentially meritorious opposition to the motion to vacate the default because no note of issue was filed, meaning that the action could not have been on the trial calendar, and, as such, this statute would not apply. Finamore v David Ullman, P.C, 179 A.D.3d 642, 116 N.Y.S.3d 357, 2020 N.Y. App. Div. LEXIS 159 (N.Y. App. Div. 2d Dep't 2020).

Landlord showed an adequate excuse for its 18-month delay in moving to restore its non-primary residence holdover proceeding to the trial calendar where the landlord’s counsel alleged that the delay was due to the counsel’s inadvertent failure to properly diary the one-year deadline for moving to restore the matter, which was caused by the counsel’s change in diary systems. Landlord also demonstrated that it did not abandon the litigation in view of the considerable amount of discovery engaged in by the parties. Berger E. Corp. v Grigg, 792 N.Y.S.2d 285, 6 Misc. 3d 76, 2004 N.Y. Misc. LEXIS 2814 (N.Y. App. Term 2004).

Trial court erred in denying restoration of a matter to the calendar after it was removed and the matter dismissed due to plaintiff’s counsel’s failure to appear at a calendar call, pursuant to N.Y. C.P.L.R. 3404, because the matter was still in the pre-note of issue status; although dismissal for such failure to appear was allowed pursuant to N.Y. Comp. Code R. & Regs. tit. 22, § 202.27, such rule was not cited or relied upon by the court in dismissing the action and accordingly, it did not provide a basis for the improper dismissal. Chowdhury v Phillips, 306 A.D.2d 51, 761 N.Y.S.2d 169, 2003 N.Y. App. Div. LEXIS 6362 (N.Y. App. Div. 1st Dep't 2003).

Plaintiff’s motion to restore her personal injury action to the trial calendar more than one year after it had been dismissed pursuant to N.Y. C.P.L.R. 3404 was improperly granted because (1) plaintiff’s contention that her attorney missed a trial conference because she was unaware of the date amounted to law office failure, which, under the circumstances of the case, did not constitute a reasonable excuse; (2) plaintiff had engaged in only minimal activity regarding the case during the 2 ½ year period which elapsed from the date it was marked off the calendar, to

the date she moved to restore, and the limited activity was insufficient to rebut the presumption of abandonment that attached after the automatic dismissal; and (3) plaintiff's submissions failed to adequately demonstrate the existence of a meritorious cause of action. Castillo v City of New York, 6 A.D.3d 568, 775 N.Y.S.2d 82, 2004 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 2d Dep't 2004).

**24. — —Failure to file**

Where plaintiff's motion to be relieved of his default, caused by his attorney's failure to serve and file a proper statement of readiness, was based on the failure of a stenographer employed by the attorneys to file the necessary paper, such an excuse is insufficient as a justification for opening the default. Chicollo v New York City Housing Authority, 31 A.D.2d 546, 295 N.Y.S.2d 365, 1968 N.Y. App. Div. LEXIS 2827 (N.Y. App. Div. 2d Dep't 1968).

Office failure alleged by plaintiff's attorney did not constitute an adequate excuse for a failure to discover a statement of readiness had not been filed, and the action was properly dismissed for failure to prosecute. Where 15 months had elapsed between the dismissal in plaintiff's motion to vacate dismissal and restore the action to the trial calendar and plaintiff failed to show a meritorious cause of action, his motion was denied. Mingis v Daitch Crystal Dairies, Inc., 32 A.D.2d 746, 300 N.Y.S.2d 645, 1969 N.Y. App. Div. LEXIS 3844 (N.Y. App. Div. 1st Dep't 1969).

"Law office failure" is generally unacceptable as an excuse for failure to file statement of readiness and to restore action to calendar. Galante v Solon Holding Corp., 46 A.D.2d 636, 360 N.Y.S.2d 252, 1974 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 1st Dep't 1974).

Dismissal of medical malpractice action for failure to prosecute under CLS CPLR § 3216 was proper where, inter alia, no note of issue was ever filed with court, and although plaintiffs' counsel alleged that he sent note of issue to clerical service to be filed with court and that "inexplicably" it was never filed, he did not attempt to file it on learning that clerical service had not done so. Davies v Slotkin, 251 A.D.2d 533, 674 N.Y.S.2d 728, 1998 N.Y. App. Div. LEXIS

7543 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 683 N.Y.S.2d 174, 705 N.E.2d 1215, 1998 N.Y. LEXIS 4081 (N.Y. 1998).

Action for medical malpractice and wrongful death would not be restored to trial calendar where (1) failure of counsel's paralegal to move to restore case to calendar when told to do so was not reasonable excuse for 20-month delay in moving to restore, (2) because of plaintiff's inactivity during that period, he failed to rebut presumption of abandonment that attaches when case has been automatically dismissed, and (3) 11 years passed between alleged malpractice and motion to restore, and thus defendants would be prejudiced by restoration. Collins v New York City Health & Hosp. Corp., 266 A.D.2d 178, 697 N.Y.S.2d 341, 1999 N.Y. App. Div. LEXIS 11144 (N.Y. App. Div. 2d Dep't 1999).

In personal injury action wherein plaintiff provided requested discovery but note of issue was inadvertently misplaced in her counsel's law office records and not filed, and action was dismissed after both parties failed to appear at 1997 calendar call, court should have granted plaintiff's 1999 motion to vacate dismissal and restore action to calendar where (1) plaintiff contended that her former counsel, who was still listed on court records as attorney of record, was advised of court date but never advised her new counsel, who was not notified by court of scheduled appearance, (2) documented phone call between parties' counsel in 1998 supported plaintiff's contention and evinced her readiness to file note of issue, and (3) record indicated that plaintiff did not intend to abandon action. Agarrat v Metro-North Commuter R.R., 270 A.D.2d 154, 704 N.Y.S.2d 585, 2000 N.Y. App. Div. LEXIS 3056 (N.Y. App. Div. 1st Dep't 2000).

Asserted law office failure, neglect to file and misrepresentations as to its status by young associate in plaintiff's attorney's law firm, was not reasonable excuse for complete inactivity in case between preliminary conference and instant motion to dismiss action as abandoned, made more than 2 years later. Nettleship v Wallin, 272 A.D.2d 241, 708 N.Y.S.2d 85, 2000 N.Y. App. Div. LEXIS 5884 (N.Y. App. Div. 1st Dep't 2000).

Trial court erred by marking plaintiffs' lawsuit off court's calendar because they failed to file a note of issue, and because the lawsuit was improperly marked off, it was improperly dismissed

under CPLR 3404. Johnson v Sam Minskoff & Sons, 287 A.D.2d 233, 735 N.Y.S.2d 503, 2001 N.Y. App. Div. LEXIS 12361 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's motion to restore his medical malpractice and wrongful death action to the trial calendar after its automatic dismissal under N.Y. C.P.L.R. 3404 was improperly denied as plaintiff's excuse of law office failure for the delay in moving to restore the action based on the matrimonial difficulties of his assigned attorney was reasonable. Levine v Agus, 28 A.D.3d 719, 814 N.Y.S.2d 215, 2006 N.Y. App. Div. LEXIS 4907 (N.Y. App. Div. 2d Dep't 2006).

**25. — —Lost documents**

The trial court improperly denied motions to dismiss an action as abandoned under CPLR § 3404, where plaintiffs' excuse that they were searching for a document requested by defendants was not only vague, conclusory, and accounted for only a portion of the time elapsed, where no reason was advanced why the document could not have been located earlier or why a note of issue could not have been filed in its absence, and where plaintiffs' failure timely to move to restore their case to calendar was unacceptable law office failure. Mauro v Techni-Plate, Inc., 96 A.D.2d 835, 465 N.Y.S.2d 589, 1983 N.Y. App. Div. LEXIS 19419 (N.Y. App. Div. 2d Dep't 1983).

On motion to vacate dismissal pursuant to CLS CPLR § 3404, plaintiff failed to show reasonable excuse for delay where his attorney asserted only that file was "inadvertently misplaced" and gave no further information. Robinson v New York City Transit Auth., 203 A.D.2d 351, 610 N.Y.S.2d 296, 1994 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied medical malpractice plaintiff's motion to restore action to trial calendar where action was marked off calendar because of plaintiff's inability to proceed to trial, allegation that plaintiff's file was misplaced during relocation of his attorneys' offices did not constitute reasonable excuse for nearly one year delay in moving to restore, and defense had been substantially prejudiced by defendant doctor's death, which occurred about 8 months after

action was stricken. Iorio v Galeon, 230 A.D.2d 771, 646 N.Y.S.2d 818, 1996 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 2d Dep't 1996).

**26. — —Pre-trial conference matters**

Trial court erred in vacating dismissal and restoring the case to the trial calendar where notwithstanding that published notice was given plaintiffs' counsel failed to appear at pre-trial conference and such failure could only be characterized as law office failure, where the judgment dismissing the action was entered in January, 1980, and where plaintiffs moved to vacate the dismissal in January, 1981. Condurso v Thumsuden, 84 A.D.2d 802, 444 N.Y.S.2d 151, 1981 N.Y. App. Div. LEXIS 16006 (N.Y. App. Div. 2d Dep't 1981), app. dismissed, 55 N.Y.2d 953, 449 N.Y.S.2d 193, 434 N.E.2d 262, 1982 N.Y. LEXIS 3132 (N.Y. 1982).

It was error to deny plaintiff's promptly made motion to restore case to trial calendar even though counsel failed to appear on initial date set for argument of such motion, where action was initially stricken from trial calendar when counsel appeared less than one hour late for pretrial conference scheduled for purpose of extending defendants' time to conduct discovery of plaintiff's extensive medical file. Dousmanis v Joe Hornstein, Inc., 218 A.D.2d 627, 631 N.Y.S.2d 28 (N.Y. App. Div. 1st Dep't 1995).

**27. — —Trial matters**

Court in Kings County abused its discretion in denying plaintiff's motion to vacate prior order which dismissed action after plaintiff's counsel failure to appear for jury selection, where approximately one hour after counsel called to inform court that he was en route from Staten Island, court granted defense counsel's oral application to dismiss case. Rosario v Elishis, 270 A.D.2d 404, 704 N.Y.S.2d 645, 2000 N.Y. App. Div. LEXIS 3043 (N.Y. App. Div. 2d Dep't 2000).

**28. —Relocation of attorney's office**

Plaintiff's motion to restore should have been granted where there was nothing to contradict her reasonable excuse that counsel had moved his office at time and never received notice of compliance conference, and plaintiff showed merit to her personal injury claim. Haberlin v New York City Transit Auth., 228 A.D.2d 383, 644 N.Y.S.2d 718, 1996 N.Y. App. Div. LEXIS 7451 (N.Y. App. Div. 1st Dep't 1996), overruled in part, Bingham v New York City Tr. Auth., 8 N.Y.3d 176, 832 N.Y.S.2d 125, 864 N.E.2d 49, 2007 N.Y. LEXIS 120 (N.Y. 2007).

Court properly denied medical malpractice plaintiff's motion to restore action to trial calendar where action was marked off calendar because of plaintiff's inability to proceed to trial, allegation that plaintiff's file was misplaced during relocation of his attorneys' offices did not constitute reasonable excuse for nearly one year delay in moving to restore, and defense had been substantially prejudiced by defendant doctor's death, which occurred about 8 months after action was stricken. Iorio v Galeon, 230 A.D.2d 771, 646 N.Y.S.2d 818, 1996 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 2d Dep't 1996).

**29. —Staff or employee of attorney**

The granting of plaintiff's motion to vacate the dismissal of his cause of action for failure to prosecute was an improvident exercise of discretion where the only explanation for 22 months' delay in moving after the case was marked off the calendar was a change in clerical personnel in the office of plaintiff's counsel and resulting confusion in office administration. Evans v Kompinski, 28 A.D.2d 635, 280 N.Y.S.2d 596, 1967 N.Y. App. Div. LEXIS 4230 (N.Y. App. Div. 4th Dep't 1967).

Where plaintiff's motion to be relieved of his default, caused by his attorney's failure to serve and file a proper statement of readiness, was based on the failure of a stenographer employed by the attorneys to file the necessary paper, such an excuse is insufficient as a justification for opening the default. Chicollo v New York City Housing Authority, 31 A.D.2d 546, 295 N.Y.S.2d 365, 1968 N.Y. App. Div. LEXIS 2827 (N.Y. App. Div. 2d Dep't 1968).

Dismissal of medical malpractice action for failure to prosecute under CLS CPLR § 3216 was proper where, inter alia, no note of issue was ever filed with court, and although plaintiffs' counsel alleged that he sent note of issue to clerical service to be filed with court and that "inexplicably" it was never filed, he did not attempt to file it on learning that clerical service had not done so. Davies v Slotkin, 251 A.D.2d 533, 674 N.Y.S.2d 728, 1998 N.Y. App. Div. LEXIS 7543 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 683 N.Y.S.2d 174, 705 N.E.2d 1215, 1998 N.Y. LEXIS 4081 (N.Y. 1998).

Action for medical malpractice and wrongful death would not be restored to trial calendar where (1) failure of counsel's paralegal to move to restore case to calendar when told to do so was not reasonable excuse for 20-month delay in moving to restore, (2) because of plaintiff's inactivity during that period, he failed to rebut presumption of abandonment that attaches when case has been automatically dismissed, and (3) 11 years passed between alleged malpractice and motion to restore, and thus defendants would be prejudiced by restoration. Collins v New York City Health & Hosp. Corp., 266 A.D.2d 178, 697 N.Y.S.2d 341, 1999 N.Y. App. Div. LEXIS 11144 (N.Y. App. Div. 2d Dep't 1999).

**30. —Substitution of attorney**

Where primary cause for delay in prosecution of lawsuit was substitution of attorneys on three separate occasions by plaintiff, and during interim case was marked off calendar and subsequently dismissed pursuant to rule providing for dismissal of abandoned cases, but plaintiff's present counsel made several applications for additional discovery proceedings which motions were opposed by defendants and were litigated at time when plaintiff's counsel was not aware that case had already been marked "off calendar," lawsuit was not intentionally abandoned and thus denial of plaintiff's motion to restore case to trial calendar and for leave to serve supplemental bill of particulars was improvident exercise of discretion. Paiement v Hertz Corp., Auto Delivery Div., 47 A.D.2d 889, 367 N.Y.S.2d 28, 1975 N.Y. App. Div. LEXIS 9299 (N.Y. App. Div. 1st Dep't 1975).

In an action to recover damages for breach of contract and on a note, dismissal of the action for failure to prosecute would not be vacated where plaintiffs' new attorneys, who were informed before the expiration of the one-year period that the matter had been marked off the calendar, failed to make timely motion to restore the matter to the calendar, and where the delay in moving to vacate the default was a case of law office failure. O'Brien v Groome, 87 A.D.2d 624, 448 N.Y.S.2d 242, 1982 N.Y. App. Div. LEXIS 15938 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 63 N.Y.2d 952, 1984 N.Y. LEXIS 6404 (N.Y. 1984).

**31. Length of inactivity; 1 year or less**

Dismissal of an action because it has not been restored to the calendar within one year after being marked "off" or struck from the calendar is a dismissal for neglect to prosecute and, if the statute of limitations does not run, a new action on the same cause is not barred as the original dismissal is not on the merits. Freeman's Beverages, Inc. v National Cash Register Co., 50 A.D.2d 1075, 376 N.Y.S.2d 58, 1975 N.Y. App. Div. LEXIS 12102 (N.Y. App. Div. 4th Dep't 1975).

Standard for motions to restore a case to the trial calendar where a case has been on the general docket for less than a year is less exacting than that required to restore a case deemed abandoned under civil practice rule. Sesan v American Home Products Corp., 52 A.D.2d 1058, 384 N.Y.S.2d 600, 1976 N.Y. App. Div. LEXIS 12974 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs whose cause of action to recover for personal injuries was deemed abandoned pursuant to CLS CPLR § 3404 were entitled to consideration of their motion to restore cause of action to calendar when they included prayer in their motion for "other and further relief," even though proper course should have been first to move to vacate "automatic" dismissal of § 3404; despite seemingly definitive language of § 3404, dismissal for failure to restore action within one year after it has been marked off calendar is neither automatic nor self-executing and court retains discretion to grant motion after year has expired. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App.

Div. 1st Dep't 1986), app. dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

It was proper to deny plaintiff's motion to restore action to trial calendar, and to dismiss action with prejudice, where plaintiff had been granted several adjournments over one-year period and, despite warning prior to last adjournment that no further adjournments would be granted, he was not ready to proceed on final adjourned date. Hansen v Loomis, 137 A.D.2d 584, 524 N.Y.S.2d 476, 1988 N.Y. App. Div. LEXIS 1040 (N.Y. App. Div. 2d Dep't 1988).

Case stricken from trial calendar and not restored within one year is automatically deemed abandoned under CLS CPLR § 3404, although case may be restored to calendar where plaintiff demonstrates viable excuse, meritorious claim, lack of prejudice, and absence of intent to abandon. Leone v Bates Plan-A-Home of Sidney, Inc., 144 A.D.2d 759, 534 N.Y.S.2d 751, 1988 N.Y. App. Div. LEXIS 10917 (N.Y. App. Div. 3d Dep't 1988).

If motion to restore case to trial calendar is made within one-year period of matter being stricken, it must be deemed timely under CLS CPLR § 3404. Maida v Rite Aid Corp., 210 A.D.2d 589, 619 N.Y.S.2d 812, 1994 N.Y. App. Div. LEXIS 11817 (N.Y. App. Div. 3d Dep't 1994).

Motion to restore case to trial calendar was deemed timely where it was made within one year of matter being stricken from trial calendar; court would not require action to be actually restored to trial calendar within one year to avoid automatic dismissal, as court backlog could delay actual restoration notwithstanding proper making of motion. Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Action against defendant should not have been dismissed for plaintiff's failure to timely file proof of service where defendant appeared in action during 120-day period following its commencement; thus, action was properly restored to trial calendar. Lieber v Sette-Juliano Constr. Corp., 228 A.D.2d 419, 643 N.Y.S.2d 420, 1996 N.Y. App. Div. LEXIS 6264 (N.Y. App. Div. 2d Dep't 1996).

Given inherent power of courts to control their calendars and supervise progress and conduct of litigation, court's sua sponte reinstatement of plaintiff's note of issue was not improvident where terms of court's order striking note of issue showed that court clearly intended to reinstate it as soon as plaintiff obtained new counsel, and defendant's reliance on CLS CPLR § 3404 was misplaced because one year did not elapse between striking and reinstatement. Murray-Gardner Mgmt. v Iroquois Gas Transmission Sys., L.P., 251 A.D.2d 954, 674 N.Y.S.2d 820, 1998 N.Y. App. Div. LEXIS 7730 (N.Y. App. Div. 3d Dep't 1998).

Court should have granted plaintiffs' motion to restore action to trial calendar, as circumstances indicated that action was not abandoned by plaintiffs where it had been removed from calendar on mutual consent to allow defendant to conduct further physical examination of one plaintiff, defendant apparently took no action to conduct physical exam, and case was subsequently dismissed pursuant to CLS CPLR § 3404 when plaintiffs failed to restore action within one year. Nicolich v Fitzgerald, 259 A.D.2d 741, 687 N.Y.S.2d 418, 1999 N.Y. App. Div. LEXIS 3180 (N.Y. App. Div. 2d Dep't 1999).

When action has been stricken from trial calendar and not restored within one year, motion to vacate automatic dismissal is required, and moving party must show merits of case, reasonable excuse for delay, absence of intent to abandon matter, and lack of prejudice to nonmoving party. Plaintiffs failed to rebut presumption of abandonment that attaches when matter has been automatically dismissed under CLS CPLR § 3404 where 1996 stipulation allowing plaintiffs to file note of issue was insufficient predicate for restoration of case to trial calendar, and there was no other activity in case between June 1996 and October 1998. Schwartz v Mandelbaum & Gluck, 266 A.D.2d 273, 698 N.Y.S.2d 252, 1999 N.Y. App. Div. LEXIS 13059 (N.Y. App. Div. 2d Dep't 1999).

Court improperly denied plaintiffs' motion to restore action to trial calendar on ground that they failed to submit affidavit of merit where there was no default on part of plaintiffs, and motion to restore action was made within one year of date it was marked off calendar; under circumstances, no affidavit of merit was required. Incanno v Sparacio, 269 A.D.2d 497, 703

N.Y.S.2d 242, 2000 N.Y. App. Div. LEXIS 1980 (N.Y. App. Div. 2d Dep't 2000), overruled in part, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

Proceeding under CLS RPTL Art 7 that was struck from trial calendar and not restored within one year was deemed abandoned and dismissed pursuant to CLS CPLR § 3404, and thus court should have treated petitioner's cross motion to restore as motion to vacate automatic dismissal. State v Town of Clifton, 275 A.D.2d 523, 712 N.Y.S.2d 652, 2000 N.Y. App. Div. LEXIS 8418 (N.Y. App. Div. 3d Dep't 2000).

To restore case dismissed under CLS CPLR § 3404, plaintiffs needed only to request restoration within one year of "off" marking, without any obligation to demonstrate reasonable excuse, meritorious action, lack of intent to abandon and lack of prejudice to defendants or some lesser burden, even though case was almost 10 years old and had appeared on trial calendar on 8 other occasions, and it could be safely assumed that use of § 3404 was not appropriate; trial court "set the course" for easy restoration when it chose to utilize § 3404 in proper exercise of its discretion, and prior cases applying varying standards for restoration, focusing on basis of "off" making, were inconsistent with purpose of § 3404 and should no longer be followed. Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

In a personal injury action, plaintiffs' motion to restore the case to the inquest calendar was properly granted because no written order was entered dismissing the action and restoration was automatic as plaintiffs' motion was made less than one year after the case was marked off the inquest calendar. Hirsch v Monroe Bus Corp., 24 A.D.3d 609, 808 N.Y.S.2d 342, 2005 N.Y. App. Div. LEXIS 14315 (N.Y. App. Div. 2d Dep't 2005).

Plaintiff who moved to restore case to civil court calendar within one year from date it was stricken was entitled to relief under 22 NYCRR 208.14(c) since case was not yet deemed abandoned under CLS CPLR § 3404, notwithstanding fact that return date of motion fell beyond

one-year period. Dunbar v G. & S. Partners, 146 Misc. 2d 641, 558 N.Y.S.2d 789, 1990 N.Y. Misc. LEXIS 355 (N.Y. App. Term 1990).

Where the trial court granted defendant's motion to strike the complaint and dismissed the action upon the injured parties' default in opposing the motion, the trial court held that the injured parties' could later move to restore the case to the trial calendar, and the injured parties did so within one year as required under N.Y. C.P.L.R. 3404, the trial court had no basis for dismissing the injured parties' action and properly vacated its dismissal of the action. Newsome v Akins, 6 A.D.3d 512, 774 N.Y.S.2d 405, 2004 N.Y. App. Div. LEXIS 4448 (N.Y. App. Div. 2d Dep't 2004).

Because the parties intention was clearly to remove a case from the active calendar long enough for plaintiff's attorney to locate the plaintiff, and because the defendant did not object at the hearing in which the plaintiff's attorney moved for such removal, the plaintiff could return the case to the active calendar anytime with in a year, despite inappropriate wording in the prior order that indicated the parties had stipulated to a discontinuance of the action. Johnson v Rivera, 10 A.D.3d 288, 781 N.Y.S.2d 22, 2004 N.Y. App. Div. LEXIS 10199 (N.Y. App. Div. 1st Dep't 2004).

**32. —More than 1 year and up to 3 years**

Where no steps to prosecute a personal injury action were taken for 18 months after pretrial examinations were completed and the clerk dismissed the action, the Special Term improvidently exercised its discretion to open the default and vacate the dismissal. Pisaturo v McCloud, 26 A.D.2d 610, 271 N.Y.S.2d 94, 1966 N.Y. App. Div. LEXIS 3976 (N.Y. App. Div. 4th Dep't 1966).

Where action was begun July 6, 1966, the issue was joined and the case appeared on the calendar on September 26, 1969, and was struck off for failure to appear and then dismissed September 26, 1970 pursuant to CPLR 3404 and no action was taken until January 1972 when motion was made to open default and restore action to calendar, granting of motion was unwarranted in light of the extended delay without consideration of prejudice to defendant. Kohn

v Sabra Trucking & Warehouse, Inc., 41 A.D.2d 521, 339 N.Y.S.2d 782, 1973 N.Y. App. Div. LEXIS 5295 (N.Y. App. Div. 1st Dep't 1973).

Inasmuch as more than a year had elapsed without entry of order restoring case to trial calendar, plaintiffs' application to vacate four preclusion orders was premature until default was vacated. Farmer v L. B. Smith, Inc., 52 A.D.2d 1068, 384 N.Y.S.2d 331, 1976 N.Y. App. Div. LEXIS 12993 (N.Y. App. Div. 4th Dep't 1976).

The court's denial of the plaintiffs' motion to restore an action to the trial calendar, which motion was made two years after the action was originally marked off the calendar and more than one year after it was automatically dismissed pursuant to CPLR § 3404, was not warranted despite the fact that explanation for the delay was inadequate, where the delay was partly accounted for by illness and the pendency of settlement negotiations and where the imposition of the heavier costs rather than complete dismissal was more in accord with the dictates of justice. Stiliho v Fine, 79 A.D.2d 913, 434 N.Y.S.2d 427, 1981 N.Y. App. Div. LEXIS 9785 (N.Y. App. Div. 1st Dep't 1981).

The trial court erred in dismissing a case as abandoned under CPLR R 3404, where plaintiff had actively pursued his case by way of discovery and had filed a new note of issue a little more than a year thereafter. Morhaim v Morhaim, 81 A.D.2d 790, 439 N.Y.S.2d 33, 1981 N.Y. App. Div. LEXIS 11436 (N.Y. App. Div. 1st Dep't 1981).

It was abuse of discretion to grant medical malpractice plaintiff's motion to vacate default judgment where plaintiff failed to overcome presumption of abandonment created by CLS CPLR § 3404 since her motion to vacate default was not made until more than 2 years after date case was marked off calendar, she failed to establish meritorious claim, and her proffered excuse for default was insufficient. Friedberg v Bay Ridge Orthopedic Associates, P. C., 122 A.D.2d 194, 504 N.Y.S.2d 731, 1986 N.Y. App. Div. LEXIS 59524 (N.Y. App. Div. 2d Dep't 1986).

Court properly denied plaintiffs' motion to restore negligence action to trial calendar where plaintiffs offered no excuse to justify 2-year delay in bringing motion and there was no indication

that injured plaintiff sustained “serious injury.” Bunyan v Goldwasser, 131 A.D.2d 805, 517 N.Y.S.2d 85, 1987 N.Y. App. Div. LEXIS 48251 (N.Y. App. Div. 2d Dep't 1987).

Infant plaintiff was not entitled to vacatur of judgment dismissing her personal injury action under CLS CPLR § 3404 where (1) matter had been struck on plaintiff’s failure to proceed to trial in January 1985, (2) pending offer of settlement was withdrawn in July 1985, and plaintiff’s counsel conceded that his office ceased settlement discussions in June 1985 when his firm was “substituted by other counsel,” (3) in March 1987, plaintiff rehired counsel with respect to lawsuit, and (4) no explanation for delay in bringing motion was offered. Aleshin v Long Beach, 147 A.D.2d 604, 538 N.Y.S.2d 13, 1989 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 2d Dep't 1989).

To restore stricken case to trial calendar, plaintiffs who fail to move for restoration until motion to dismiss is made, and more than one year after case is stricken off calendar, must show (1) that they possess meritorious cause of action, (2) that defendants would not be prejudiced by restoration, (3) that they had acceptable excuse for delay, and (4) that they had not intended to deliberately default or abandon action. Dublar v Miller, 196 A.D.2d 478, 601 N.Y.S.2d 848, 1993 N.Y. App. Div. LEXIS 7705 (N.Y. App. Div. 2d Dep't 1993).

Court erred in granting plaintiffs’ motion to restore case to calendar based solely on fact that, at time case was marked off calendar, parties had entered into stipulation to restore case to calendar on consent, since (1) agreement to restore on consent was insufficient ground on which to predicate restoration, especially as there had been no activity whatsoever for 17-month period during which case was off calendar, and (2) plaintiffs failed to submit affidavit of meritorious cause of action or to show that defendants would not be prejudiced by restoration. Kopilas v Peterson, 206 A.D.2d 460, 614 N.Y.S.2d 562, 1994 N.Y. App. Div. LEXIS 7486 (N.Y. App. Div. 2d Dep't 1994).

Court did not abuse its discretion in denying plaintiff’s motion to vacate order of dismissal in light of (1) plaintiff’s history of recalcitrance in complying with discovery directives and addressing substantive issues relating to liability and damages, (2) 2 ½ -year period of inactivity following

striking of plaintiff's trial note of issue, and (3) plaintiff's failure to contact court during 90-day demand issued under CLS CPLR § 3216; moreover, materials submitted with plaintiff's motion to vacate failed to respond to court's request for specific liability and damage information. Meade v L.A. Lama Agency Inc., 260 A.D.2d 979, 689 N.Y.S.2d 302, 1999 N.Y. App. Div. LEXIS 4417 (N.Y. App. Div. 3d Dep't 1999).

Plaintiffs were entitled to have their action restored to trial calendar, even though they took no action during 13 months immediately preceding motion to restore, where (1) their expert clearly articulated facts and opinions which, if believed, proved actionable medical malpractice by defendant in failing to obtain X-ray, which failure led to later hip surgeries and complete replacement, (2) their counsel provided reasonable excuse based on misconception about relationship between present action and related negligence action, (3) plaintiffs served discovery and opposed consolidation motion within year before CLS CPLR § 3404 dismissal, and (4) no meaningful prejudice to defendant resulted from brief interruption in disclosure, because Appellate Division would provide for additional pretrial discovery in granting new physical examination and deposition of injured plaintiff. Campbell v Yanoff, 273 A.D.2d 166, 710 N.Y.S.2d 65, 2000 N.Y. App. Div. LEXIS 7514 (N.Y. App. Div. 1st Dep't 2000).

Landlord's motion to restore summary holdover proceeding to trial calendar more than one year after it was marked off calendar would not be treated as motion to vacate dismissal for abandonment, where only activity by landlord between date proceeding was marked off calendar and restoration motion was landlord's motion for money judgment due to respondent's failure to pay use and occupancy, made one month after proceeding was marked off. 474 W. 150th St. Realty Corp. v Lewis, 166 Misc. 2d 954, 636 N.Y.S.2d 263, 1995 N.Y. Misc. LEXIS 592 (N.Y. Civ. Ct. 1995).

**33. —More than 3 years and up to 6 years**

Where, despite 1971 determination of Supreme Court, Appellate Division, which affirmed order granting defendants' motion for protective order, plaintiff permitted case to remain dormant on

general docket for four more years before moving to restore case for trial, motion to restore case to calendar would be denied and complaint dismissed for want of prosecution. Tallman v William S. Merrell Co., 52 A.D.2d 1080, 384 N.Y.S.2d 589, 1976 N.Y. App. Div. LEXIS 13009 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 42 N.Y.2d 822, 396 N.Y.S.2d 650, 364 N.E.2d 1343, 1977 N.Y. LEXIS 2154 (N.Y. 1977).

Where 1971 protective order granted by Supreme Court, Appellate Division constituted ample notice to plaintiff that special term's prior notation "Do not dismiss" from general docket was without substance and constituted stern notice to plaintiff that there had been too much delay in prosecution, and plaintiff, over four years later, sought to proceed with case, history of action revealed flagrant lack of attention to its prosecution and therefore motion to restore case to trial calendar would be denied and complaint dismissed. Miner v William S. Merrell Co., 52 A.D.2d 1080, 384 N.Y.S.2d 590, 1976 N.Y. App. Div. LEXIS 13010 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 42 N.Y.2d 821, 396 N.Y.S.2d 649, 364 N.E.2d 1342, 1977 N.Y. LEXIS 2153 (N.Y. 1977).

**34. —More than 6 years and up to 9 years**

Where negligence action to recover damages for personal injuries was dismissed when plaintiff was not ready to proceed to trial on date set more than seven years after action was commenced, plaintiff's attorney's affidavit claiming that plaintiff's physician had died and that his records had been sent to another doctor was insufficient grounds to warrant restoration of case to trial calendar, in that motion was not accompanied by affidavit by person having knowledge of facts indicating viable cause of action. Ruggiero v Elbin Realty, 51 A.D.2d 1011, 380 N.Y.S.2d 773, 1976 N.Y. App. Div. LEXIS 11775 (N.Y. App. Div. 2d Dep't), app. dismissed, 39 N.Y.2d 708, 1976 N.Y. LEXIS 3371 (N.Y. 1976), app. dismissed, 39 N.Y.2d 891, 386 N.Y.S.2d 394, 352 N.E.2d 581, 1976 N.Y. LEXIS 2834 (N.Y. 1976).

It was abuse of discretion to allow plaintiffs to revive their negligence action originally brought in 1974 and deemed abandoned and dismissed in 1982, where plaintiffs were given various

opportunities to remedy default but offered no explanation for delay and where defendants would suffer prejudice if forced to defend action after such lengthy delay. Beck v Dillman, 125 A.D.2d 433, 509 N.Y.S.2d 365, 1986 N.Y. App. Div. LEXIS 62729 (N.Y. App. Div. 2d Dep't 1986).

**35. —More than 9 years**

Plaintiff was not entitled to restoration of action for personal injuries allegedly sustained through negligent administration of prescription drug where (1) defendant doctors, whose testimony would have been crucial to plaintiff's allegations, were now deceased, and (2) many of acts complained of occurred more than 10 years previously, so that of remaining witnesses might not be reliable. Gray v Sandoz Pharmaceuticals, Div. of Sandoz, Inc., 158 A.D.2d 583, 551 N.Y.S.2d 551, 1990 N.Y. App. Div. LEXIS 1989 (N.Y. App. Div. 2d Dep't), app. dismissed, 75 N.Y.2d 1005, 557 N.Y.S.2d 312, 556 N.E.2d 1119, 1990 N.Y. LEXIS 1096 (N.Y. 1990).

**36. More than 1 dismissal**

It was an abuse of discretion to vacate a dismissal of an action which had been four times called for trial without an appearance by plaintiff, twice dismissed and once marked off the calendar, but each time restored. Ersson v Westerich, 24 A.D.2d 435, 260 N.Y.S.2d 673, 1965 N.Y. App. Div. LEXIS 3870 (N.Y. App. Div. 1st Dep't 1965), app. dismissed, 18 N.Y.2d 578, 1966 N.Y. LEXIS 2091 (N.Y. 1966).

Case which has been marked "off" Supreme Court calendar due to plaintiff's failure to answer calendar and which has been restored to calendar by order of restoration conditioned on final determination of appeals pending and upon completion of discovery proceedings, is not subject to CPLR 3404 upon allegedly being marked off calendar for second time. Martin v Heritage State, Ltd., 116 A.D.2d 957, 498 N.Y.S.2d 286, 1986 N.Y. App. Div. LEXIS 51728 (N.Y. App. Div. 3d Dep't 1986).

Compliance with 22 NYCRR § 208.14(c)’s one-year deadline is necessary but not sufficient condition for motion to restore; notwithstanding such compliance, if case has been marked off more than once, it may not be restored. Centennial Restorations Co. v Wyatt, 248 A.D.2d 193, 669 N.Y.S.2d 585, 1998 N.Y. App. Div. LEXIS 2410 (N.Y. App. Div. 1st Dep't 1998).

**37. Pro se representation**

In legal malpractice action wherein Supreme Court denied plaintiff’s motion to restore action to Trial Calendar, Appellate Division would remit matter for factual findings concerning striking of case from trial calendar and whether or not plaintiff made timely and meritorious prior motion to restore where (1) there was no evidence that plaintiff intended to abandon action, (2) plaintiff was proceeding pro se, and (3) there was evidence that plaintiff had previously moved to restore action to trial calendar, which motion had been lost or mislaid in court files. Dame v Feinman, 134 A.D.2d 477, 521 N.Y.S.2d 400, 1987 N.Y. App. Div. LEXIS 50672 (N.Y. App. Div. 2d Dep't 1987).

**38. Settlement negotiations**

A pending action should not be “automatically” dismissed while the parties are actively engaged in settlement negotiations, and rules which provide for the dismissal of abandoned cases were not intended to apply where litigation is “actually in progress.” Tactuk v Freiberg, 24 A.D.2d 503, 261 N.Y.S.2d 438, 1965 N.Y. App. Div. LEXIS 3905 (N.Y. App. Div. 2d Dep't 1965).

Negotiations for settlement do not provide excuse for delay, in proceeding to trial, beyond a brief interval after last communication. Cislo v Di Pasquale, 51 A.D.2d 874, 380 N.Y.S.2d 143, 1976 N.Y. App. Div. LEXIS 11496 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs (husband and wife) were not entitled to restoration of abandoned case to calendar where (1) defendant made settlement offer during trial recess which was accepted by husband, who then asked for time to consult with wife, (2) case was discontinued and marked off trial

calendar, (3) plaintiffs moved for restoration more than one year later, (4) the only excuse proffered for delay was that wife continued to reject offer and that plaintiffs were attempting to retain other counsel, (5) plaintiffs failed to include affidavit of merit, and (6) defendant averred that 2 witnesses were no longer available. Leone v Bates Plan-A-Home of Sidney, Inc., 144 A.D.2d 759, 534 N.Y.S.2d 751, 1988 N.Y. App. Div. LEXIS 10917 (N.Y. App. Div. 3d Dep't 1988).

In action which stemmed from longstanding claim by county that it was owed specific amount for costs incurred in abating public nuisance which had existed on lot formerly owned by defendant, court erred in refusing to restore case to trial calendar where (1) parties entered into stipulation of settlement which required approval of county board of supervisors, (2) at time of settlement, court stated that action could be reinstated by April 30 in absence of approval by board, (3) parties thereafter agreed to various extensions of April 30 deadline, and (4) within extension agreed to by parties, board failed to approve settlement and county requested that case be restored. State v Warren Bros. Co., 190 A.D.2d 728, 593 N.Y.S.2d 308, 1993 N.Y. App. Div. LEXIS 1032 (N.Y. App. Div. 2d Dep't 1993).

In determining intent to abandon action, lack of subsequent litigation activity was not particularly germane where parties had completed discovery at time case was marked off calendar, but pro se plaintiffs' attempt to reopen previously stalled settlement negotiations, and their continuing search for another attorney, sufficiently evidenced their intent to pursue action. Cippitelli v Town of Niskayuna, 277 A.D.2d 540, 715 N.Y.S.2d 110, 2000 N.Y. App. Div. LEXIS 11112 (N.Y. App. Div. 3d Dep't 2000).

There was no basis to restore the plaintiff's personal injury action to the trial calendar under N.Y. C.P.L.R. 2104, 3404 after the plaintiff notified the court that the action had settled because the case was not abandoned, misunderstanding "gross" proceeds with "net" did not establish a meritorious action, and the defendant would be prejudiced by the restoration. Lopez v Podgurski, 959 N.Y.S.2d 396, 38 Misc. 3d 1015, 2013 N.Y. Misc. LEXIS 59 (N.Y. County Ct. 2013).

Because the plaintiff continued to supply extensive discovery materials to the defendants and engaged in settlement negotiations after the case had been marked “off” the trial calendar, and because the plaintiff demonstrated a reasonable excuse for the delay and a meritorious cause of action, the plaintiff’s personal injury action was restored to the trial calendar pursuant to N.Y. C.P.L.R. 3404, 5015, and N.Y. Comp. Codes R. & Regs. tit. 22, § 202.21(f). Chrysostomou v Alladin, 901 N.Y.S.2d 905, 24 Misc. 3d 1247(A), 2009 N.Y. Misc. LEXIS 2300 (Sept. 9, 2009).

**39. Stipulations; consensual removal or dismissal**

Where some 18 months had elapsed since medical malpractice case was taken off trial calendar, plaintiff had delayed some nine months in filing stipulation with defendant providing that case be restored to calendar and plaintiff made no showing of merit, trial court did not err in denying motion to restore case to calendar; however, in light of stipulation and fact that defendant had taken physical examination of plaintiff about one year previously, denial should have been without prejudice to plaintiff’s further application. Williams v Giattini, 49 A.D.2d 337, 374 N.Y.S.2d 642, 1975 N.Y. App. Div. LEXIS 10908 (N.Y. App. Div. 1st Dep't 1975).

Notwithstanding alleged agreement that defendant would not oppose restoration, plaintiff was not entitled to have case restored to trial calendar where plaintiff’s proffered excuse for delay was inadequate and his affidavits of merit unsatisfactory; parties could not contract away court’s self-executing power to dismiss pursuant to CLS CPLR § 3404, and although written stipulation satisfying CLS CPLR § 2104 would have been worth some consideration, alleged oral agreement was worth little if any consideration where supposedly made in courthouse corridor and evidenced only by conflicting assertions of counsel at informal hearing. Bergan v Home for Incurables, 124 A.D.2d 517, 508 N.Y.S.2d 434, 1986 N.Y. App. Div. LEXIS 61846 (N.Y. App. Div. 1st Dep't 1986).

Court properly denied motion to dismiss personal injury action for failure to prosecute (CLS CPLR § 3404), and properly granted plaintiff’s motion to restore case to calendar, where parties had stipulated in open court to mark action off calendar to pursue other legal matters relevant to

action. Sannella v Di Costanzo & Cutrona, 136 A.D.2d 617, 523 N.Y.S.2d 778, 1988 N.Y. App. Div. LEXIS 356 (N.Y. App. Div. 2d Dep't 1988).

In action for medical malpractice and strict products liability, court properly vacated dismissal under CLS CPLR § 3404, since circumstances leading up to removal of case from trial calendar were not within ambit of § 3404 where case had been removed by mutual consent and there was activity in case in interim; even if § 3404 were applicable, restoration to trial calendar was proper since (1) plaintiffs' allegations that defendants prescribed birth control pill Ovral without obtaining plaintiff's medical history, which would have contraindicated use of Ovral, established meritorious causes of action, and (2) plaintiffs demonstrated valid excuse for default and lack of significant prejudice to defendants. Denver v American Home Products Corp., 138 A.D.2d 670, 526 N.Y.S.2d 485, 1988 N.Y. App. Div. LEXIS 3239 (N.Y. App. Div. 2d Dep't 1988).

It was error to grant plaintiffs' motion to vacate automatic dismissal of medical malpractice action under CLS CPLR § 3404, even though parties' stipulation obligated defendant to consent to "restoration" of action on timely motion following completion of discovery, since plaintiffs' long delays in seeking to resume prosecution of action were unexplained, there was no showing that those delays had not occasioned prejudice, and plaintiffs failed to submit affidavit by medical expert demonstrating merit to their allegations that defendant departed from good and accepted medical practice. Escobar v Deepdale General Hosp., 172 A.D.2d 486, 567 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 2d Dep't 1991).

Court erred in granting plaintiffs' motion to restore case to calendar based solely on fact that, at time case was marked off calendar, parties had entered into stipulation to restore case to calendar on consent, since (1) agreement to restore on consent was insufficient ground on which to predicate restoration, especially as there had been no activity whatsoever for 17-month period during which case was off calendar, and (2) plaintiffs failed to submit affidavit of meritorious cause of action or to show that defendants would not be prejudiced by restoration. Kopilas v Peterson, 206 A.D.2d 460, 614 N.Y.S.2d 562, 1994 N.Y. App. Div. LEXIS 7486 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Action for property damage, personal injuries, loss of income, and severe emotional distress as result of water seepage into plaintiffs' apartment would not be dismissed for want of prosecution under CLS CPLR § 3216 where series of misfortunes provided excuse for delay, plaintiff daughter underwent 2 surgical procedures for broken leg and surgery for abdominal condition, plaintiff father was in failing health during pendency of action from effects of coronary bypass surgery and stroke, he devoted his time to caring for his elderly wife who suffered from Parkinson's disease, credibly meritorious claim could be gleaned from affidavit detailing damage to apartment and stipulation granting rent abatement, and defendants alleged no particular prejudice from delay. Weppler v Pretium Assocs., 245 A.D.2d 249, 666 N.Y.S.2d 643, 1997 N.Y. App. Div. LEXIS 13407 (N.Y. App. Div. 1st Dep't 1997).

Dismissal of divorce action would be vacated, and action would be restored to trial calendar, even though parties failed to appear at preliminary conference, where both parties denied receiving notice of conference, defendant joined in plaintiff's motion to vacate, and it would be waste of judicial resources to require parties to relitigate various issues and again engage in discovery, forensics, and appointment of law guardian. Pearlman v Pearlman, 251 A.D.2d 390, 673 N.Y.S.2d 322, 1998 N.Y. App. Div. LEXIS 6602 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs were entitled to restoration of case to trial calendar where they voluntarily withdrew it from calendar without opposition from defendant and with leave to restore it on 10 days notice,

and their motion to restore was timely. Cohen v Seiden, 266 A.D.2d 334, 698 N.Y.S.2d 151, 1999 N.Y. App. Div. LEXIS 11533 (N.Y. App. Div. 2d Dep't 1999).

In action by insurer against its insured to recover unpaid premiums, court properly granted plaintiff's motion to vacate automatic dismissal of action under CLS CPLR § 3404 where action was marked off calendar pursuant to parties' stipulation, plaintiff entered stipulation to accommodate defendant's need to bring third-party action against insurance broker, and stipulation was followed with immediate and significant third-party practice, which included commencement and prosecution of second third-party action against yet another insurance broker, who was only party to oppose instant motion. Colonia Ins. Co. v S&A Stores, Inc., 272 A.D.2d 209, 708 N.Y.S.2d 381, 2000 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1st Dep't 2000).

On motion to vacate automatic dismissal of case, distinction exists between case removed from calendar on consent and one stricken without consent, but circumstances of consensual removal are merely factor for court to consider and are not dispositive of motion. Dalto v 3660 Park Wantagh Owners, Inc., 275 A.D.2d 296, 712 N.Y.S.2d 58, 2000 N.Y. App. Div. LEXIS 8590 (N.Y. App. Div. 2d Dep't 2000).

Presumption that plaintiff had abandoned action was rebutted by parties' stipulation to restore it to calendar, and by plaintiff's compliance with substantial discovery requests; also, by signing stipulation, defendants waived any claim of prejudice. Williams v Rockefeller Ctr. Props., 282 A.D.2d 285, 723 N.Y.S.2d 183, 2001 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 1st Dep't 2001).

Because a plaintiff settled a partition action without a reservation of any rights, the settlement rendered the plaintiff's prior appeal academic; consequently, without a claim of fraud, collusion, or mistake, or such other factors as would vitiate a contract, the plaintiff's N.Y. C.P.L.R. 3404 motion to restore the action to the trial calendar should have been denied. Ramnarain v Ramnarain, 46 A.D.3d 655, 846 N.Y.S.2d 668, 2007 N.Y. App. Div. LEXIS 12584 (N.Y. App. Div. 2d Dep't 2007), app. dismissed, 10 N.Y.3d 785, 857 N.Y.S.2d 20, 886 N.E.2d 782, 2008 N.Y. LEXIS 552 (N.Y. 2008), app. dismissed, 11 N.Y.3d 885, 873 N.Y.S.2d 257, 901 N.E.2d 751, 2008 N.Y. LEXIS 3998 (N.Y. 2008).

**40. Sua sponte dismissal by court**

In an action to recover damages for a breach of contract and for an accounting, the sua sponte vacatur of the judgment of dismissal was error where the plaintiff never sought such relief and where the defendants were never given an opportunity to oppose the granting of such relief. Tender Care, Inc. v Selin, 90 A.D.2d 547, 455 N.Y.S.2d 122, 1982 N.Y. App. Div. LEXIS 18601 (N.Y. App. Div. 2d Dep't 1982).

Plaintiffs were entitled to vacatur of court's sua sponte dismissal of action, because procedural facts did not present rare instance in which court could properly invoke its inherent power to dismiss action for attorneys' failure to appear at status conference, where parties did not receive notice of conference or dismissal, and they engaged in pretrial litigation for over 3 years before finally becoming aware that case had been dismissed when defendants' motion to dismiss was rejected. Stonehill Publ'g v Clancy-Cullen Storage Co., 251 A.D.2d 25, 673 N.Y.S.2d 665, 1998 N.Y. App. Div. LEXIS 6411 (N.Y. App. Div. 1st Dep't 1998).

Given inherent power of courts to control their calendars and supervise progress and conduct of litigation, court's sua sponte reinstatement of plaintiff's note of issue was not improvident where terms of court's order striking note of issue showed that court clearly intended to reinstate it as soon as plaintiff obtained new counsel, and defendant's reliance on CLS CPLR § 3404 was misplaced because one year did not elapse between striking and reinstatement. Murray-Gardner Mgmt. v Iroquois Gas Transmission Sys., L.P., 251 A.D.2d 954, 674 N.Y.S.2d 820, 1998 N.Y. App. Div. LEXIS 7730 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff, seeking to have case restored to active calendar, had burden to support his claim that CLS CPLR § 3404 did not apply since case might have been marked off as result of clerk's administrative call. Kisch v St. Vincent's Hosp. & Med. Ctr., 279 A.D.2d 341, 718 N.Y.S.2d 356, 2001 N.Y. App. Div. LEXIS 438 (N.Y. App. Div. 1st Dep't 2001).

While sanctions were warranted for the continued failure of a tenant's counsel to comply with the pre-trial orders issued under N.Y. Unif. R. Trial Cts. § 202.26 N.Y. Comp. Codes R. & Regs. tit. 22, §§ 200.1 to 202.60, 215.1 to 220.12 (Uniform Trial Court Rules), dismissal was too drastic a remedy as counsel was never warned the continued noncompliance would result in sua sponte dismissal under N.Y. C.P.L.R. 3404, and the tenant apparently bore no responsibility for the counsel's actions. Alveranga-Duran v New Whitehall Apts., L.L.C., 40 A.D.3d 287, 836 N.Y.S.2d 24, 2007 N.Y. App. Div. LEXIS 5700 (N.Y. App. Div. 1st Dep't 2007), transferred, 2008 N.Y. Misc. LEXIS 9963 (N.Y. Sup. Ct. June 20, 2008).

Sua sponte dismissal of a legal malpractice case was error because the trial court had vacated the note of issue, and N.Y. C.P.L.R. 3404 was inapplicable to pre-note of issue cases, and thus did not provide a basis for the direct dismissal; further, the N.Y. C.P.L.R. 3216 preconditions for dismissal of an action in pre-note of issue status for want of prosecution were not met. Suburban Restoration Co. v Viglotti, 54 A.D.3d 750, 863 N.Y.S.2d 724, 2008 N.Y. App. Div. LEXIS 6716 (N.Y. App. Div. 2d Dep't 2008).

Because there can be no automatic dismissal under changes to the statute, if a plaintiff shows a reasonable excuse for failing to prosecute the cause of action, a dismissed case should be restored to the docket. LoFredo v CMC Occupational Health Servs., P.C., 189 Misc. 2d 781, 735 N.Y.S.2d 909, 2001 N.Y. Misc. LEXIS 702 (N.Y. App. Term 2001), overruled, Chavez v 407 Seventh Ave. Corp., 807 N.Y.S.2d 785, 10 Misc. 3d 33, 2005 N.Y. Misc. LEXIS 2452 (N.Y. App. Term 2005).

Trial court erred in sua sponte dismissing pursuant to N.Y. C.P.L.R. 3404 plaintiffs' personal injury action against an elevator company; no note of issue placing this action on the trial calendar was ever filed, and the action was in discovery at the time it was marked off. Millien v Millar Elevator Indus., 5 A.D.3d 641, 774 N.Y.S.2d 764, 2004 N.Y. App. Div. LEXIS 3316 (N.Y. App. Div. 2d Dep't 2004).

**ii. Proofs**

**41. Generally**

Motion to vacate default and to restore action to trial calendar should have been granted where action for wrongful death was commenced within six months of death of decedent, note of issue without statement of readiness was filed approximately one year later and action was marked off calendar for failure to file a statement of readiness one year subsequent to that, action having been dismissed one year subsequent. Sloan v Glashow, 29 A.D.2d 963, 289 N.Y.S.2d 44, 1968 N.Y. App. Div. LEXIS 4295 (N.Y. App. Div. 2d Dep't 1968).

Wife was entitled to restoration of matrimonial action to calendar for determination of ancillary issue of alimony where (1) husband moved for reverse summary judgment awarding divorce to wife based on his own default in answering, and sought judgment granting final divorce and severing all other issues for determination at later date, (2) judgment of divorce was entered and stated that court retained jurisdiction for purposes of determination of ancillary issues such as alimony, (3) husband thereafter continued to make payments to wife pursuant to prior order of support, (4) about 3 ½ years later, husband obtained vacation and termination of support order on basis of divorce judgment, (5) wife then sought restoration of case to calendar, and (6) court denied motion on basis that wife already had full and fair opportunity to litigate issue and was barred by res judicata; wife did not have full and fair opportunity to litigate issue as shown by husband’s earlier summary judgment motion papers, which limited question before court solely to default judgment based on default in answering and which requested that issue of alimony be severed for future consideration, and wife’s delay in seeking resolution of alimony issue was caused by husband’s continued payment of support under prior order. Alster v Alster, 159 A.D.2d 671, 552 N.Y.S.2d 968, 1990 N.Y. App. Div. LEXIS 3596 (N.Y. App. Div. 2d Dep't 1990).

Plaintiffs, who inadvertently filed note of issue which could not, under 22 NYCRR former 202.56(d)(2), have been permissibly filed at such time because medical malpractice panel proceedings had not been completed, were entitled to relief from court clerk’s automatic dismissal of their action pursuant to CLS CPLR § 3404 after note of issue was struck from court

calendar and not restored thereto within one year of dismissal, since subsequent striking of note of issue was not attributable to act or omission in nature of default within meaning of § 3404. Kaplan v Elkind, 192 A.D.2d 643, 596 N.Y.S.2d 456, 1993 N.Y. App. Div. LEXIS 3938 (N.Y. App. Div. 2d Dep't 1993).

It was error to deny plaintiff's motion to renew and reargue motion to restore where she submitted affidavit of merit setting for details of accident, and court, in striking action from calendar, did not issue formal order setting forth its disposition of case, so that plaintiff's counsel's mistaken belief that case was only marked off was not unreasonable. Telep v Republic Elevator Corp., 267 A.D.2d 57, 699 N.Y.S.2d 380, 1999 N.Y. App. Div. LEXIS 12658 (N.Y. App. Div. 1st Dep't 1999).

Court properly granted plaintiff's motion to restore matter to calendar where it had been marked off calendar due to failure of both parties to appear at pre-trial conference and erroneous belief of both parties that case was to be placed by court on referee's calendar for determination of issue of damages, plaintiff had obtained summary judgment on issue of liability, there was no intent by plaintiff to abandon matter, and there was no prejudice to defendants. Goldberg, Weprin & Ustin v Borg, 271 A.D.2d 265, 707 N.Y.S.2d 40, 2000 N.Y. App. Div. LEXIS 4077 (N.Y. App. Div. 1st Dep't 2000).

Court erred in denied plaintiff's motion, in effect, to restore action since defendant appeared in action by service of answer within 120 days after filing of summons and complaint without raising objection to defective filing. Livingston v Wagi, 284 A.D.2d 378, 727 N.Y.S.2d 315, 2001 N.Y. App. Div. LEXIS 6073 (N.Y. App. Div. 2d Dep't 2001).

**42. Abandonment; intent to abandon, generally**

Motion to vacate automatic dismissal of action should be granted where the record indicated a meritorious cause of action, no intention to abandon the action on the part of plaintiff and no merit to defendant's claim of prejudice. Ackerman v Perchikoff, 30 A.D.2d 672, 291 N.Y.S.2d 894, 1968 N.Y. App. Div. LEXIS 3791 (N.Y. App. Div. 2d Dep't 1968).

Under CLS CPLR § 3404, restoration of action to calendar requires showing of merit to moving party's claim, lack of prejudice to other parties, lack of intent to abandon or deliberately default in action, and reasonable excuse for moving party's delay. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

In an action to recover damages for personal injuries sustained by the plaintiff, the court did not dismiss the plaintiff's complaint pursuant to this provision for failure to file a timely 90 day note of issue because the plaintiff demonstrated that she had a meritorious cause of action and did not intend to abandon her complaint. Spaulding v AVR Realty Co., LLC, 60 Misc. 3d 825, 79 N.Y.S.3d 894, 2018 N.Y. Misc. LEXIS 2634 (N.Y. Sup. Ct. 2018).

**43. —Insufficient proof of abandonment**

Various procedural steps taken by parties to action, subsequent to time, that the matter was marked off calendar, supported conclusion that plaintiff, moving to vacate dismissal of action, never intended to abandon same. Kelly-Masp Piledriving Corp. v Vita Food Products, Inc., 52 A.D.2d 559, 382 N.Y.S.2d 321, 1976 N.Y. App. Div. LEXIS 12121 (N.Y. App. Div. 1st Dep't 1976).

Automatic dismissal provisions of CLS CPLR § 3404 were applicable where personal injury action commenced in December, 1981 was struck from calendar with consent of parties and Justice presiding in October, 1984; accordingly, court had discretion to vacate dismissal, in view of (1) correspondence between parties' counsel and expert, indicating plaintiff's lack of intent to abandon case, (2) plaintiff's documented difficulty in obtaining report from expert she had retained, demonstrating sufficient excuse for delay, (3) plaintiff's showing of substantial possibility of success on merits, and (4) lack of showing that defendant was prejudiced by delay. Curtin v Grand Union Co., 124 A.D.2d 918, 508 N.Y.S.2d 333, 1986 N.Y. App. Div. LEXIS 62239 (N.Y. App. Div. 3d Dep't 1986).

Court properly denied defendant's motion to vacate plaintiff's note of issue and certificate of readiness and to strike action from trial calendar where motion practice and further discovery

conducted by parties subsequent to time case was marked off trial calendar clearly evinced intent to pursue rather than abandon action, and many of delays were caused by defendant's own conduct. Beltrani v Mirabile, 141 A.D.2d 688, 529 N.Y.S.2d 573, 1988 N.Y. App. Div. LEXIS 6968 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs were entitled to have action restored to calendar where (1) on July 14, plaintiffs' counsel obtained order granting him permission to withdraw as plaintiffs' counsel, (2) in August, copy of order was served on plaintiffs, but they were not served with notice to appoint another attorney, (3) when plaintiffs failed to appear at subsequent calendar call, defendant moved to dismiss, and (4) on November 14, court ruled that plaintiffs had abandoned action and granted motion to dismiss; following removal of plaintiffs' counsel, no further action could be taken against plaintiffs without leave of court until 30 days after notice to appoint another attorney had been served. Leonard Johnson & Sons Enterprises, Ltd. v Brighton Commons Partnership, 171 A.D.2d 1059, 579 N.Y.S.2d 605, 1991 N.Y. App. Div. LEXIS 6803 (N.Y. App. Div. 4th Dep't 1991).

It was abuse of discretion to dismiss action as abandoned where (1) during period after note of issue and certificate of readiness were stricken from calendar, parties' attorneys engaged in discovery proceedings and motion practice, and otherwise proceeded with course of conduct evincing lack of intent to abandon, (2) although plaintiffs' counsel failed to meet other time restrictions imposed by court, he filed second note of issue and certificate of readiness on court's final direction that he do so by certain date, and only then did defendants' counsel move to dismiss under CLS CPLR § 3404, and (3) there was no indication of prejudice to defendants. Drucker v Progressive Enterprises, Inc., 172 A.D.2d 481, 567 N.Y.S.2d 837, 1991 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 2d Dep't 1991).

Court should have vacated its prior order dismissing complaint where case had been placed on calendar designated as "marked off, case active" with consent of all parties during pendency of 2 prior appeals (as to both of which plaintiff was completely successful) and there was no indication of any dilatoriness on plaintiff's part in pursuing those appeals, clearly demonstrating

lack of intent to abandon action and reasonable excuse for delay. Nedell v Sprigman, 227 A.D.2d 163, 641 N.Y.S.2d 837, 1996 N.Y. App. Div. LEXIS 4855 (N.Y. App. Div. 1st Dep't 1996).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Court improperly denied plaintiff's motion to restore action to trial calendar where delay was around 20 months, there was no prejudice to defendant, plaintiff's activities during interim evinced no intent to abandon action, discovery was complete, and plaintiff provided adequate proof of merits of action. Weiss v City of New York, 247 A.D.2d 239, 669 N.Y.S.2d 33, 1998 N.Y. App. Div. LEXIS 984 (N.Y. App. Div. 1st Dep't 1998).

Court erred in denying plaintiff's motion to restore case to trial calendar, even though plaintiff submitted unsigned, unsworn affidavit of merit, where verified complaint and bill of particulars revealed that he was seriously and permanently injured, there were numerous family tragedies suffered by his counsel, there was no intent to abandon action, and delay prejudiced plaintiff more than defendants. Nicholos v Cashelard Restaurant, 249 A.D.2d 187, 672 N.Y.S.2d 98, 1998 N.Y. App. Div. LEXIS 4681 (N.Y. App. Div. 1st Dep't 1998).

Plaintiffs' lack of intent to abandon action was demonstrated by fact that case had been marked off calendar because of death of plaintiff and necessity of appointing executor, and by genuine, although unsuccessful, motion to restore case within one-year period. Murrell v New York City Transit Auth., 260 A.D.2d 307, 689 N.Y.S.2d 67, 1999 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1st Dep't 1999).

It was abuse of discretion to deny plaintiffs' motion to restore action to court calendar where they produced evidence of their continued participation in discovery proceedings during period when case was marked off calendar, plaintiff's deposition testimony and bill of particulars established merit of plaintiffs' actions sounding in negligence and for violations of Labor Law, delay in moving to restore action was relatively brief, and both parties' continued participation in discovery showed credibility of their explanation that they inadvertently missed calendar call and never intended to abandon action. Ramputi v Timko Contr. Corp., 262 A.D.2d 26, 691 N.Y.S.2d 432, 1999 N.Y. App. Div. LEXIS 6158 (N.Y. App. Div. 1st Dep't 1999).

Court improperly denied plaintiff's motion to restore action to trial calendar where case was marked off calendar through no fault of plaintiff, plaintiff showed merit and lack of any intent to abandon action, failure to timely move to restore action was due to counsel's oversight, 12-day delay was minimal, and no prejudice were shown. Evans v New York City Hous. Auth., 262 A.D.2d 123, 692 N.Y.S.2d 54, 1999 N.Y. App. Div. LEXIS 6796 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs' motion to vacate order of dismissal pursuant to CLS CPLR § 3404 and restore case to calendar should have been granted where plaintiffs' attorney set forth in detail his health problems that had delayed motion, plaintiffs submitted expert proof of meritorious cause of action, record established that plaintiffs never intended to abandon case, and there was ongoing activity, including pending appeal. Collins v Elbadawi, 265 A.D.2d 850, 695 N.Y.S.2d 634, 1999 N.Y. App. Div. LEXIS 9921 (N.Y. App. Div. 4th Dep't 1999).

Action should not have been dismissed for failure to restore it to trial calendar after note of issue had been stricken where plaintiffs' intention to prosecute was demonstrated by their discovery activities, filing of motion to restore, compliance with court's conditional order of dismissal, engaging in settlement discussions, and filing of motion to vacate dismissal, portion of delay was caused by court's in camera inspection of records, and opposing parties' allegations of prejudice were belied by fact that key witnesses had been deposed. McGuire v Tishman Constr. Corp., 275 A.D.2d 249, 712 N.Y.S.2d 522, 2000 N.Y. App. Div. LEXIS 8715 (N.Y. App. Div. 1st Dep't 2000).

Lack of intent to abandon was shown, on motion to restore case to calendar, by evidence that plaintiffs had discharged their previous counsel for repeated delays in going forward with depositions, and had furnished authorizations for access to records. Ball v Sano, 282 A.D.2d 330, 723 N.Y.S.2d 644, 2001 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 1st Dep't 2001).

Action was not abandoned where it had been removed from trial calendar to allow plaintiff to move for leave to serve amended and supplemental verified bill of particulars, action was thereafter restored to trial calendar given that court stayed trial of action for 60 days to allow defendant additional physical examination, and, through no fault of plaintiff, defendant's doctor did not conduct examination until over 2 years later; thus, court erred in denying plaintiff's motion to restore action to trial calendar. Jankowicz v N.Y. City Health & Hosps. Corp., 284 A.D.2d 502, 726 N.Y.S.2d 713, 2001 N.Y. App. Div. LEXIS 6762 (N.Y. App. Div. 2d Dep't 2001).

Court improperly denied plaintiffs' motion to restore case to calendar where defendant city did not identify any particular prejudice, aside from mere passage of time, matter was marked off calendar for reasons unrelated to plaintiffs' default or neglect, plaintiffs showed as least some activity during year case was marked off, and action involved lead paint ingestion by infant. Peterson v City of New York, 286 A.D.2d 287, 730 N.Y.S.2d 58, 2001 N.Y. App. Div. LEXIS 8311 (N.Y. App. Div. 1st Dep't 2001).

Dismissal of a construction worker's personal injury action arising out of his 1992 accident was inappropriate under N.Y. C.P.L.R. 3404 because there was no proof that the action was marked off the calendar within the meaning of 3404; neither the issuance of stays nor the placement of the action on a stay calendar, possibly as a result of an incorrect belief that the worker, who worked for the U.S. Department of Defense for a time as a civilian able body seaman, was in military service under N.Y. Military Law § 304 and N.Y. Comp. Codes R. & Regs. tit. 22, § 212.18(f), was the equivalent of marking the action off the calendar. Ballestero v Haf Edgecombe Assoc., L.P., 33 A.D.3d 952, 823 N.Y.S.2d 512, 2006 N.Y. App. Div. LEXIS 13013 (N.Y. App. Div. 2d Dep't 2006).

Court erred in denying plaintiff's motion to restore action to calendar and in entering judgment dismissing action where motion was made within one year of its being marked off calendar, defendants acknowledged that settlement negotiations were actively pursued during period before motion was submitted, and court itself had acknowledged merits of action at pretrial conference. Mosesson v 288 / 98 West End Tenants Corp., 272 A.D.2d 152, 707 N.Y.S.2d 431, 2000 N.Y. App. Div. LEXIS 5436 (N.Y. App. Div. 1st Dep't 2000).

**44. —Insufficient proof of non-abandonment**

Where there was no showing of non-abandonment or reasonable excuse for delay of 32 months after case was placed on general docket, Special Term's restoration of case, which had been dismissed for "neglect to prosecute," to trial calendar on motion by plaintiff, who failed to show any disposition to try action, was improvident exercise of discretion. Omar v David Fruit & Co., 59 A.D.2d 647, 398 N.Y.S.2d 300, 1977 N.Y. App. Div. LEXIS 13520 (N.Y. App. Div. 4th Dep't 1977).

Court erred in granting plaintiff's motion to restore dental malpractice action to trial calendar where (1) excuse offered by plaintiff was unsupported by evidentiary facts, (2) plaintiff failed to submit affidavit from expert explaining alleged malpractice, and (3) letter submitted by plaintiff did not discuss malpractice, but simply stated that she was undergoing continuing dental treatment; letter from judge who originally marked case off calendar was not substitute for affirmation or affidavit. LaForgue v Garsson, 207 A.D.2d 432, 616 N.Y.S.2d 227, 1994 N.Y. App. Div. LEXIS 8346 (N.Y. App. Div. 2d Dep't 1994).

Husband had abandoned a divorce action per CPLR 3404 and 22 NYCRR 202.48(a) and (b) where he offered no explanation for his failure to file a proposed judgment for 12 years. Iyageh v Iyageh, 77 Misc. 3d 292, 177 N.Y.S.3d 849, 2022 N.Y. Misc. LEXIS 6177 (N.Y. Sup. Ct. 2022).

**45. —Presumption of abandonment; not rebutted**

Plaintiffs whose cause of action for recovery for personal injuries was deemed abandoned were not entitled to restoration of case pursuant to CLS CPLR § 3404 where (1) papers supporting motion were insufficient since they did not contain evidentiary facts but relied only on conclusory allegations of injured plaintiff's mother (who had no personal knowledge of circumstances leading to injury) and on physicians' reports and bill of particulars dealing only with damages, not liability, (2) plaintiffs' excuse for delay in prosecuting case was inadequate since plaintiffs did not lack capacity during period of delay and proffered reason for delay related only to medical reports of damages rather than to liability issues, (3) defendants were clearly prejudiced by 16-year period since accident occurred, and (4) plaintiffs failed to rebut presumption of abandonment since they were able to show only 2 isolated instances of pretrial discovery as examples of recent action on case. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App. Div. 1st Dep't 1986), app. dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

Record in medical malpractice action was patently insufficient to overcome presumption of abandonment raised by CLS CPLR § 3404 where plaintiff offered no adequate explanation for his supposed inability to obtain his own medical records until 7 years after action's inception and 3 years after matter was placed on trial calendar, and physician's affidavit of merit relied exclusively on plaintiff's medical records, was extremely conclusory, and lacked any assertion that defendant's vaguely-described omission constituted departure from accepted medical practice. Bergan v Home for Incurables, 124 A.D.2d 517, 508 N.Y.S.2d 434, 1986 N.Y. App. Div. LEXIS 61846 (N.Y. App. Div. 1st Dep't 1986).

Court improperly vacated dismissal of negligence action which was commenced in November, 1976, marked off trial calendar in October, 1980 (because plaintiffs' counsel had lost contact with plaintiffs and thus they were unavailable to submit to depositions 10 days prior to trial), and automatically dismissed for neglect to prosecute in October, 1981, since (1) plaintiffs failed to adequately rebut presumption of abandonment created by dismissal pursuant to CLS CPLR §

3404, (2) no reasonable excuse was offered for 5-year delay in moving to reinstate cause, and (3) plaintiffs failed to show that defendants would not be prejudiced by reinstatement of case in view of delay. Resto v Kohen, 124 A.D.2d 722, 508 N.Y.S.2d 228, 1986 N.Y. App. Div. LEXIS 62026 (N.Y. App. Div. 2d Dep't 1986).

Court properly dismissed cross-complaint as abandoned where (1) entire action was marked off trial calendar on July 2, 1986, (2) cross-plaintiffs undertook no action to restore matter to calendar for 33 months, until cross motion to formally dismiss case was made, (3) there was no activity by parties during interim when action was marked “off” which would negate presumption of intent to abandon, and (4) cross-plaintiffs did not sustain their burden of demonstrating merit to their action. M.J. Williams Corp. v Roma Fragrances & Cosmetics, Ltd., 166 A.D.2d 327, 561 N.Y.S.2d 1, 1990 N.Y. App. Div. LEXIS 12742 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff would be presumed to have abandoned her personal injury action, which would not be restored to trial calendar, where she failed to show reasonable excuse for her delay of 11 months in obtaining corrected chiropractor’s report or for additional 7 months in moving to restore case to calendar, 6 ½ years had elapsed since accident that allegedly caused plaintiff’s injuries, and thus defendant would be prejudiced by restoration. Tate v Peninsula Hosp. Ctr., 255 A.D.2d 503, 680 N.Y.S.2d 609, 1998 N.Y. App. Div. LEXIS 12670 (N.Y. App. Div. 2d Dep't 1998).

Court erred in restoring personal injury action to trial calendar because plaintiff’s claim that he was unaware of trial conference amounted to inexcusable law office failure, plaintiff failed to rebut presumption of abandonment given his inactivity during 28-month delay in moving to restore action, and defendant would be prejudiced if action was restored where more than 9 years had elapsed between accident and plaintiff’s motion to restore. Cruz v Volkswagen of Am. Inc., 277 A.D.2d 340, 716 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 12149 (N.Y. App. Div. 2d Dep't 2000).

Action commenced in September 1994 to recover for injury sustained in July 1992 would be presumed abandoned where record was devoid of any explanation for complete lack of activity

for entire 27-month period during which case was off calendar and for additional 5-month period before that beginning with preliminary conference held in August 1996. Roman v City of New York, 281 A.D.2d 246, 721 N.Y.S.2d 535, 2001 N.Y. App. Div. LEXIS 2448 (N.Y. App. Div. 1st Dep't 2001).

Action should have been dismissed under CLS CPLR § 3404 where plaintiff's claims, without documentation, that she suffered from various medical conditions were insufficient to account for her delay of more than 2 years in moving to restore case to calendar, and her conclusory claims failed to establish merits of action; presumption of abandonment had not been rebutted. Aguilar v Djonvic, 282 A.D.2d 366, 723 N.Y.S.2d 474, 2001 N.Y. App. Div. LEXIS 4097 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's motion to restore her medical malpractice action to trial calendar was denied as (1) 10-year-old deposition describing her fall from examination table in defendant's office after allegedly being left alone for 40 minutes was insufficient to establish meritorious claim, without medical evidence as to whether leaving her alone deviated from accepted practice, (2) unexplained failure of her court reporting service to keep track of case did not excuse her 5-year delay in moving to vacate automatic dismissal under CLS CPLR § 3404, (3) there was no course of conduct to rebut presumption of abandonment that attached after automatic dismissal, and (4) 14-year gap between alleged malpractice and application to vacate dismissal was significantly prejudicial to defendant. Gold v Steinmetz, 186 Misc. 2d 245, 717 N.Y.S.2d 478, 2000 N.Y. Misc. LEXIS 465 (N.Y. Civ. Ct. 2000).

Although an agreement contemplated that a deceased patient's administratrix would seek restoration of a medical malpractice action within a few months after it was marked off the calendar, the administratrix did not seek restoration for approximately 27 months; therefore, she did not rebut the presumption of abandonment in N.Y. C.P.L.R. § 3404. Krichmar v Queens Med. Imaging, P.C., 26 A.D.3d 417, 810 N.Y.S.2d 488, 2006 N.Y. App. Div. LEXIS 2123 (N.Y. App. Div. 2d Dep't 2006).

**46. — —Rebutted**

Where plaintiff ignored defendant’s demand for a bill of particulars and an order of preclusion was granted and the action dismissed for neglect to prosecute, the plaintiff could not commence a second action designed merely to evade and circumvent the preclusion order, since by bringing the second identical action the plaintiff rebutted the presumption of abandonment and the dismissal of the first action was set aside and the action reinstated. Bieniek v Miller Drug Stores, Inc., 25 A.D.2d 941, 270 N.Y.S.2d 491, 1966 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 4th Dep't 1966).

Plaintiffs’ motion to vacate the dismissal of the underlying action which occurred after plaintiffs’ former counsel apparently was inflicted with a substantial physical and mental disability was properly granted as to those parties against whom they demonstrated a meritorious claim and lack of prejudice, where after learning from one of the attorneys for the defendants that the case had been dismissed, one plaintiff immediately contacted the court directly to verify that fact and took steps to vacate the order of dismissal, which were sufficient to rebut the presumption of abandonment. Bouvia v Community General Hospital, 85 A.D.2d 909, 446 N.Y.S.2d 791, 1981 N.Y. App. Div. LEXIS 16754 (N.Y. App. Div. 4th Dep't 1981).

Where plaintiff demonstrated a meritorious cause of action, where there was no indication of prejudice resulting from delay to the defendants, and where the action was stricken from the Trial Calendar with leave to restore after completion of pretrial proceedings, the presumption of abandonment under CPLR § 3404 was sufficiently rebutted, and under CPLR § 2005, the trial court did not err in restoring the matter to calendar. Pirnak v Savino, 96 A.D.2d 857, 465 N.Y.S.2d 773, 1983 N.Y. App. Div. LEXIS 19449 (N.Y. App. Div. 2d Dep't 1983).

Presumption of abandonment may be rebutted by injured plaintiff’s continuing surgical treatments and his attorney’s ongoing efforts to acquire necessary documentation and medical records; delay is reasonably excused where matter was originally marked on calendar at instigation of justice presiding at pretrial conference whose underlying purpose was to ascertain

effects of injured plaintiff's then recent surgery. Sheehan v Hollywood, 112 A.D.2d 211, 491 N.Y.S.2d 432, 1985 N.Y. App. Div. LEXIS 55960 (N.Y. App. Div. 2d Dep't 1985).

In medical malpractice action, plaintiff sufficiently rebutted statutory presumption that action marked off trial calendar and not restored for one year has been abandoned where she provided evidence of her ongoing attempts to procure new expert witness to replace medical expert who withdrew from case on eve of trial. Ford v Empire Medical Group, 123 A.D.2d 820, 507 N.Y.S.2d 436, 1986 N.Y. App. Div. LEXIS 60952 (N.Y. App. Div. 2d Dep't 1986).

Trial court improvidently exercised its discretion in denying plaintiff's motion to restore action to trial calendar where plaintiff's many attempts either to restore action or to reach settlement agreement with defendant, often frustrated by conduct of defendant and his attorney, provided reasonable excuse for not moving to vacate dismissal earlier, and thus rebutted presumption of abandonment arising from failure to restore action to calendar within one year under CLS CPLR § 3404. Syndicate Bldg. Corp. v Lorber, 193 A.D.2d 506, 597 N.Y.S.2d 372, 1993 N.Y. App. Div. LEXIS 5016 (N.Y. App. Div. 1st Dep't 1993).

Plaintiff's action should have been restored to trial calendar under CLS CPLR § 3404, although it was based on alleged police misconduct that occurred 11 years earlier, where (1) delay was caused by excusable law office failure, (2) deposition transcript supported merits of claim, (3) having filed statement of readiness without opposition, plaintiff established intent not to abandon claim, and (4) defendants never raised claim of prejudice before motion court and court never mentioned issue of prejudice. Zabari v City of New York, 242 A.D.2d 15, 672 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1998).

**47. —Sufficient proof of abandonment**

In a medical malpractice action, the trial court erred in granting plaintiff's motion to restore the action to the calendar after it had been automatically dismissed pursuant to CPLR § 3404 due to plaintiff's failure to comply with discovery requests and to submit to a physical examination, where plaintiff's complete inaction for more than fifteen months after the case was stricken

clearly constituted abandonment within the meaning of the statute, where plaintiff's stated reasons for her delay in complying with defendant's requests for hospital and medical authorizations consisted merely of conclusory assertions that the full names and addresses of the various institutions and doctors had taken a year to obtain and that the authorizations of certain foreign physicians had been difficult to obtain, and did not provide a basis for excusing plaintiff's default in the absence of any statement setting forth plaintiff's efforts to obtain the information and some showing that it was necessary to obtain the addresses of the institutions and hospitals in order to give defendant the required authorizations, and where plaintiff's affidavit of merits was similarly bare and conclusory, and contained no statement by plaintiff's physician that there had been any departure from acceptable medical practice during plaintiff's treatment. Romanoff v St. Vincent's Hospital & Medical Center, 97 A.D.2d 382, 467 N.Y.S.2d 591, 1983 N.Y. App. Div. LEXIS 19943 (N.Y. App. Div. 1st Dep't 1983).

Wife was entitled to have husband's matrimonial action dismissed as abandoned under CLS CPLR § 3404 where husband failed to enter order of restoration which he had previously obtained some 3 years before seeking restoration, apparently in order to use order as "potential weapon" with which to strike back in event that reconciliation between parties during period failed; moreover, wife would not be deemed to have abused statute, even though she brought her own matrimonial action on failure of reconciliation under more liberal property distribution provisions of CLS Dom Rel § 236, where she consistently treated husband's action as abandoned and had made serious attempts at reconciliation. Mamet v Mamet, 132 A.D.2d 479, 518 N.Y.S.2d 5, 1987 N.Y. App. Div. LEXIS 49031 (N.Y. App. Div. 1st Dep't 1987), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 6, 1987 N.Y. LEXIS 18996 (N.Y. 1987), overruled, Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff was not entitled to vacatur of dismissal of her 1990 action where she failed to appear at 1995 status conference, primary cause of delay and inactivity was her failure to contact her attorney or make her location known to her attorney for 4 years, reasons for her attorney's

failure to place action on calendar were his inability to contact her and fear of resulting dismissal for unreadiness, plaintiff offered no excuse for not keeping her attorney informed of her location, and thus plaintiff would be deemed to have abandoned action. Kidwell v Xerox Corp., 281 A.D.2d 188, 721 N.Y.S.2d 234, 2001 N.Y. App. Div. LEXIS 2237 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's motion to restore property damage action to trial calendar was properly denied on ground that defendants and third-party defendants would be prejudiced if they were forced to defend action based on events which occurred in 1982 and 1983, where there was no activity in case for more than 3 years following its dismissal, evincing plaintiff's intent to abandon, and plaintiff did not demonstrate reasonable excuse for delay in moving to restore. Furniture Vill., Inc. v Schoenberger, 283 A.D.2d 607, 725 N.Y.S.2d 860, 2001 N.Y. App. Div. LEXIS 5500 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 929, 733 N.Y.S.2d 364, 759 N.E.2d 363, 2001 N.Y. LEXIS 3114 (N.Y. 2001).

**48. Excuse; excusable neglect, generally**

Party moving to restore case to trial calendar after it has been stricken pursuant to rule regarding dismissal of abandoned cases must prove a satisfactory excuse for default which has resulted in having case marked "off" the calendar and for the neglect in moving to restore it within one year; he must also demonstrate that he has a meritorious cause of action. Quick-Way Excavators, Inc. v D.H. Overmyer Co., 44 A.D.2d 740, 354 N.Y.S.2d 468, 1974 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 3d Dep't 1974).

When a case has been abandoned and dismissed, a motion to open the default and restore it to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party, and excusable neglect as must be shown to open a default. Sal Masonry Contractors, Inc. v Arkay Constr. Corp., 49 A.D.2d 808, 373 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 4th Dep't 1975).

Once action has been dismissed for failure to prosecute, motion to open default and restore case to trial calendar will require same kind of proof of merit, or lack or prejudice to opposing

party and of excusable neglect, as must be shown to open default judgment. Ruggiero v Elbin Realty, 51 A.D.2d 1011, 380 N.Y.S.2d 773, 1976 N.Y. App. Div. LEXIS 11775 (N.Y. App. Div. 2d Dep't), app. dismissed, 39 N.Y.2d 708, 1976 N.Y. LEXIS 3371 (N.Y. 1976), app. dismissed, 39 N.Y.2d 891, 386 N.Y.S.2d 394, 352 N.E.2d 581, 1976 N.Y. LEXIS 2834 (N.Y. 1976).

Where a case has been on the docket for more than a year and has been deemed dismissed under civil practice rule, a motion to restore the case to the calendar under such rule requires the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as must be shown to open a default judgment. Sesan v American Home Products Corp., 52 A.D.2d 1058, 384 N.Y.S.2d 600, 1976 N.Y. App. Div. LEXIS 12974 (N.Y. App. Div. 4th Dep't 1976).

It was improper to restore case to trial calendar once it was stricken as abandoned in absence of a motion by plaintiffs to negate default, supported by a proper showing of merit, absence of prejudice to defendant, excuse for default, and present readiness. Colucci v Slippery Slats & All That, Inc., 52 A.D.2d 1083, 384 N.Y.S.2d 320, 1976 N.Y. App. Div. LEXIS 13015 (N.Y. App. Div. 4th Dep't 1976).

In the absence of motion to vacate default, supported by appropriate showing of merit, absence of prejudice to the defendant, excuse for default and present readiness, restoration of negligence action to calendar was improvident exercise of discretion. Til v O'Brien, 53 A.D.2d 1030, 386 N.Y.S.2d 155, 1976 N.Y. App. Div. LEXIS 15839 (N.Y. App. Div. 4th Dep't), app. dismissed, 40 N.Y.2d 902, 389 N.Y.S.2d 365, 357 N.E.2d 1020, 1976 N.Y. LEXIS 3118 (N.Y. 1976).

Once an action has been dismissed under CPLR § 3404, a motion to open the default and restore the case to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as must be shown to open a default judgment under CPLR § 5015. Fluman v TSS Dep't Store, 100 A.D.2d 838, 473 N.Y.S.2d 835, 1984 N.Y. App. Div. LEXIS 17942 (N.Y. App. Div. 2d Dep't 1984).

Under CLS CPLR § 3404, restoration of action to calendar requires showing of merit to moving party's claim, lack of prejudice to other parties, lack of intent to abandon or deliberately default in action, and reasonable excuse for moving party's delay. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff's motion to vacate automatic dismissal of her action and to restore it to trial calendar was properly denied, despite adequate showing of merit of action, where she failed to show reasonable excuse for her delay in prosecuting action, intent not to abandon action, and absence of prejudice to defendants if action, which arose in 1987, were restored. Ramirez v City of New York, 281 A.D.2d 169, 721 N.Y.S.2d 508, 2001 N.Y. App. Div. LEXIS 1893 (N.Y. App. Div. 1st Dep't 2001).

Case in which wife and minor children sought to recover damages from bar owner pursuant to Dram Shop Act would be restored to the calendar if plaintiffs were able to show that the case had merit and that it was not abandoned or that there was a neglect to prosecute, and there was no showing of prejudice to the defendants. Garlinghouse v Nelson, 72 Misc. 2d 432, 339 N.Y.S.2d 538, 1973 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1973).

**49. —Insufficient proof of excuse**

Where an action was dismissed under this rule in October 1962 and the plaintiff took no action from the time of the default in answering the calendar until he moved to vacate the dismissal in May 1964, the dismissal would not be vacated where he made no satisfactory explanation of his inaction. Montalbano v Maplebrook Estates, Inc., 22 A.D.2d 786, 254 N.Y.S.2d 139, 1964 N.Y. App. Div. LEXIS 2710 (N.Y. App. Div. 1st Dep't 1964).

The granting of a motion to vacate dismissal of an action and restore the case was an improvident exercise of discretion, which resulted in prejudice to the defendant, as plaintiff's injuries were not severe and there was no valid and reasonable excuse for an almost four years delay in the prosecution of the action after it had been marked off the calendar. Gamerov v

Cunard S.S. Co., 34 A.D.2d 824, 312 N.Y.S.2d 698, 1970 N.Y. App. Div. LEXIS 4700 (N.Y. App. Div. 2d Dep't 1970).

Sketchy affidavit of merit, coupled with lack of reasonable or acceptable excuse for delay, warranted dismissal of action which had been removed from calendar due to plaintiff's failure to appear following several adjournments. Weigert v Regal Advertising Associates Corp., 42 A.D.2d 899, 347 N.Y.S.2d 710, 1973 N.Y. App. Div. LEXIS 3504 (N.Y. App. Div. 1st Dep't), app. dismissed, 33 N.Y.2d 933, 353 N.Y.S.2d 725, 309 N.E.2d 127, 1973 N.Y. LEXIS 864 (N.Y. 1973).

Trial court did not abuse discretion by refusing to allow plaintiff relief from her default in personal injury action, where allegations contained in the complaint and plaintiff's affidavit, absent supporting expert testimony, provided inadequate showing of merit of action, and where there was no sufficient excuse for plaintiff's failure to timely restore the action. Casey v Fuller Brush Co., 51 A.D.2d 639, 378 N.Y.S.2d 510, 1976 N.Y. App. Div. LEXIS 10978 (N.Y. App. Div. 3d Dep't 1976).

Plaintiffs failed to make requisite showing of facts sufficient to excuse their delay in prosecution of negligence action which had been dismissed and to establish meritorious cause of action, and thus restoration of action to trial calendar by Special Term on motion by plaintiffs was improvident exercise of discretion. Casamassina v Sutton Associates, Inc., 54 A.D.2d 682, 387 N.Y.S.2d 265, 1976 N.Y. App. Div. LEXIS 14224 (N.Y. App. Div. 2d Dep't 1976).

Where plaintiffs showed no excuse for their failure to move to vacate default within one year, nor did they set forth facts showing their cause of action to be meritorious, county court did not err in its determination that action had been abandoned for failure to remove it from deferred calendar within one year. Hickey v Shumacher, 54 A.D.2d 790, 387 N.Y.S.2d 746, 1976 N.Y. App. Div. LEXIS 14477 (N.Y. App. Div. 3d Dep't 1976).

Where there was no showing of non-abandonment or reasonable excuse for delay of 32 months after case was placed on general docket, Special Term's restoration of case, which had been

dismissed for “neglect to prosecute,” to trial calendar on motion by plaintiff, who failed to show any disposition to try action, was improvident exercise of discretion. Omar v David Fruit & Co., 59 A.D.2d 647, 398 N.Y.S.2d 300, 1977 N.Y. App. Div. LEXIS 13520 (N.Y. App. Div. 4th Dep't 1977).

The lower court did not abuse its discretion in conditionally granting plaintiff’s motion to vacate the dismissal of the action pursuant to CPLR § 3404 and restore the action to the calendar where less than two months had elapsed between the dismissal of the action and the making of plaintiff’s motion to restore, and where there was evidence that the case was marked off the calendar not due to plaintiff’s neglect, but out of plaintiff’s willingness to permit the striking of the action by an additional defendant on defendants’ counterclaim, who needed more time in which to complete discovery. Moreover, while the affidavit of plaintiff’s president submitted in support of the motion to restore the action merely referred to the complaint, the affidavit and complaint read together constituted a sufficient showing of merit. General Staple Co. v Amtronics, Inc., 81 A.D.2d 877, 439 N.Y.S.2d 166, 1981 N.Y. App. Div. LEXIS 11576 (N.Y. App. Div. 2d Dep't 1981).

Where the moving papers did not state an acceptable excuse for plaintiffs’ failure to request removal of the case from the general docket within one year, it was an abuse of discretion to grant the motion to restore. Lancette v Crouse-Irving Memorial Hospital, Inc., 81 A.D.2d 1002, 442 N.Y.S.2d 963, 1981 N.Y. App. Div. LEXIS 11749 (N.Y. App. Div. 4th Dep't), app. dismissed, 54 N.Y.2d 753, 1981 N.Y. LEXIS 4915 (N.Y. 1981).

The restoration of an action for damages to the trial calendar almost 16 months after notice from the court that the action was no longer on the calendar was an improvident abuse of discretion where there was no satisfactory explanation for the delay in moving for restoration or any demonstration of merit to the action. Van Sant v Hall, 95 A.D.2d 919, 464 N.Y.S.2d 47, 1983 N.Y. App. Div. LEXIS 18892 (N.Y. App. Div. 3d Dep't 1983).

Plaintiffs whose cause of action for recovery for personal injuries was deemed abandoned were not entitled to restoration of case pursuant to CLS CPLR § 3404 where (1) papers supporting

motion were insufficient since they did not contain evidentiary facts but relied only on conclusory allegations of injured plaintiff's mother (who had no personal knowledge of circumstances leading to injury) and on physicians' reports and bill of particulars dealing only with damages, not liability, (2) plaintiffs' excuse for delay in prosecuting case was inadequate since plaintiffs did not lack capacity during period of delay and proffered reason for delay related only to medical reports of damages rather than to liability issues, (3) defendants were clearly prejudiced by 16-year period since accident occurred, and (4) plaintiffs failed to rebut presumption of abandonment since they were able to show only 2 isolated instances of pretrial discovery as examples of recent action on case. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App. Div. 1st Dep't 1986), app. dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

Court improperly vacated dismissal of negligence action which was commenced in November, 1976, marked off trial calendar in October, 1980 (because plaintiffs' counsel had lost contact with plaintiffs and thus they were unavailable to submit to depositions 10 days prior to trial), and automatically dismissed for neglect to prosecute in October, 1981, since (1) plaintiffs failed to adequately rebut presumption of abandonment created by dismissal pursuant to CLS CPLR § 3404, (2) no reasonable excuse was offered for 5-year delay in moving to reinstate cause, and (3) plaintiffs failed to show that defendants would not be prejudiced by reinstatement of case in view of delay. Resto v Kohen, 124 A.D.2d 722, 508 N.Y.S.2d 228, 1986 N.Y. App. Div. LEXIS 62026 (N.Y. App. Div. 2d Dep't 1986).

Special Term improperly vacated dismissal of medical malpractice action where plaintiff failed to set forth reasonable excuse for 34-month delay in seeking to move to restore case to trial calendar; moreover, report allegedly from (unidentified) physician and plaintiff's affidavit were insufficient to establish merits of action. Paglia v Agrawal, 124 A.D.2d 793, 508 N.Y.S.2d 514, 1986 N.Y. App. Div. LEXIS 62113 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 946, 516 N.Y.S.2d 658, 509 N.E.2d 353, 1987 N.Y. LEXIS 16473 (N.Y. 1987).

Supreme Court erred in vacating order of dismissal pursuant to CLS CPLR § 3404 where there was neither affidavit of merit nor adequate excuse for lengthy delay. Lyon v Tomczyk, 124 A.D.2d 1004, 508 N.Y.S.2d 783, 1986 N.Y. App. Div. LEXIS 62334 (N.Y. App. Div. 4th Dep't 1986).

It was error to restore wrongful death action to trial calendar where excuse for failure to proceed in timely fashion was not established, claim that meritorious cause of action existed was set forth in conclusory fashion without supporting evidence, and question of possible prejudice to defendant if case were restored was not even addressed. Public Adm'r of County of New York v Heil Corp., 126 A.D.2d 533, 510 N.Y.S.2d 655, 1987 N.Y. App. Div. LEXIS 41669 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court did not abuse its discretion in refusing plaintiff’s motion to restore to trial calendar mortgage foreclosure action which had been pending for over 10 years and which had been stricken from calendar twice on plaintiff’s default in appearance, particularly where counsel did not even check on status of case until more than one year after second time it was marked off. Hoenig v Stetefeldt, 127 A.D.2d 632, 511 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 43121 (N.Y. App. Div. 2d Dep't 1987).

Petitioner’s motion to vacate automatic dismissal under CLS CPLR § 3404 and to restore Article 78 proceeding to trial calendar, made after case lay dormant for nearly 5 years, was properly denied even though part of delay was due to failure of petitioner’s attorney to act and his eventual disbarment, since no valid reason was offered for 1 ½ -year delay after present counsel took possession of case file, and petitioner’s affidavit of merit, containing bare allegation of racial discrimination, was insufficient to show that her discharge from employment was due to improper motives in light of evidence that she was discharged due to unsatisfactory evaluation of her performance as probationary teacher. Kharrubi v Board of Education, 133 A.D.2d 457, 519 N.Y.S.2d 671, 1987 N.Y. App. Div. LEXIS 49926 (N.Y. App. Div. 2d Dep't 1987).

In action to recover damages for personal injuries sustained by 3 passengers in automobile accident, passengers were not entitled to restoration of action to trial calendar where (1) note of

issue and statement of readiness was filed in May 1985, but action was marked off calendar in December 1985 at request of plaintiffs' counsel, (2) no application to restore action to calendar was made within one year, (3) 18 months after action was marked off calendar, defendants moved to dismiss action for failure to prosecute, (4) 2 plaintiffs failed to present competent evidence of serious injury within meaning of CLS Ins § 5102(2), and (5) other plaintiff had long gap in treatment for alleged injuries and failed to adequately explain delay in seeking to restore action to calendar until faced with motion for dismissal. Condro v Jhaveri, 154 A.D.2d 646, 546 N.Y.S.2d 652, 1989 N.Y. App. Div. LEXIS 13807 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 896, 554 N.Y.S.2d 830, 553 N.E.2d 1340, 1990 N.Y. LEXIS 627 (N.Y. 1990).

Medical malpractice action was improvidently restored to calendar in absence of proper affidavit of merit and acceptable explanation of default where unsworn statements of 3 physicians attached to plaintiff's motion papers did not indicate that meritorious claim of malpractice existed, and did not even suggest that medical malpractice might have been committed. Saeed v Boulevard Hosp., 157 A.D.2d 654, 549 N.Y.S.2d 754, 1990 N.Y. App. Div. LEXIS 250 (N.Y. App. Div. 2d Dep't 1990).

Court erred in restoring wrongful death action to trial calendar where plaintiff offered only conclusory affidavit in support of allegation that scratch decedent sustained while attempting to exit car manufactured by defendant was substantial factor contributing to development of malignant melanoma and fatal stroke, and plaintiff offered no excuse for delay in moving to restore action and in obtaining affidavit of merits. Crystal v General Motors Corp., 157 A.D.2d 821, 550 N.Y.S.2d 418, 1990 N.Y. App. Div. LEXIS 1056 (N.Y. App. Div. 2d Dep't 1990).

Defendant was not entitled to have his cross-claims and counter-claims restored to calendar where (1) he did not move to vacate dismissal and restore case to calendar until 29 months after case was stricken from calendar by plaintiff, (2) he failed to explain his failure to timely attend to matter, (3) he did not establish merits of his claim, and (4) during 29-month period his true adversary in action, and principal witness to facts underlying his claims, had died. Todd Co. v

Birnbaum, 182 A.D.2d 505, 582 N.Y.S.2d 414, 1992 N.Y. App. Div. LEXIS 6096 (N.Y. App. Div. 1st Dep't 1992).

Court erred in granting plaintiff's motion to restore dental malpractice action to trial calendar where (1) excuse offered by plaintiff was unsupported by evidentiary facts, (2) plaintiff failed to submit affidavit from expert explaining alleged malpractice, and (3) letter submitted by plaintiff did not discuss malpractice, but simply stated that she was undergoing continuing dental treatment; letter from judge who originally marked case off calendar was not substitute for affirmation or affidavit. LaForgue v Garsson, 207 A.D.2d 432, 616 N.Y.S.2d 227, 1994 N.Y. App. Div. LEXIS 8346 (N.Y. App. Div. 2d Dep't 1994).

It was error for court to vacate automatic dismissal under CLS CPLR § 3404 and to restore action to trial calendar, where case was marked off calendar as result of unexplained failure of plaintiff's counsel to proceed to trial, plaintiff did not offer any excuse for waiting 11 months and 3 weeks to move to restore, plaintiff's expert failed to establish sufficient evidentiary foundation for his conclusion that defendant committed malpractice, and plaintiff failed to even allege that defendant would not be prejudiced if action were restored. Michitsch v Katz, 276 A.D.2d 605, 714 N.Y.S.2d 135, 2000 N.Y. App. Div. LEXIS 10365 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs' motion to restore action to active calendar was properly denied for failure to submit affidavit of merit and to show excuse for not having answered calendar call where action was marked off active status calendar 27 months before subject motion. Roman v City of New York, 281 A.D.2d 246, 721 N.Y.S.2d 535, 2001 N.Y. App. Div. LEXIS 2448 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's motion to restore property damage action to trial calendar was properly denied on ground that defendants and third-party defendants would be prejudiced if they were forced to defend action based on events which occurred in 1982 and 1983, where there was no activity in case for more than 3 years following its dismissal, evincing plaintiff's intent to abandon, and plaintiff did not demonstrate reasonable excuse for delay in moving to restore. Furniture Vill., Inc. v Schoenberger, 283 A.D.2d 607, 725 N.Y.S.2d 860, 2001 N.Y. App. Div. LEXIS 5500 (N.Y.

App. Div. 2d Dep't), app. denied, 96 N.Y.2d 929, 733 N.Y.S.2d 364, 759 N.E.2d 363, 2001 N.Y. LEXIS 3114 (N.Y. 2001).

Trial court properly denied plaintiffs' motion to restore a personal injury action to the trial calendar after the action was dismissed pursuant to N.Y. C.P.L.R. 3404; plaintiffs failed to explain their delay in prosecuting the action, and defendants would have been prejudiced by restoring the action. Kalyuskin v Rudisel, 306 A.D.2d 246, 760 N.Y.S.2d 358, 2003 N.Y. App. Div. LEXIS 6255 (N.Y. App. Div. 2d Dep't 2003).

Injured party's motion to restore the case to the trial calendar was properly denied after it was dismissed pursuant to N.Y. C.P.L.R. 3404; the injured party failed to provide a reasonable excuse for the failure to timely restore the case, and the injured party also failed to demonstrate a lack of prejudice to the landowner. Neidereger v Hidden Park Apts., Inc., 306 A.D.2d 392, 760 N.Y.S.2d 892, 2003 N.Y. App. Div. LEXIS 7101 (N.Y. App. Div. 2d Dep't 2003).

Trial court providently exercised its discretion in determining that no reasonable excuse had been shown for a delay in prosecuting a consolidated personal injury action and the delay was prejudicial, warranting denial of a motion to restore the consolidated action to the active calendar after the case had been dismissed pursuant to this section. Brito v MS/WG 1107 Broadway Owner, LLC, 234 A.D.3d 654, 226 N.Y.S.3d 93, 2025 N.Y. App. Div. LEXIS 94 (N.Y. App. Div. 2d Dep't 2025).

**50. — —Attorney-related excuse**

Once an action has been deemed dismissed under CPLR 3404, a motion to open the default and restore the case to the calendar would require the same kind of proof of merit, lack of prejudice to the opposing party, and excusable neglect as must be shown to open a default judgment, and application alleging that delay in moving to reopen was attributable to law office failure fell far short of such proof and was an unacceptable excuse. McIntire Associates, Inc. v Glens Falls Ins. Co., 41 A.D.2d 692, 342 N.Y.S.2d 819, 1973 N.Y. App. Div. LEXIS 5061 (N.Y. App. Div. 4th Dep't 1973).

It was an improvident exercise of discretion to order reinstatement to the docket of a cause in which plaintiff's attorneys failed to show that anything had been done in 3 ½ years and failed to state meritorious reasons for reinstatement of cause to calendar. Atkins v Rigby, 41 A.D.2d 889, 342 N.Y.S.2d 522, 1973 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 4th Dep't 1973).

Motion to restore action to calendar was properly denied, despite plaintiffs' excuse that their attorney did not know that case had been struck until she attempted to file note of issue after disclosure had been completed, where there was no activity for period of some 3 ½ years following striking of action from calendar. 179 MacDougal Equities v North Realty Co., 232 A.D.2d 280, 648 N.Y.S.2d 551, 1996 N.Y. App. Div. LEXIS 10366 (N.Y. App. Div. 1st Dep't 1996).

It was abuse of discretion to grant plaintiffs' motion to restore action to trial calendar where no action was taken by plaintiffs from date that case was dismissed by operation of law until they moved to restore case to calendar over 3 years later, and their bare assertion that their counsel was unable to properly follow up on case, together with their failure to offer any proof that they were unable to search for new counsel because of illness in family of one of their principals, were insufficient bases to find lack of intent to abandon, or to show excusable default. Habib v Miller, 233 A.D.2d 480, 650 N.Y.S.2d 285, 1996 N.Y. App. Div. LEXIS 12654 (N.Y. App. Div. 2d Dep't 1996).

Balance of equities in personal injury action weighed against denial of plaintiff's motion under CLS CPLR § 3404 to restore action to trial calendar where, inter alia, (1) plaintiff's counsel was negligent, but not willfully in default, in repeatedly failing to learn time and place of his required pretrial court appearances and in failing to follow proper procedures for opposing defendant's efforts to dismiss case, (2) most, if not all, relevant witnesses had already been deposed, and (3) plaintiff had provided defendant with medical reports detailing his injuries; thus, there was little danger that lapse of time would cause prejudice from inability of witnesses to recall event. Sanchez v Javind Apt. Corp., 246 A.D.2d 353, 667 N.Y.S.2d 708, 1998 N.Y. App. Div. LEXIS 224 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff was not entitled to vacatur of dismissal of action under CLS CPLR § 3404 where (1) unsubstantiated assertions of plaintiff's attorney were insufficient to show either meritorious cause of action or absence of prejudice to defendant or third-party defendant if action were restored to trial calendar, and (2) intermittent periods of disability claimed by plaintiff's attorney were not reasonable excuse for delay, absent showing that disability was continuous throughout period in question. Bray v Thor Steel & Welding Ltd., 275 A.D.2d 912, 713 N.Y.S.2d 400, 2000 N.Y. App. Div. LEXIS 9671 (N.Y. App. Div. 4th Dep't 2000), app. denied, 738 N.Y.S.2d 254, 2000 N.Y. App. Div. LEXIS 13584 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 778, 725 N.Y.S.2d 633, 749 N.E.2d 203, 2001 N.Y. LEXIS 640 (N.Y. 2001).

Court erred in restoring personal injury action to trial calendar because plaintiff's claim that he was unaware of trial conference amounted to inexcusable law office failure, plaintiff failed to rebut presumption of abandonment given his inactivity during 28-month delay in moving to restore action, and defendant would be prejudiced if action was restored where more than 9 years had elapsed between accident and plaintiff's motion to restore. Cruz v Volkswagen of Am. Inc., 277 A.D.2d 340, 716 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 12149 (N.Y. App. Div. 2d Dep't 2000).

Delay of 4 years in moving to restore was not excused by facts that plaintiff's counsel thought action had been restored to calendar by defendants and had confused instant action with another action commenced by plaintiff's decedent. Groudine v Delco Dev. Corp., 286 A.D.2d 416, 729 N.Y.S.2d 513, 2001 N.Y. App. Div. LEXIS 8123 (N.Y. App. Div. 2d Dep't 2001).

Because a plaintiff complied with N.Y. Comp. Codes R. & Regs. tit. 22, § 208.14(c) by explaining why an action was marked off and by stating that the action was ready for trial, and because the plaintiff was not required to submit an affidavit of merit, the trial court erred in denying the plaintiff's N.Y. C.P.L.R. 3404 motion to restore the action to the trial calendar. Florin v Free Lance Garage Doors, 831 N.Y.S.2d 635, 14 Misc. 3d 108, 2007 N.Y. Misc. LEXIS 318 (N.Y. App. Term 2007).

**51. — —Court-related excuse**

Plaintiff was not entitled to order vacating dismissal of her action where action had been dismissed 5 years earlier under CLS CPLR § 3404, and (1) clerk's failure to enter certificate of dismissal was no excuse for delay in moving for restoration since dismissal pursuant to § 3404 is automatic and entry of such dismissal is merely ministerial, and (2) plaintiff failed to establish that restoration would not be unduly prejudicial to defendants. Rosser v Scacalossi, 140 A.D.2d 318, 527 N.Y.S.2d 552, 1988 N.Y. App. Div. LEXIS 4615 (N.Y. App. Div. 2d Dep't 1988).

Action should not have been dismissed for failure to restore it to trial calendar after note of issue had been stricken where plaintiffs' intention to prosecute was demonstrated by their discovery activities, filing of motion to restore, compliance with court's conditional order of dismissal, engaging in settlement discussions, and filing of motion to vacate dismissal, portion of delay was caused by court's in camera inspection of records, and opposing parties' allegations of prejudice were belied by fact that key witnesses had been deposed. McGuire v Tishman Constr. Corp., 275 A.D.2d 249, 712 N.Y.S.2d 522, 2000 N.Y. App. Div. LEXIS 8715 (N.Y. App. Div. 1st Dep't 2000).

**52. — —Inactivity for 3 or more years**

It was abuse of discretion to grant plaintiff's motion to restore wrongful death action to trial calendar where (1) plaintiff's affidavit completely failed to demonstrate any merit to her claim, especially where her counsel's affidavit indicated that decedent was killed while driving in opposite direction of traffic, and (2) there was no valid excuse offered for plaintiff's failure to move to restore action to calendar for almost 3 years following her appeal of order changing venue. Hillegass v Duffy, 148 A.D.2d 677, 539 N.Y.S.2d 426, 1989 N.Y. App. Div. LEXIS 4197 (N.Y. App. Div. 2d Dep't 1989).

Trial judge erred in restoring previously dismissed personal injury action to trial calendar where plaintiffs failed to advance any excuse for 3-year delay in having administratrix appointed for deceased original plaintiff, and for additional one-year delay in moving to restore action to trial

calendar. Parillo v Blatt, 160 A.D.2d 853, 554 N.Y.S.2d 285, 1990 N.Y. App. Div. LEXIS 4470 (N.Y. App. Div. 2d Dep't 1990).

Plaintiffs were not entitled to vacatur of default in action against city to recover for their son's suicide on Riker's Island since (1) suicide report annexed to motion papers implied neither negligence nor causation and thus did not establish meritorious cause of action, and (2) counsel failed to present sufficient explanation for 3-year delay in moving to restore action. Moye v New York, 168 A.D.2d 342, 562 N.Y.S.2d 664, 1990 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1990), app. dismissed, 77 N.Y.2d 940, 569 N.Y.S.2d 613, 572 N.E.2d 54, 1991 N.Y. LEXIS 565 (N.Y. 1991).

It was error to grant plaintiffs' motion to vacate automatic dismissal of medical malpractice action under CLS CPLR § 3404, even though parties' stipulation obligated defendant to consent to "restoration" of action on timely motion following completion of discovery, since plaintiffs' long delays in seeking to resume prosecution of action were unexplained, there was no showing that those delays had not occasioned prejudice, and plaintiffs failed to submit affidavit by medical expert demonstrating merit to their allegations that defendant departed from good and accepted medical practice. Escobar v Deepdale General Hosp., 172 A.D.2d 486, 567 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 2d Dep't 1991).

Plaintiff was not entitled to vacatur of dismissal pursuant to CLS CPLR § 3404 where he failed to explain 4-year delay in moving to restore case to trial calendar after receiving notice of its having been struck, he failed to explain 15-month delay in moving for vacatur after receiving notice of dismissal, and he failed to rebut defendants' showing that 2 of 3 witnesses could no longer be located. Jones v Manhattan Leasing Systems, Inc., 181 A.D.2d 547, 581 N.Y.S.2d 48, 1992 N.Y. App. Div. LEXIS 3788 (N.Y. App. Div. 1st Dep't 1992).

Court properly refused to restore medical malpractice action to trial calendar where it had been adjourned 3 times due to plaintiffs' inability to procure expert witness, affidavit of merit of plaintiffs' physician did not make specific observations as to procedures and treatments performed or alleged improprieties therein, and 9 years had passed since commission of alleged

malpractice. Elliot v Nyack Hosp., 204 A.D.2d 958, 612 N.Y.S.2d 271, 1994 N.Y. App. Div. LEXIS 5652 (N.Y. App. Div. 3d Dep't 1994).

Plaintiff was not entitled to vacation of her default under CLS CPLR § 3404, and to restoration of her action to trial calendar on condition that she pay defendant $500 in sanctions, where much of delay was due directly to her failure to complete her examination before trial or appear for medical examination, she did not move to vacate her default and restore action to calendar until 7 ½ years after case was stricken from calendar, and over 10 years had passed since accident. Lee v Chion, 213 A.D.2d 602, 623 N.Y.S.2d 927, 1995 N.Y. App. Div. LEXIS 3239 (N.Y. App. Div. 2d Dep't 1995).

It was abuse of discretion to grant plaintiff's motion to restore products liability action to trial calendar where motion was not made until 6 years after case was marked "off," plaintiff submitted conclusory affidavit, including statement that he utilized product "known as penetone," defendant did not make such product, and plaintiff failed to further identify product which allegedly caused his injury, failed to submit any showing of connection between his exposure to product and his medical condition, and failed to provide reasonable excuse for 6-year delay in moving to restore action to calendar. Brucculeri v Metro-North Commuter R.R., 216 A.D.2d 66, 628 N.Y.S.2d 66, 1995 N.Y. App. Div. LEXIS 6287 (N.Y. App. Div. 1st Dep't 1995).

Court properly denied plaintiffs' motion to vacate automatic dismissal of malpractice action and to restore case to trial calendar where conclusory statements of plaintiffs' counsel as to his efforts to locate expert who would cooperate with him failed to adequately explain lengthy delay, affidavit of plaintiffs' medical expert did not establish meritorious nature of their action, and 11 years had elapsed since alleged malpractice occurred. Carter v City of New York, 231 A.D.2d 485, 647 N.Y.S.2d 28, 1996 N.Y. App. Div. LEXIS 8819 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting plaintiffs' motion to vacate dismissal of action and for leave to restore case to trial calendar where they failed to provide reasonable excuse for approximately 3-year delay in moving to restore, and over 15 years had passed since alleged medical malpractice.

Fico v Health Ins. Plan, 248 A.D.2d 432, 669 N.Y.S.2d 380, 1998 N.Y. App. Div. LEXIS 2329 (N.Y. App. Div. 2d Dep't 1998).

Court erred in granting plaintiffs' motion to restore action to court's calendar where delay in bringing motion was nearly 3 years, it was possible to make motion to restore within one year, underlying accident occurred 17 years ago, and there was no activity in case between date it was marked off and date of instant motion over 4 years later. Almanzar v Rye Ridge Realty Co., 249 A.D.2d 128, 671 N.Y.S.2d 481, 1998 N.Y. App. Div. LEXIS 4339 (N.Y. App. Div. 1st Dep't 1998).

Court improperly granted plaintiff's motion to vacate automatic dismissal of action and to restore action to trial calendar where he offered no excuse for his delay in moving to restore case, he engaged in no activity as to case between time he last responded to discovery requests and when he moved to restore case 3 months later, 8 years had passed between accident that allegedly caused his injuries and time that he moved to restore, and discovery had not yet been completed. Moses v Wilmaud Realty Corp., 262 A.D.2d 538, 692 N.Y.S.2d 456, 1999 N.Y. App. Div. LEXIS 7057 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied plaintiff's motion to restore action to trial calendar where plaintiff failed to appear for trial, there was no activity as to action during 16-month delay in moving to restore case to calendar, and over 6 years had passed since alleged malpractice and time of plaintiff's motion. McCarthy v Bagner, 271 A.D.2d 509, 710 N.Y.S.2d 249, 2000 N.Y. App. Div. LEXIS 4028 (N.Y. App. Div. 2d Dep't), app. dismissed, 95 N.Y.2d 902, 716 N.Y.S.2d 642, 739 N.E.2d 1147, 2000 N.Y. LEXIS 2823 (N.Y. 2000).

Plaintiff's motion to restore her medical malpractice action to trial calendar was denied as (1) 10-year-old deposition describing her fall from examination table in defendant's office after allegedly being left alone for 40 minutes was insufficient to establish meritorious claim, without medical evidence as to whether leaving her alone deviated from accepted practice, (2) unexplained failure of her court reporting service to keep track of case did not excuse her 5-year delay in moving to vacate automatic dismissal under CLS CPLR § 3404, (3) there was no course of

conduct to rebut presumption of abandonment that attached after automatic dismissal, and (4) 14-year gap between alleged malpractice and application to vacate dismissal was significantly prejudicial to defendant. Gold v Steinmetz, 186 Misc. 2d 245, 717 N.Y.S.2d 478, 2000 N.Y. Misc. LEXIS 465 (N.Y. Civ. Ct. 2000).

**53. — —Plaintiff-related excuse**

A motion to restore an action to trial calendar in its regular order would be granted as modified on the law and the facts in the exercise of discretion, to direct the filing of a new statement of readiness within 30 days from the date of the court's order, where plaintiff's continuing serious medical problems and his documentation of unsuccessful efforts to obtain the medical reports of his status constituted sufficient excuse for the delay in moving to restore the case to calendar after it was marked off the calendar on the ninth occasion it appeared. Furthermore, the medical reports presented to the court substantiated prima facie merit to the injury action and there was also no showing of prejudice to the defendants. Kolbasiuk v Printers Bindary, Inc., 93 A.D.2d 739, 461 N.Y.S.2d 286, 1983 N.Y. App. Div. LEXIS 17575 (N.Y. App. Div. 1st Dep't 1983).

Presumption of abandonment may be rebutted by injured plaintiff's continuing surgical treatments and his attorney's ongoing efforts to acquire necessary documentation and medical records; delay is reasonably excused where matter was originally marked on calendar at instigation of justice presiding at pretrial conference whose underlying purpose was to ascertain effects of injured plaintiff's then recent surgery. Sheehan v Hollywood, 112 A.D.2d 211, 491 N.Y.S.2d 432, 1985 N.Y. App. Div. LEXIS 55960 (N.Y. App. Div. 2d Dep't 1985).

Court properly denied plaintiffs' motion to vacate automatic dismissal of their action under CLS CPLR § 3404, since they failed to establish reasonable excuse for delay and intent not to abandon matter, where there was no activity in matter from 1990 (when case was first marked off calendar) through first part of 1991, plaintiffs admittedly withheld their address from their attorney, and it appeared that plaintiffs had deliberately thwarted their attorney's attempts to

communicate with them. Bohlman v Lorenzen, 208 A.D.2d 582, 617 N.Y.S.2d 193, 1994 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied plaintiff's motion to restore action to trial calendar where he engaged in virtually no activity as to case between when it was marked off calendar and when he moved to restore it, he did not show reasonable excuse for delay in moving to restore, delay was lengthy, and 6 years had passed since accident. Plaintiff did not show reasonable excuse for his delay in moving to restore case to trial calendar by asserting that physical examination by defendant's doctor remained outstanding and that such discovery could not occur due to plaintiff's incarceration, since plaintiff was still incarcerated when counsel finally moved to restore case, yet motion also sought direction about how to conduct physical examination; under circumstances, such motion could have been brought any time after case was struck from trial calendar. Jeffs v Janessa, Inc., 226 A.D.2d 504, 641 N.Y.S.2d 75, 1996 N.Y. App. Div. LEXIS 4380 (N.Y. App. Div. 2d Dep't), app. dismissed, 88 N.Y.2d 1037, 651 N.Y.S.2d 11, 673 N.E.2d 1238, 1996 N.Y. LEXIS 3204 (N.Y. 1996).

**54. — —Witness-related excuse**

In a medical malpractice action, the trial court erred in granting plaintiff's motion to restore the action to the calendar after it had been automatically dismissed pursuant to CPLR § 3404 due to plaintiff's failure to comply with discovery requests and to submit to a physical examination, where plaintiff's complete inaction for more than fifteen months after the case was stricken clearly constituted abandonment within the meaning of the statute, where plaintiff's stated reasons for her delay in complying with defendant's requests for hospital and medical authorizations consisted merely of conclusory assertions that the full names and addresses of the various institutions and doctors had taken a year to obtain and that the authorizations of certain foreign physicians had been difficult to obtain, and did not provide a basis for excusing plaintiff's default in the absence of any statement setting forth plaintiff's efforts to obtain the information and some showing that it was necessary to obtain the addresses of the institutions

and hospitals in order to give defendant the required authorizations, and where plaintiff's affidavit of merits was similarly bare and conclusory, and contained no statement by plaintiff's physician that there had been any departure from acceptable medical practice during plaintiff's treatment. Romanoff v St. Vincent's Hospital & Medical Center, 97 A.D.2d 382, 467 N.Y.S.2d 591, 1983 N.Y. App. Div. LEXIS 19943 (N.Y. App. Div. 1st Dep't 1983).

Plaintiff was not entitled to have breach of contract action restored to trial calendar 2 ½ years after it was stricken since (1) he failed to sustain his burden of showing lack of prejudice to defendants where one defendant, who was crucial witness, had died prior to bringing of motion, and defendants also contended that whereabouts of 2 nonparty defense witnesses were presently unknown, and (2) sending of 3 letters inquiring as to certain witness' availability for deposition did not establish reasonable excuse for his lengthy delay in moving to restore action, and thus he failed to make sufficient showing to excuse his failure to proceed expeditiously. Tucker v Hotel Employees & Restaurant Employees Union, Local 100, 134 A.D.2d 494, 521 N.Y.S.2d 279, 1987 N.Y. App. Div. LEXIS 50689 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was not entitled to reinstatement of legal malpractice action where (1) action was automatically dismissed pursuant to CLS CPLR § 3404, and (2) there was no evidence of any activity during next 2 years prior to time that plaintiff obtained new expert witness; plaintiff's vague and conclusory statements regarding attempt to locate expert did not establish reasonable excuse for delay. Roland v Napolitano, 209 A.D.2d 501, 619 N.Y.S.2d 77, 1994 N.Y. App. Div. LEXIS 11260 (N.Y. App. Div. 2d Dep't 1994).

**55. —Sufficient proof of excuse**

Where delay causing dismissal of medical malpractice action was occasioned in part by defendants' desire to pursue further discovery proceedings, and partly by court's failure to render a decision on motion to restore and because of clerk's failure to notify plaintiffs of his action in docketing their case, plaintiffs' conduct was excusable, and, in view of defendants' delay in answering, their requests for further discovery which resulted in striking the note of

issue and their confusing position on the motion to restore, they could not claim prejudice for delay which they helped cause. Gaffy v Buffalo General Hospital, 55 A.D.2d 850, 390 N.Y.S.2d 702, 1976 N.Y. App. Div. LEXIS 15670 (N.Y. App. Div. 4th Dep't 1976).

Motion to restore action to calendar should have been granted where plaintiff brought motion and attempted to re-file his note of issue only 4 weeks after defendant served his second 90-day demand and within 4 months of date that case was taken off calendar without prejudice; moreover, plaintiff provided reasonable explanation for delays and demonstrated that action had merit. Gory v County of Madison, 133 A.D.2d 951, 520 N.Y.S.2d 667, 1987 N.Y. App. Div. LEXIS 51991 (N.Y. App. Div. 3d Dep't 1987).

Plaintiff's action should have been restored to trial calendar under CLS CPLR § 3404, although it was based on alleged police misconduct that occurred 11 years earlier, where (1) delay was caused by excusable law office failure, (2) deposition transcript supported merits of claim, (3) having filed statement of readiness without opposition, plaintiff established intent not to abandon claim, and (4) defendants never raised claim of prejudice before motion court and court never mentioned issue of prejudice. Zabari v City of New York, 242 A.D.2d 15, 672 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff was entitled to restoration of action to trial calendar, even though she did not so move within one year after action was marked off calendar, where her showing of meritorious cause of action, reasonable excuse for delay, and lack of prejudice to defendant was uncontroverted by defendant, who did not oppose motion. Mahon v Rothschild, 273 A.D.2d 23, 708 N.Y.S.2d 863, 2000 N.Y. App. Div. LEXIS 6359 (N.Y. App. Div. 1st Dep't 2000).

Denial of a patient's motion to restore a malpractice action to trial calendar was error because, although the hospital asserted that the action was marked off the calendar in 2004 and properly dismissed in 2009 for failure to prosecute, there was no indication in the record that the action was ever marked off the calendar for N.Y. C.P.L.R. 3404 purposes, and, if the action was indeed marked off the calendar in 2004, the hospital did not indicate how the action could have been "dismissed" more than four years; the patient showed that she did not have notice of the 2009

conference and, without notice, the patient's default was a nullity, as was the remedy imposed as a consequence. Vacatur of the default was required as a matter of law and due process, and no showing of a potentially meritorious cause of action was required. Vasquez v New York City Health & Hosps. Corp., 100 A.D.3d 868, 954 N.Y.S.2d 206, 2012 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 2d Dep't 2012).

A plaintiff was entitled to have an action restored to the calendar of the City Court where he showed that his failure to appear for a Court date had been due to confusion surrounding the transfer of the case from the Supreme Court to the City Court, and to a misunderstanding as to the trial date. The City Court would not examine the factual and legal bases utilized by the Supreme Court in making the transfer. Whale Riggers & Erectors, Inc. v North Star Electrical Contracting Corp., 109 Misc. 2d 166, 439 N.Y.S.2d 623, 1981 N.Y. Misc. LEXIS 2369 (N.Y. City Ct. 1981).

**56. — —Attorney-related excuse**

The trial court in a personal injury action erred in denying plaintiff's motion to vacate the automatic dismissal of the action that had been entered pursuant to CPLR § 3404 where plaintiff demonstrated that his complaint had merit, and where plaintiff also put forward a justifiable excuse for his failure to move to restore his case within one year of its dismissal in that plaintiff had been represented by a small firm that consisted of three lawyers, and the lawyer who had been handling the matter had suffered a series of heart attacks and had ultimately died, after which the file had been transferred to another attorney. Rizzo v New York, 98 A.D.2d 688, 469 N.Y.S.2d 764, 1983 N.Y. App. Div. LEXIS 20984 (N.Y. App. Div. 1st Dep't 1983), app. dismissed, 62 N.Y.2d 801, 1984 N.Y. LEXIS 8272 (N.Y. 1984).

Supreme Court properly restored to preferred trial calendar wrongful death action which had been dismissed pursuant to CLS CPLR § 3404 where defendant did not show that it would be prejudiced by restoration, plaintiff appeared to have meritorious cause of action, plaintiff's counsel had suffered debilitating stroke prior to time case was dismissed, and he indicated that

he had understood opposing counsel was going to mark case as ready. Smigel v Rensselaerville, 125 A.D.2d 847, 510 N.Y.S.2d 34, 1986 N.Y. App. Div. LEXIS 63046 (N.Y. App. Div. 3d Dep't 1986).

Court properly granted plaintiffs' motion to restore their action to trial calendar where (1) they had no notice of their prior counsel's withdrawal until motion to dismiss was served, whereupon they obtained their prior attorney's file and secured new counsel, (2) their cross motion to restore case to trial calendar was made promptly thereafter, (3) their affidavits and supporting documentation demonstrated viable cause of action, and (4) there was no indication that defendants were prejudiced by delay. Malpass v Mavis Tire Supply Corp., 143 A.D.2d 890, 533 N.Y.S.2d 397, 1988 N.Y. App. Div. LEXIS 10265 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs' motion to vacate order of dismissal pursuant to CLS CPLR § 3404 and restore case to calendar should have been granted where plaintiffs' attorney set forth in detail his health problems that had delayed motion, plaintiffs submitted expert proof of meritorious cause of action, record established that plaintiffs never intended to abandon case, and there was ongoing activity, including pending appeal. Collins v Elbadawi, 265 A.D.2d 850, 695 N.Y.S.2d 634, 1999 N.Y. App. Div. LEXIS 9921 (N.Y. App. Div. 4th Dep't 1999).

**57. — —Effect of pending appeal**

Court should have vacated its prior order dismissing complaint where case had been placed on calendar designated as "marked off, case active" with consent of all parties during pendency of 2 prior appeals (as to both of which plaintiff was completely successful) and there was no indication of any dilatoriness on plaintiff's part in pursuing those appeals, clearly demonstrating lack of intent to abandon action and reasonable excuse for delay. Nedell v Sprigman, 227 A.D.2d 163, 641 N.Y.S.2d 837, 1996 N.Y. App. Div. LEXIS 4855 (N.Y. App. Div. 1st Dep't 1996).

**58. — —Plaintiff-related excuse**

Court did not abuse its discretion in restoring action to trial calendar on ground that plaintiff's medical excuse for delay (his diagnosis and treatment for Lyme disease) lacked necessary medical documentation, where over-all circumstances militated in favor of restoration. Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Action for property damage, personal injuries, loss of income, and severe emotional distress as result of water seepage into plaintiffs' apartment would not be dismissed for want of prosecution under CLS CPLR § 3216 where series of misfortunes provided excuse for delay, plaintiff daughter underwent 2 surgical procedures for broken leg and surgery for abdominal condition, plaintiff father was in failing health during pendency of action from effects of coronary bypass surgery and stroke, he devoted his time to caring for his elderly wife who suffered from Parkinson's disease, credibly meritorious claim could be gleaned from affidavit detailing damage to apartment and stipulation granting rent abatement, and defendants alleged no particular prejudice from delay. Weppler v Pretium Assocs., 245 A.D.2d 249, 666 N.Y.S.2d 643, 1997 N.Y. App. Div. LEXIS 13407 (N.Y. App. Div. 1st Dep't 1997).

Court erred in denying plaintiff's motion to restore case to trial calendar, even though plaintiff submitted unsigned, unsworn affidavit of merit, where verified complaint and bill of particulars revealed that he was seriously and permanently injured, there were numerous family tragedies suffered by his counsel, there was no intent to abandon action, and delay prejudiced plaintiff

more than defendants. Nicholos v Cashelard Restaurant, 249 A.D.2d 187, 672 N.Y.S.2d 98, 1998 N.Y. App. Div. LEXIS 4681 (N.Y. App. Div. 1st Dep't 1998).

Motion to vacate dismissal was properly granted on showing of merit made in verified complaint, reasonable excuse for 15 months it took plaintiff to serve amended bill of particulars, including extensive medical treatment and difficulties in procuring medical records, and absence of prejudice to defendant. Lebron v New York City Hous. Auth., 257 A.D.2d 541, 685 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1999).

Use of incorrect address for service of papers on opposing counsel was adequate excuse for plaintiffs' delay in bringing motion to restore case to calendar, particularly where defendants could claim no prejudice from 22-day delay. Murrell v New York City Transit Auth., 260 A.D.2d 307, 689 N.Y.S.2d 67, 1999 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1st Dep't 1999).

Case should be restored to calendar where plaintiff showed merit and lack of prejudice to defendants, lack of activity in case was partly attributable to defendants' failure to reschedule depositions, and no parties had received notice of conference that had prompted court's action when parties did not appear. Kisch v St. Vincent's Hosp. & Med. Ctr., 279 A.D.2d 341, 718 N.Y.S.2d 356, 2001 N.Y. App. Div. LEXIS 438 (N.Y. App. Div. 1st Dep't 2001).

**59. — —Witness-related excuse**

Automatic dismissal provisions of CLS CPLR § 3404 were applicable where personal injury action commenced in December, 1981 was struck from calendar with consent of parties and Justice presiding in October, 1984; accordingly, court had discretion to vacate dismissal, in view of (1) correspondence between parties' counsel and expert, indicating plaintiff's lack of intent to abandon case, (2) plaintiff's documented difficulty in obtaining report from expert she had retained, demonstrating sufficient excuse for delay, (3) plaintiff's showing of substantial possibility of success on merits, and (4) lack of showing that defendant was prejudiced by delay. Curtin v Grand Union Co., 124 A.D.2d 918, 508 N.Y.S.2d 333, 1986 N.Y. App. Div. LEXIS 62239 (N.Y. App. Div. 3d Dep't 1986).

**60. Merit; meritorious cause of action, generally**

Motion to vacate automatic dismissal of action should be granted where the record indicated a meritorious cause of action, no intention to abandon the action on the part of plaintiff and no merit to defendant’s claim of prejudice. Ackerman v Perchikoff, 30 A.D.2d 672, 291 N.Y.S.2d 894, 1968 N.Y. App. Div. LEXIS 3791 (N.Y. App. Div. 2d Dep't 1968).

Party moving to restore case to trial calendar after it has been stricken pursuant to rule regarding dismissal of abandoned cases must prove a satisfactory excuse for default which has resulted in having case marked “off” the calendar and for the neglect in moving to restore it within one year; he must also demonstrate that he has a meritorious cause of action. Quick-Way Excavators, Inc. v D.H. Overmyer Co., 44 A.D.2d 740, 354 N.Y.S.2d 468, 1974 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 3d Dep't 1974).

When a case has been abandoned and dismissed, a motion to open the default and restore it to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party, and excusable neglect as must be shown to open a default. Sal Masonry Contractors, Inc. v Arkay Constr. Corp., 49 A.D.2d 808, 373 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 4th Dep't 1975).

Once action has been dismissed for failure to prosecute, motion to open default and restore case to trial calendar will require same kind of proof of merit, or lack or prejudice to opposing party and of excusable neglect, as must be shown to open default judgment. Ruggiero v Elbin Realty, 51 A.D.2d 1011, 380 N.Y.S.2d 773, 1976 N.Y. App. Div. LEXIS 11775 (N.Y. App. Div. 2d Dep't), app. dismissed, 39 N.Y.2d 708, 1976 N.Y. LEXIS 3371 (N.Y. 1976), app. dismissed, 39 N.Y.2d 891, 386 N.Y.S.2d 394, 352 N.E.2d 581, 1976 N.Y. LEXIS 2834 (N.Y. 1976).

Where a case has been on the docket for more than a year and has been deemed dismissed under civil practice rule, a motion to restore the case to the calendar under such rule requires the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as

must be shown to open a default judgment. Sesan v American Home Products Corp., 52 A.D.2d 1058, 384 N.Y.S.2d 600, 1976 N.Y. App. Div. LEXIS 12974 (N.Y. App. Div. 4th Dep't 1976).

In the absence of motion to vacate default, supported by appropriate showing of merit, absence of prejudice to the defendant, excuse for default and present readiness, restoration of negligence action to calendar was improvident exercise of discretion. Til v O'Brien, 53 A.D.2d 1030, 386 N.Y.S.2d 155, 1976 N.Y. App. Div. LEXIS 15839 (N.Y. App. Div. 4th Dep't), app. dismissed, 40 N.Y.2d 902, 389 N.Y.S.2d 365, 357 N.E.2d 1020, 1976 N.Y. LEXIS 3118 (N.Y. 1976).

Plaintiffs failed to make requisite showing of facts sufficient to excuse their delay in prosecution of negligence action which had been dismissed and to establish meritorious cause of action, and thus restoration of action to trial calendar by Special Term on motion by plaintiffs was improvident exercise of discretion. Casamassina v Sutton Associates, Inc., 54 A.D.2d 682, 387 N.Y.S.2d 265, 1976 N.Y. App. Div. LEXIS 14224 (N.Y. App. Div. 2d Dep't 1976).

Where plaintiffs showed no excuse for their failure to move to vacate default within one year, nor did they set forth facts showing their cause of action to be meritorious, county court did not err in its determination that action had been abandoned for failure to remove it from deferred calendar within one year. Hickey v Shumacher, 54 A.D.2d 790, 387 N.Y.S.2d 746, 1976 N.Y. App. Div. LEXIS 14477 (N.Y. App. Div. 3d Dep't 1976).

Once an action has been dismissed under CPLR § 3404, a motion to open the default and restore the case to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as must be shown to open a default judgment under CPLR § 5015. Fluman v TSS Dep't Store, 100 A.D.2d 838, 473 N.Y.S.2d 835, 1984 N.Y. App. Div. LEXIS 17942 (N.Y. App. Div. 2d Dep't 1984).

Court properly granted plaintiff’s motion to restore medical malpractice action to trial calendar even though no affidavit of merit by medical expert had been proffered in support thereof under 22 NYCRR § 202.21 since action was not marked off calendar due to plaintiff’s default (plaintiff

requested withdrawal to permit substitution of herself as administratrix of deceased plaintiff's estate and to amend complaint to plead cause of action for wrongful death) nor was motion to restore untimely; rule was not intended to rigidly mandate submission of affidavit of merit irrespective of absence of default. Balducci v Jason, 133 A.D.2d 436, 519 N.Y.S.2d 656, 1987 N.Y. App. Div. LEXIS 49909 (N.Y. App. Div. 2d Dep't 1987), overruled, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

Under CLS CPLR § 3404, restoration of action to calendar requires showing of merit to moving party's claim, lack of prejudice to other parties, lack of intent to abandon or deliberately default in action, and reasonable excuse for moving party's delay. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

While plaintiff's health excused his failure to file note of issue and timely move to restore case to calendar, Supreme Court's written decision permitting him to serve amended complaint, adding causes of action, sustaining some claims and dismissing others, was insufficient to restore case to trial calendar, as court merely decided that causes of action which it sustained were facially valid, without determining factual merit. Jaffe v Carol Mgmt. Corp., 268 A.D.2d 292, 702 N.Y.S.2d 21, 2000 N.Y. App. Div. LEXIS 305 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff's motion to vacate automatic dismissal of her action and to restore it to trial calendar was properly denied, despite adequate showing of merit of action, where she failed to show reasonable excuse for her delay in prosecuting action, intent not to abandon action, and absence of prejudice to defendants if action, which arose in 1987, were restored. Ramirez v City of New York, 281 A.D.2d 169, 721 N.Y.S.2d 508, 2001 N.Y. App. Div. LEXIS 1893 (N.Y. App. Div. 1st Dep't 2001).

Case in which wife and minor children sought to recover damages from bar owner pursuant to Dram Shop Act would be restored to the calendar if plaintiffs were able to show that the case had merit and that it was not abandoned or that there was a neglect to prosecute, and there was no showing of prejudice to the defendants. Garlinghouse v Nelson, 72 Misc. 2d 432, 339 N.Y.S.2d 538, 1973 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1973).

Under 22 NYCRR § 208.14(c), action brought in New York City Civil Court is not automatically deemed dismissed on being stricken from calendar, and may be restored without necessity of affidavit of merits as long as motion to restore is made within one year after action had been stricken; only time affidavit of merits is necessary is when motion to restore is made more than one year after action had been stricken and is thus subject to mandates of CLS CPLR §§ 3404 and 5015. Guzman v Members Am. Credit Union, 172 Misc. 2d 192, 658 N.Y.S.2d 822, 1997 N.Y. Misc. LEXIS 148 (N.Y. Civ. Ct. 1997).

**61. —Insufficient proof of merit**

Where some 18 months had elapsed since medical malpractice case was taken off trial calendar, plaintiff had delayed some nine months in filing stipulation with defendant providing that case be restored to calendar and plaintiff made no showing of merit, trial court did not err in denying motion to restore case to calendar; however, in light of stipulation and fact that defendant had taken physical examination of plaintiff about one year previously, denial should have been without prejudice to plaintiff's further application. Williams v Giattini, 49 A.D.2d 337, 374 N.Y.S.2d 642, 1975 N.Y. App. Div. LEXIS 10908 (N.Y. App. Div. 1st Dep't 1975).

Trial court did not abuse discretion by refusing to allow plaintiff relief from her default in personal injury action, where allegations contained in the complaint and plaintiff's affidavit, absent supporting expert testimony, provided inadequate showing of merit of action, and where there was no sufficient excuse for plaintiff's failure to timely restore the action. Casey v Fuller Brush Co., 51 A.D.2d 639, 378 N.Y.S.2d 510, 1976 N.Y. App. Div. LEXIS 10978 (N.Y. App. Div. 3d Dep't 1976).

The restoration of an action for damages to the trial calendar almost 16 months after notice from the court that the action was no longer on the calendar was an improvident abuse of discretion where there was no satisfactory explanation for the delay in moving for restoration or any demonstration of merit to the action. Van Sant v Hall, 95 A.D.2d 919, 464 N.Y.S.2d 47, 1983 N.Y. App. Div. LEXIS 18892 (N.Y. App. Div. 3d Dep't 1983).

Court properly dismissed cross-complaint as abandoned where (1) entire action was marked off trial calendar on July 2, 1986, (2) cross-plaintiffs undertook no action to restore matter to calendar for 33 months, until cross motion to formally dismiss case was made, (3) there was no activity by parties during interim when action was marked “off” which would negate presumption of intent to abandon, and (4) cross-plaintiffs did not sustain their burden of demonstrating merit to their action. M.J. Williams Corp. v Roma Fragrances & Cosmetics, Ltd., 166 A.D.2d 327, 561 N.Y.S.2d 1, 1990 N.Y. App. Div. LEXIS 12742 (N.Y. App. Div. 1st Dep't 1990).

Defendant was not entitled to have his cross-claims and counter-claims restored to calendar where (1) he did not move to vacate dismissal and restore case to calendar until 29 months after case was stricken from calendar by plaintiff, (2) he failed to explain his failure to timely attend to matter, (3) he did not establish merits of his claim, and (4) during 29-month period his true adversary in action, and principal witness to facts underlying his claims, had died. Todd Co. v Birnbaum, 182 A.D.2d 505, 582 N.Y.S.2d 414, 1992 N.Y. App. Div. LEXIS 6096 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff’s motion to restore personal injury action to trial calendar was properly denied where action had been dismissed under CLS CPLR § 3404, and he did not show existence of meritorious cause of action. Robinson v West Point Leasing Corp., 266 A.D.2d 526, 698 N.Y.S.2d 554, 1999 N.Y. App. Div. LEXIS 12234 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 94 N.Y.2d 933, 708 N.Y.S.2d 352, 729 N.E.2d 1151, 2000 N.Y. LEXIS 589 (N.Y. 2000).

Plaintiffs’ motion to restore action to active calendar was properly denied for failure to submit affidavit of merit and to show excuse for not having answered calendar call where action was marked off active status calendar 27 months before subject motion. Roman v City of New York, 281 A.D.2d 246, 721 N.Y.S.2d 535, 2001 N.Y. App. Div. LEXIS 2448 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not show that her action against commuter railroad company had merit, and thus she was not entitled to vacatur of dismissal of action under CLS CPLR § 3404 and restoration of action to calendar, where (1) her false arrest and malicious prosecution claims were based on

company's alleged vicarious liability for conduct of its conductor, who had complained of harassment by plaintiff, and record did not show that conductor's conduct was actionable, and (2) plaintiff's claims for intentional infliction of emotional distress failed, absent showing of requisite element of egregious or outrageous conduct. Du Chateau v Metro-North Commuter R.R. Co., 281 A.D.2d 250, 721 N.Y.S.2d 538, 2001 N.Y. App. Div. LEXIS 2449 (N.Y. App. Div. 1st Dep't 2001).

In the slip and fall case, the administratrix was not entitled to relief from the N.Y. C.P.L.R. 3404 dismissal, as the administratrix did not establish a meritorious cause of action or a reasonable excuse for the delay. Chavez v 407 Seventh Ave. Corp., 807 N.Y.S.2d 785, 10 Misc. 3d 33, 2005 N.Y. Misc. LEXIS 2452 (N.Y. App. Term 2005), rev'd, 39 A.D.3d 454, 833 N.Y.S.2d 219, 2007 N.Y. App. Div. LEXIS 4172 (N.Y. App. Div. 2d Dep't 2007).

Where the law firm's action was dismissed pursuant to N.Y. C.P.L.R. 3404, the firm was not entitled to have the action restored to the trial calendar; the firm failed to demonstrate that it had a meritorious cause of action or a reasonable excuse for the delay. Samuel & Weininger v Belovin & Franzblau, 5 A.D.3d 466, 772 N.Y.S.2d 600, 2004 N.Y. App. Div. LEXIS 2477 (N.Y. App. Div. 2d Dep't 2004).

**62. — —Conclusory affidavits**

In a medical malpractice action, the trial court erred in granting plaintiff's motion to restore the action to the calendar after it had been automatically dismissed pursuant to CPLR § 3404 due to plaintiff's failure to comply with discovery requests and to submit to a physical examination, where plaintiff's complete inaction for more than fifteen months after the case was stricken clearly constituted abandonment within the meaning of the statute, where plaintiff's stated reasons for her delay in complying with defendant's requests for hospital and medical authorizations consisted merely of conclusory assertions that the full names and addresses of the various institutions and doctors had taken a year to obtain and that the authorizations of certain foreign physicians had been difficult to obtain, and did not provide a basis for excusing

plaintiff’s default in the absence of any statement setting forth plaintiff’s efforts to obtain the information and some showing that it was necessary to obtain the addresses of the institutions and hospitals in order to give defendant the required authorizations, and where plaintiff’s affidavit of merits was similarly bare and conclusory, and contained no statement by plaintiff’s physician that there had been any departure from acceptable medical practice during plaintiff’s treatment. Romanoff v St. Vincent's Hospital & Medical Center, 97 A.D.2d 382, 467 N.Y.S.2d 591, 1983 N.Y. App. Div. LEXIS 19943 (N.Y. App. Div. 1st Dep't 1983).

On motion to vacate default and restore medical malpractice action to trial calendar, plaintiff failed to establish meritorious claim on basis of physician’s affidavit merely stating his opinion that plaintiff “has a good and meritorious cause of action,” without specifying any acts on part of defendants which constituted departure from accepted medical practice, and without even stating that plaintiff was victim of medical malpractice. Friedberg v Bay Ridge Orthopedic Associates, P. C., 122 A.D.2d 194, 504 N.Y.S.2d 731, 1986 N.Y. App. Div. LEXIS 59524 (N.Y. App. Div. 2d Dep't 1986).

Plaintiffs whose cause of action for recovery for personal injuries was deemed abandoned were not entitled to restoration of case pursuant to CLS CPLR § 3404 where (1) papers supporting motion were insufficient since they did not contain evidentiary facts but relied only on conclusory allegations of injured plaintiff’s mother (who had no personal knowledge of circumstances leading to injury) and on physicians’ reports and bill of particulars dealing only with damages, not liability, (2) plaintiffs’ excuse for delay in prosecuting case was inadequate since plaintiffs did not lack capacity during period of delay and proffered reason for delay related only to medical reports of damages rather than to liability issues, (3) defendants were clearly prejudiced by 16-year period since accident occurred, and (4) plaintiffs failed to rebut presumption of abandonment since they were able to show only 2 isolated instances of pretrial discovery as examples of recent action on case. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App. Div. 1st Dep't 1986), app.

dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

Special Term improperly vacated dismissal of medical malpractice action where plaintiff failed to set forth reasonable excuse for 34-month delay in seeking to move to restore case to trial calendar; moreover, report allegedly from (unidentified) physician and plaintiff's affidavit were insufficient to establish merits of action. Paglia v Agrawal, 124 A.D.2d 793, 508 N.Y.S.2d 514, 1986 N.Y. App. Div. LEXIS 62113 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 946, 516 N.Y.S.2d 658, 509 N.E.2d 353, 1987 N.Y. LEXIS 16473 (N.Y. 1987).

It was error to restore wrongful death action to trial calendar where excuse for failure to proceed in timely fashion was not established, claim that meritorious cause of action existed was set forth in conclusory fashion without supporting evidence, and question of possible prejudice to defendant if case were restored was not even addressed. Public Adm'r of County of New York v Heil Corp., 126 A.D.2d 533, 510 N.Y.S.2d 655, 1987 N.Y. App. Div. LEXIS 41669 (N.Y. App. Div. 2d Dep't 1987).

Merit of medical malpractice action against physicians was not established by plaintiff's submission of deposition testimony, verified complaint, X-rays taken by codefendant hospital, and discharge report of nonparty hospital setting forth plaintiff's medical history, in absence of affidavit by medical expert stating that treatment rendered was below acceptable standards and caused plaintiff's injuries; accordingly, it was error to grant plaintiff's motion to restore case to trial calendar pursuant to CLS CPLR § 3404, and to deny physicians' cross-motion to dismiss. Wulster v Rubinstein, 126 A.D.2d 545, 510 N.Y.S.2d 668, 1987 N.Y. App. Div. LEXIS 41680 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 70 N.Y.2d 694, 518 N.Y.S.2d 1031, 512 N.E.2d 557, 1987 N.Y. LEXIS 17989 (N.Y. 1987), overruled, Basetti v Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 9264 (N.Y. App. Div. 2d Dep't 2001).

Special Term properly refused to restore legal malpractice action to trial calendar where plaintiff's affidavit merely set forth conclusory statement that he had good and meritorious cause of action and he failed to allege any acts or omissions on part of defendant which would

constitute malpractice. Miller v Jessel Rothman, P. C., 127 A.D.2d 826, 512 N.Y.S.2d 220, 1987 N.Y. App. Div. LEXIS 53414 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 693, 518 N.Y.S.2d 1028, 512 N.E.2d 554, 1987 N.Y. LEXIS 17960 (N.Y. 1987).

Petitioner's motion to vacate automatic dismissal under CLS CPLR § 3404 and to restore Article 78 proceeding to trial calendar, made after case lay dormant for nearly 5 years, was properly denied even though part of delay was due to failure of petitioner's attorney to act and his eventual disbarment, since no valid reason was offered for 1 ½ -year delay after present counsel took possession of case file, and petitioner's affidavit of merit, containing bare allegation of racial discrimination, was insufficient to show that her discharge from employment was due to improper motives in light of evidence that she was discharged due to unsatisfactory evaluation of her performance as probationary teacher. Kharrubi v Board of Education, 133 A.D.2d 457, 519 N.Y.S.2d 671, 1987 N.Y. App. Div. LEXIS 49926 (N.Y. App. Div. 2d Dep't 1987).

Court erred in restoring wrongful death action to trial calendar where plaintiff offered only conclusory affidavit in support of allegation that scratch decedent sustained while attempting to exit car manufactured by defendant was substantial factor contributing to development of malignant melanoma and fatal stroke, and plaintiff offered no excuse for delay in moving to restore action and in obtaining affidavit of merits. Crystal v General Motors Corp., 157 A.D.2d 821, 550 N.Y.S.2d 418, 1990 N.Y. App. Div. LEXIS 1056 (N.Y. App. Div. 2d Dep't 1990).

Medical affidavit of plaintiff's physician was insufficient to establish merit required to restore malpractice action, which had been dismissed pursuant to CLS CPLR § 3404, where physician's affidavit failed to make specific observations as to alleged improprieties and merely stated that, on review of medical records, he was of opinion to reasonable degree of medical certainty that "there was a deviation from accepted medical practice." Nepomniaschi v Goldstein, 182 A.D.2d 743, 582 N.Y.S.2d 761, 1992 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 2d Dep't 1992).

Court properly refused to restore medical malpractice action to trial calendar where it had been adjourned 3 times due to plaintiffs' inability to procure expert witness, affidavit of merit of plaintiffs' physician did not make specific observations as to procedures and treatments

performed or alleged improprieties therein, and 9 years had passed since commission of alleged malpractice. Elliot v Nyack Hosp., 204 A.D.2d 958, 612 N.Y.S.2d 271, 1994 N.Y. App. Div. LEXIS 5652 (N.Y. App. Div. 3d Dep't 1994).

Court properly denied plaintiff's motion to restore to trial calendar action alleging that drugstore dispensed contaminated medication or that drug company negligently manufactured medication where (1) plaintiff failed to file certificate of readiness, contending that further discovery was needed in 10-year-old claim, (2) her attorney's affirmation was insufficient, and remaining affidavits (those of plaintiff and her treating physician) were bare, conclusory, and devoid of specifics to establish merit, and (3)letter from consulting toxicologist was uncertified. Maida v Rite Aid Corp., 210 A.D.2d 589, 619 N.Y.S.2d 812, 1994 N.Y. App. Div. LEXIS 11817 (N.Y. App. Div. 3d Dep't 1994).

It was abuse of discretion to grant plaintiff's motion to restore products liability action to trial calendar where motion was not made until 6 years after case was marked "off," plaintiff submitted conclusory affidavit, including statement that he utilized product "known as penetone," defendant did not make such product, and plaintiff failed to further identify product which allegedly caused his injury, failed to submit any showing of connection between his exposure to product and his medical condition, and failed to provide reasonable excuse for 6-year delay in moving to restore action to calendar. Brucculeri v Metro-North Commuter R.R., 216 A.D.2d 66, 628 N.Y.S.2d 66, 1995 N.Y. App. Div. LEXIS 6287 (N.Y. App. Div. 1st Dep't 1995).

Under CLS CPLR § 3404, plaintiff who sought to restore case to calendar failed to show merit of his claim where his pleadings and affidavit contained only conclusory allegations of negligence. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

Court properly denied plaintiffs' motion to vacate automatic dismissal of malpractice action and to restore case to trial calendar where conclusory statements of plaintiffs' counsel as to his efforts to locate expert who would cooperate with him failed to adequately explain lengthy delay, affidavit of plaintiffs' medical expert did not establish meritorious nature of their action, and 11

years had elapsed since alleged malpractice occurred. Carter v City of New York, 231 A.D.2d 485, 647 N.Y.S.2d 28, 1996 N.Y. App. Div. LEXIS 8819 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff failed to show merits of case by merely submitting affidavit of mechanical engineer, who opined in conclusory fashion that lighter in question, which exploded in decedent's hand, had "manufacturing defects" in its "fuel metering subassembly," since expert did not state how such condition was proximate cause of decedent's injuries nor did he support his opinion with any evidence. Buck v Reed, 231 A.D.2d 821, 647 N.Y.S.2d 581, 1996 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 3d Dep't 1996).

It was error for court to vacate automatic dismissal under CLS CPLR § 3404 and to restore action to trial calendar, where case was marked off calendar as result of unexplained failure of plaintiff's counsel to proceed to trial, plaintiff did not offer any excuse for waiting 11 months and 3 weeks to move to restore, plaintiff's expert failed to establish sufficient evidentiary foundation for his conclusion that defendant committed malpractice, and plaintiff failed to even allege that defendant would not be prejudiced if action were restored. Michitsch v Katz, 276 A.D.2d 605, 714 N.Y.S.2d 135, 2000 N.Y. App. Div. LEXIS 10365 (N.Y. App. Div. 2d Dep't 2000).

Action should have been dismissed under CLS CPLR § 3404 where plaintiff's claims, without documentation, that she suffered from various medical conditions were insufficient to account for her delay of more than 2 years in moving to restore case to calendar, and her conclusory claims failed to establish merits of action; presumption of abandonment had not been rebutted. Aguilar v Djonvic, 282 A.D.2d 366, 723 N.Y.S.2d 474, 2001 N.Y. App. Div. LEXIS 4097 (N.Y. App. Div. 1st Dep't 2001).

**63. — —Insufficiency as to causation**

Plaintiffs were not entitled to vacatur of default in action against city to recover for their son's suicide on Riker's Island since (1) suicide report annexed to motion papers implied neither negligence nor causation and thus did not establish meritorious cause of action, and (2) counsel failed to present sufficient explanation for 3-year delay in moving to restore action. Moye v New

York, 168 A.D.2d 342, 562 N.Y.S.2d 664, 1990 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1990), app. dismissed, 77 N.Y.2d 940, 569 N.Y.S.2d 613, 572 N.E.2d 54, 1991 N.Y. LEXIS 565 (N.Y. 1991).

Court properly denied plaintiffs' motion to vacate automatic dismissal of malpractice action and to restore case to trial calendar where conclusory statements of plaintiffs' counsel as to his efforts to locate expert who would cooperate with him failed to adequately explain lengthy delay, affidavit of plaintiffs' medical expert did not establish meritorious nature of their action, and 11 years had elapsed since alleged malpractice occurred. Carter v City of New York, 231 A.D.2d 485, 647 N.Y.S.2d 28, 1996 N.Y. App. Div. LEXIS 8819 (N.Y. App. Div. 2d Dep't 1996).

Infant plaintiff failed to submit sufficient proof of merit to justify restoring her action to trial calendar, based on her affidavit stating that she recalled that when she was 2 years old she fell into bathtub containing water that was "incredibly hot" and sustained severe burns, as affidavit did not state how defendants' negligence constituted proximate cause of accident. Lundy v Timm, 264 A.D.2d 820, 695 N.Y.S.2d 418, 1999 N.Y. App. Div. LEXIS 9411 (N.Y. App. Div. 2d Dep't 1999).

**64. — —No affidavits of merit**

Supreme Court erred in vacating order of dismissal pursuant to CLS CPLR § 3404 where there was neither affidavit of merit nor adequate excuse for lengthy delay. Lyon v Tomczyk, 124 A.D.2d 1004, 508 N.Y.S.2d 783, 1986 N.Y. App. Div. LEXIS 62334 (N.Y. App. Div. 4th Dep't 1986).

It was error for court to grant plaintiff's motion to restore case to trial calendar in absence of affidavit of merit where note of issue hadbeen stricken more that 1 ½ years earlier, notwithstanding that it was clear that plaintiff did not intend to abandon action and had engaged in pretrial discovery since striking of note of issue. McPhail v F & B Assoc., 160 A.D.2d 398, 554 N.Y.S.2d 25, 1990 N.Y. App. Div. LEXIS 3952 (N.Y. App. Div. 1st Dep't 1990).

It was error to grant plaintiffs' motion to vacate automatic dismissal of medical malpractice action under CLS CPLR § 3404, even though parties' stipulation obligated defendant to consent to "restoration" of action on timely motion following completion of discovery, since plaintiffs' long delays in seeking to resume prosecution of action were unexplained, there was no showing that those delays had not occasioned prejudice, and plaintiffs failed to submit affidavit by medical expert demonstrating merit to their allegations that defendant departed from good and accepted medical practice. Escobar v Deepdale General Hosp., 172 A.D.2d 486, 567 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 2d Dep't 1991).

Court erred in granting dental malpractice plaintiff's motion to restore case to trial calendar where she failed to provide affidavit of merit by physician or other qualified expert, stating with specificity expert's observations as to procedures or treatments performed and alleged deviations from acceptable standards of medical care. Iazzetta v Vicenzi, 243 A.D.2d 540, 663 N.Y.S.2d 109, 1997 N.Y. App. Div. LEXIS 9858 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff's motion to restore her medical malpractice action to trial calendar was denied as (1) 10-year-old deposition describing her fall from examination table in defendant's office after allegedly being left alone for 40 minutes was insufficient to establish meritorious claim, without medical evidence as to whether leaving her alone deviated from accepted practice, (2) unexplained failure of her court reporting service to keep track of case did not excuse her 5-year delay in moving to vacate automatic dismissal under CLS CPLR § 3404, (3) there was no course of conduct to rebut presumption of abandonment that attached after automatic dismissal, and (4) 14-year gap between alleged malpractice and application to vacate dismissal was significantly prejudicial to defendant. Gold v Steinmetz, 186 Misc. 2d 245, 717 N.Y.S.2d 478, 2000 N.Y. Misc. LEXIS 465 (N.Y. Civ. Ct. 2000).

**65. — —Supporting statements unsworn**

It was error to grant plaintiffs' motion to vacate automatic dismissal and to restore dental malpractice case to trial calendar, brought more than one year after case had been marked off

calendar, even though there was no intent by plaintiffs to abandon action and defendants neither claimed nor suffered prejudice from delay, since report of plaintiffs' dental expert regarding merits of claim, although detailed, was unsworn; however, motion should be denied without prejudice to renewal upon proper papers in view of plaintiffs' mere omission to have expert's report verified. Hammer v Hochberg, 128 A.D.2d 834, 513 N.Y.S.2d 708, 1987 N.Y. App. Div. LEXIS 44522 (N.Y. App. Div. 2d Dep't 1987).

Medical malpractice action was improvidently restored to calendar in absence of proper affidavit of merit and acceptable explanation of default where unsworn statements of 3 physicians attached to plaintiff's motion papers did not indicate that meritorious claim of malpractice existed, and did not even suggest that medical malpractice might have been committed. Saeed v Boulevard Hosp., 157 A.D.2d 654, 549 N.Y.S.2d 754, 1990 N.Y. App. Div. LEXIS 250 (N.Y. App. Div. 2d Dep't 1990).

Court properly denied plaintiff's motion to restore to trial calendar action alleging that drugstore dispensed contaminated medication or that drug company negligently manufactured medication where (1) plaintiff failed to file certificate of readiness, contending that further discovery was needed in 10-year-old claim, (2) her attorney's affirmation was insufficient, and remaining affidavits (those of plaintiff and her treating physician) were bare, conclusory, and devoid of specifics to establish merit, and (3)letter from consulting toxicologist was uncertified. Maida v Rite Aid Corp., 210 A.D.2d 589, 619 N.Y.S.2d 812, 1994 N.Y. App. Div. LEXIS 11817 (N.Y. App. Div. 3d Dep't 1994).

**66. — —Unsubstantiated attorney's affidavit**

It was abuse of discretion to grant plaintiff's motion to restore wrongful death action to trial calendar where (1) plaintiff's affidavit completely failed to demonstrate any merit to her claim, especially where her counsel's affidavit indicated that decedent was killed while driving in opposite direction of traffic, and (2) there was no valid excuse offered for plaintiff's failure to move to restore action to calendar for almost 3 years following her appeal of order changing

venue. Hillegass v Duffy, 148 A.D.2d 677, 539 N.Y.S.2d 426, 1989 N.Y. App. Div. LEXIS 4197 (N.Y. App. Div. 2d Dep't 1989).

Personal injury plaintiff seeking to restore action to trial calendar under CLS CPLR § 3404 failed to show meritorious cause of action where complaint and affirmation in support of his motion were verified by his attorneys rather than by individual with personal knowledge, and those documents merely stated in conclusory way that defendants were negligent. McKenna v Solomon, 255 A.D.2d 496, 681 N.Y.S.2d 59, 1998 N.Y. App. Div. LEXIS 12656 (N.Y. App. Div. 2d Dep't 1998).

Motion to vacate dismissal of proceeding under CLS RPTL Art 7 was not adequately supported by allegation that settlement negotiations excused delay, since attorney's affidavit failed to address other factors—merits of claim, absence of intent to abandon, and lack of prejudice. State v Town of Clifton, 275 A.D.2d 523, 712 N.Y.S.2d 652, 2000 N.Y. App. Div. LEXIS 8418 (N.Y. App. Div. 3d Dep't 2000).

Plaintiff was not entitled to vacatur of dismissal of action under CLS CPLR § 3404 where (1) unsubstantiated assertions of plaintiff's attorney were insufficient to show either meritorious cause of action or absence of prejudice to defendant or third-party defendant if action were restored to trial calendar, and (2) intermittent periods of disability claimed by plaintiff's attorney were not reasonable excuse for delay, absent showing that disability was continuous throughout period in question. Bray v Thor Steel & Welding Ltd., 275 A.D.2d 912, 713 N.Y.S.2d 400, 2000 N.Y. App. Div. LEXIS 9671 (N.Y. App. Div. 4th Dep't 2000), app. denied, 738 N.Y.S.2d 254, 2000 N.Y. App. Div. LEXIS 13584 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 778, 725 N.Y.S.2d 633, 749 N.E.2d 203, 2001 N.Y. LEXIS 640 (N.Y. 2001).

**67. —Sufficient proof of merit**

Even though a case marked "off" the calendar, which is not restored within one year thereafter is deemed abandoned and automatically dismissed, court may vacate the dismissal where it appears conclusively from a showing of facts sufficient to excuse the delay, and a showing of

merits, that neither party intended to abandon the action. Boyle v Krebs & Schulz Motors, Inc., 18 A.D.2d 1010, 239 N.Y.S.2d 143, 1963 N.Y. App. Div. LEXIS 4128 (N.Y. App. Div. 2d Dep't 1963).

The lower court did not abuse its discretion in conditionally granting plaintiff's motion to vacate the dismissal of the action pursuant to CPLR § 3404 and restore the action to the calendar where less than two months had elapsed between the dismissal of the action and the making of plaintiff's motion to restore, and where there was evidence that the case was marked off the calendar not due to plaintiff's neglect, but out of plaintiff's willingness to permit the striking of the action by an additional defendant on defendants' counterclaim, who needed more time in which to complete discovery. Moreover, while the affidavit of plaintiff's president submitted in support of the motion to restore the action merely referred to the complaint, the affidavit and complaint read together constituted a sufficient showing of merit. General Staple Co. v Amtronics, Inc., 81 A.D.2d 877, 439 N.Y.S.2d 166, 1981 N.Y. App. Div. LEXIS 11576 (N.Y. App. Div. 2d Dep't 1981).

The trial court in a personal injury action erred in denying plaintiff's motion to vacate the automatic dismissal of the action that had been entered pursuant to CPLR § 3404 where plaintiff demonstrated that his complaint had merit, and where plaintiff also put forward a justifiable excuse for his failure to move to restore his case within one year of its dismissal in that plaintiff had been represented by a small firm that consisted of three lawyers, and the lawyer who had been handling the matter had suffered a series of heart attacks and had ultimately died, after which the file had been transferred to another attorney. Rizzo v New York, 98 A.D.2d 688, 469 N.Y.S.2d 764, 1983 N.Y. App. Div. LEXIS 20984 (N.Y. App. Div. 1st Dep't 1983), app. dismissed, 62 N.Y.2d 801, 1984 N.Y. LEXIS 8272 (N.Y. 1984).

Automatic dismissal provisions of CLS CPLR § 3404 were applicable where personal injury action commenced in December, 1981 was struck from calendar with consent of parties and Justice presiding in October, 1984; accordingly, court had discretion to vacate dismissal, in view of (1) correspondence between parties' counsel and expert, indicating plaintiff's lack of intent to

abandon case, (2) plaintiff's documented difficulty in obtaining report from expert she had retained, demonstrating sufficient excuse for delay, (3) plaintiff's showing of substantial possibility of success on merits, and (4) lack of showing that defendant was prejudiced by delay. Curtin v Grand Union Co., 124 A.D.2d 918, 508 N.Y.S.2d 333, 1986 N.Y. App. Div. LEXIS 62239 (N.Y. App. Div. 3d Dep't 1986).

Supreme Court properly restored to preferred trial calendar wrongful death action which had been dismissed pursuant to CLS CPLR § 3404 where defendant did not show that it would be prejudiced by restoration, plaintiff appeared to have meritorious cause of action, plaintiff's counsel had suffered debilitating stroke prior to time case was dismissed, and he indicated that he had understood opposing counsel was going to mark case as ready. Smigel v Rensselaerville, 125 A.D.2d 847, 510 N.Y.S.2d 34, 1986 N.Y. App. Div. LEXIS 63046 (N.Y. App. Div. 3d Dep't 1986).

Motion to restore action to calendar should have been granted where plaintiff brought motion and attempted to re-file his note of issue only 4 weeks after defendant served his second 90-day demand and within 4 months of date that case was taken off calendar without prejudice; moreover, plaintiff provided reasonable explanation for delays and demonstrated that action had merit. Gory v County of Madison, 133 A.D.2d 951, 520 N.Y.S.2d 667, 1987 N.Y. App. Div. LEXIS 51991 (N.Y. App. Div. 3d Dep't 1987).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Court improperly denied plaintiff's motion to restore action to trial calendar where delay was around 20 months, there was no prejudice to defendant, plaintiff's activities during interim evinced no intent to abandon action, discovery was complete, and plaintiff provided adequate proof of merits of action. Weiss v City of New York, 247 A.D.2d 239, 669 N.Y.S.2d 33, 1998 N.Y. App. Div. LEXIS 984 (N.Y. App. Div. 1st Dep't 1998).

Court improperly denied plaintiff's motion to restore action to trial calendar where case was marked off calendar through no fault of plaintiff, plaintiff showed merit and lack of any intent to abandon action, failure to timely move to restore action was due to counsel's oversight, 12-day delay was minimal, and no prejudice were shown. Evans v New York City Hous. Auth., 262 A.D.2d 123, 692 N.Y.S.2d 54, 1999 N.Y. App. Div. LEXIS 6796 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff was entitled to restoration of action to trial calendar, even though she did not so move within one year after action was marked off calendar, where her showing of meritorious cause of action, reasonable excuse for delay, and lack of prejudice to defendant was uncontroverted by defendant, who did not oppose motion. Mahon v Rothschild, 273 A.D.2d 23, 708 N.Y.S.2d 863, 2000 N.Y. App. Div. LEXIS 6359 (N.Y. App. Div. 1st Dep't 2000).

Case should be restored to calendar where plaintiff showed merit and lack of prejudice to defendants, lack of activity in case was partly attributable to defendants' failure to reschedule depositions, and no parties had received notice of conference that had prompted court's action when parties did not appear. Kisch v St. Vincent's Hosp. & Med. Ctr., 279 A.D.2d 341, 718 N.Y.S.2d 356, 2001 N.Y. App. Div. LEXIS 438 (N.Y. App. Div. 1st Dep't 2001).

Merits of plaintiffs' case were demonstrated, on motion to restore to calendar, by evidence that vehicle collision disabled one plaintiff from employment for 4 months, and disabled other plaintiff for 7 months as well as causing him pain and impairment of his life activities. Ball v Sano, 282 A.D.2d 330, 723 N.Y.S.2d 644, 2001 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 1st Dep't 2001).

Court erred in denying plaintiff's motion to restore action to calendar and in entering judgment dismissing action where motion was made within one year of its being marked off calendar,

defendants acknowledged that settlement negotiations were actively pursued during period before motion was submitted, and court itself had acknowledged merits of action at pretrial conference. Mosesson v 288 / 98 West End Tenants Corp., 272 A.D.2d 152, 707 N.Y.S.2d 431, 2000 N.Y. App. Div. LEXIS 5436 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly denied the owners' motion for leave to reargue their prior motion to restore the action to the trial calendar and granted the designers' motion for summary judgment dismissing the owners' complaint for breach of contract because the denial of a motion to reargue was not appealable, the designers demonstrated their prima facie entitlement to judgment as a matter of law by submitting evidence that the owners could not establish a prima facie case at trial since they were precluded from offering any evidence on the issue of damages, and the owners failed to raise a triable issue of fact in opposition. Ciampa Org., LLC v Vergara, 171 A.D.3d 695, 97 N.Y.S.3d 700, 2019 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 2d Dep't 2019).

**68. — —Prima facie merit predicated on affidavits and reports**

A motion to restore an action to trial calendar in its regular order would be granted as modified on the law and the facts in the exercise of discretion, to direct the filing of a new statement of readiness within 30 days from the date of the court's order, where plaintiff's continuing serious medical problems and his documentation of unsuccessful efforts to obtain the medical reports of his status constituted sufficient excuse for the delay in moving to restore the case to calendar after it was marked off the calendar on the ninth occasion it appeared. Furthermore, the medical reports presented to the court substantiated prima facie merit to the injury action and there was also no showing of prejudice to the defendants. Kolbasiuk v Printers Bindary, Inc., 93 A.D.2d 739, 461 N.Y.S.2d 286, 1983 N.Y. App. Div. LEXIS 17575 (N.Y. App. Div. 1st Dep't 1983).

In medical malpractice action, plaintiff demonstrated meritorious cause of action sufficient to restore case to calendar after apparent abandonment where she provided 5-page affidavit of merits by medical expert detailing decedent's medical history and specifying acts and omissions

which constituted medical malpractice and their causal relation to death of decedent; absence of words “malpractice” or “departure from accepted medical standards” was not fatal, since affidavit arguably attested to such departure. Ford v Empire Medical Group, 123 A.D.2d 820, 507 N.Y.S.2d 436, 1986 N.Y. App. Div. LEXIS 60952 (N.Y. App. Div. 2d Dep't 1986).

Court properly granted plaintiffs’ motion to restore their action to trial calendar where (1) they had no notice of their prior counsel’s withdrawal until motion to dismiss was served, whereupon they obtained their prior attorney’s file and secured new counsel, (2) their cross motion to restore case to trial calendar was made promptly thereafter, (3) their affidavits and supporting documentation demonstrated viable cause of action, and (4) there was no indication that defendants were prejudiced by delay. Malpass v Mavis Tire Supply Corp., 143 A.D.2d 890, 533 N.Y.S.2d 397, 1988 N.Y. App. Div. LEXIS 10265 (N.Y. App. Div. 2d Dep't 1988).

For purposes of restoring case to trial calendar, plaintiff’s factually scant showing as to merits of its cause of action was nevertheless sufficient, where opposing affidavits offered nothing to dispute plaintiff’s cause of action. Ronsco Constr. Co. v 30 E. 85th St. Co., 219 A.D.2d 281, 641 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 1st Dep't 1996).

Court should have granted medical malpractice plaintiff’s motion to reinstate note of issue where medical records, read in conjunction with surgeon’s report, supported claim that defendant was involved in decision to delay additional surgery, which surgeon opined was deviation from accepted surgical practice. Fagain v Capella, 226 A.D.2d 421, 641 N.Y.S.2d 325, 1996 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 2d Dep't 1996).

Action for property damage, personal injuries, loss of income, and severe emotional distress as result of water seepage into plaintiffs’ apartment would not be dismissed for want of prosecution under CLS CPLR § 3216 where series of misfortunes provided excuse for delay, plaintiff daughter underwent 2 surgical procedures for broken leg and surgery for abdominal condition, plaintiff father was in failing health during pendency of action from effects of coronary bypass surgery and stroke, he devoted his time to caring for his elderly wife who suffered from Parkinson’s disease, credibly meritorious claim could be gleaned from affidavit detailing damage

to apartment and stipulation granting rent abatement, and defendants alleged no particular prejudice from delay. Weppler v Pretium Assocs., 245 A.D.2d 249, 666 N.Y.S.2d 643, 1997 N.Y. App. Div. LEXIS 13407 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff's action should have been restored to trial calendar under CLS CPLR § 3404, although it was based on alleged police misconduct that occurred 11 years earlier, where (1) delay was caused by excusable law office failure, (2) deposition transcript supported merits of claim, (3) having filed statement of readiness without opposition, plaintiff established intent not to abandon claim, and (4) defendants never raised claim of prejudice before motion court and court never mentioned issue of prejudice. Zabari v City of New York, 242 A.D.2d 15, 672 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1998).

Court erred in denying plaintiff's motion to restore case to trial calendar, even though plaintiff submitted unsigned, unsworn affidavit of merit, where verified complaint and bill of particulars revealed that he was seriously and permanently injured, there were numerous family tragedies suffered by his counsel, there was no intent to abandon action, and delay prejudiced plaintiff more than defendants. Nicholos v Cashelard Restaurant, 249 A.D.2d 187, 672 N.Y.S.2d 98, 1998 N.Y. App. Div. LEXIS 4681 (N.Y. App. Div. 1st Dep't 1998).

Motion to vacate dismissal was properly granted on showing of merit made in verified complaint, reasonable excuse for 15 months it took plaintiff to serve amended bill of particulars, including extensive medical treatment and difficulties in procuring medical records, and absence of prejudice to defendant. Lebron v New York City Hous. Auth., 257 A.D.2d 541, 685 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1999).

It was abuse of discretion to deny plaintiffs' motion to restore action to court calendar where they produced evidence of their continued participation in discovery proceedings during period when case was marked off calendar, plaintiff's deposition testimony and bill of particulars established merit of plaintiffs' actions sounding in negligence and for violations of Labor Law, delay in moving to restore action was relatively brief, and both parties' continued participation in discovery showed credibility of their explanation that they inadvertently missed calendar call and

never intended to abandon action. Ramputi v Timko Contr. Corp., 262 A.D.2d 26, 691 N.Y.S.2d 432, 1999 N.Y. App. Div. LEXIS 6158 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs' motion to vacate order of dismissal pursuant to CLS CPLR § 3404 and restore case to calendar should have been granted where plaintiffs' attorney set forth in detail his health problems that had delayed motion, plaintiffs submitted expert proof of meritorious cause of action, record established that plaintiffs never intended to abandon case, and there was ongoing activity, including pending appeal. Collins v Elbadawi, 265 A.D.2d 850, 695 N.Y.S.2d 634, 1999 N.Y. App. Div. LEXIS 9921 (N.Y. App. Div. 4th Dep't 1999).

Affidavit of plaintiff's expert, based on review of plaintiff's medical records, was sufficient to prove that plaintiff had meritorious cause of action for medical malpractice and negligence of podiatrist where expert averred that podiatrist should have ordered CAT scan or MRI to locate foreign material in plaintiff's foot, rather than doing 3 separate surgeries, and should have ordered "culture and sensitivity" test to determine cause of infection that persisted for 2 ½ years and resulted in prescription of "311 various antibiotics and 95 pain killers," that podiatrist's treatment of plaintiff fell below prevailing standard of care required of podiatrists, and that such failure was proximate cause of plaintiff's injury. Schneider v Meltzer, 266 A.D.2d 801, 700 N.Y.S.2d 237, 1999 N.Y. App. Div. LEXIS 12114 (N.Y. App. Div. 3d Dep't 1999).

Court properly denied defendant's motion to dismiss complaint for plaintiff's failure to prosecute during 4 years action was marked "off calendar" where stay of action was in effect at time action was marked off calendar, plaintiff's verified complaint and bill of particulars asserted meritorious claim for legal malpractice, and defense would likely be based principally on defendant's personal notes and court files of plaintiff's matrimonial action. Rosenkrantz v Erdheim, 272 A.D.2d 64, 707 N.Y.S.2d 831, 2000 N.Y. App. Div. LEXIS 4899 (N.Y. App. Div. 1st Dep't 2000).

**69. Prejudice; lack of prejudice, generally**

Motion to vacate automatic dismissal of action should be granted where the record indicated a meritorious cause of action, no intention to abandon the action on the part of plaintiff and no

merit to defendant’s claim of prejudice. Ackerman v Perchikoff, 30 A.D.2d 672, 291 N.Y.S.2d 894, 1968 N.Y. App. Div. LEXIS 3791 (N.Y. App. Div. 2d Dep't 1968).

When a case has been abandoned and dismissed, a motion to open the default and restore it to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party, and excusable neglect as must be shown to open a default. Sal Masonry Contractors, Inc. v Arkay Constr. Corp., 49 A.D.2d 808, 373 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 4th Dep't 1975).

Once action has been dismissed for failure to prosecute, motion to open default and restore case to trial calendar will require same kind of proof of merit, or lack or prejudice to opposing party and of excusable neglect, as must be shown to open default judgment. Ruggiero v Elbin Realty, 51 A.D.2d 1011, 380 N.Y.S.2d 773, 1976 N.Y. App. Div. LEXIS 11775 (N.Y. App. Div. 2d Dep't), app. dismissed, 39 N.Y.2d 708, 1976 N.Y. LEXIS 3371 (N.Y. 1976), app. dismissed, 39 N.Y.2d 891, 386 N.Y.S.2d 394, 352 N.E.2d 581, 1976 N.Y. LEXIS 2834 (N.Y. 1976).

Where a case has been on the docket for more than a year and has been deemed dismissed under civil practice rule, a motion to restore the case to the calendar under such rule requires the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as must be shown to open a default judgment. Sesan v American Home Products Corp., 52 A.D.2d 1058, 384 N.Y.S.2d 600, 1976 N.Y. App. Div. LEXIS 12974 (N.Y. App. Div. 4th Dep't 1976).

It was improper to restore case to trial calendar once it was stricken as abandoned in absence of a motion by plaintiffs to negate default, supported by a proper showing of merit, absence of prejudice to defendant, excuse for default, and present readiness. Colucci v Slippery Slats & All That, Inc., 52 A.D.2d 1083, 384 N.Y.S.2d 320, 1976 N.Y. App. Div. LEXIS 13015 (N.Y. App. Div. 4th Dep't 1976).

In the absence of motion to vacate default, supported by appropriate showing of merit, absence of prejudice to the defendant, excuse for default and present readiness, restoration of negligence action to calendar was improvident exercise of discretion. Til v O'Brien, 53 A.D.2d

1030, 386 N.Y.S.2d 155, 1976 N.Y. App. Div. LEXIS 15839 (N.Y. App. Div. 4th Dep't), app. dismissed, 40 N.Y.2d 902, 389 N.Y.S.2d 365, 357 N.E.2d 1020, 1976 N.Y. LEXIS 3118 (N.Y. 1976).

Where delay causing dismissal of medical malpractice action was occasioned in part by defendants' desire to pursue further discovery proceedings, and partly by court's failure to render a decision on motion to restore and because of clerk's failure to notify plaintiffs of his action in docketing their case, plaintiffs' conduct was excusable, and, in view of defendants' delay in answering, their requests for further discovery which resulted in striking the note of issue and their confusing position on the motion to restore, they could not claim prejudice for delay which they helped cause. Gaffy v Buffalo General Hospital, 55 A.D.2d 850, 390 N.Y.S.2d 702, 1976 N.Y. App. Div. LEXIS 15670 (N.Y. App. Div. 4th Dep't 1976).

Once an action has been dismissed under CPLR § 3404, a motion to open the default and restore the case to the calendar will require the same kind of proof of merit, lack of prejudice to the opposing party and excusable neglect as must be shown to open a default judgment under CPLR § 5015. Fluman v TSS Dep't Store, 100 A.D.2d 838, 473 N.Y.S.2d 835, 1984 N.Y. App. Div. LEXIS 17942 (N.Y. App. Div. 2d Dep't 1984).

Under CLS CPLR § 3404, restoration of action to calendar requires showing of merit to moving party's claim, lack of prejudice to other parties, lack of intent to abandon or deliberately default in action, and reasonable excuse for moving party's delay. Solovay v Nicola Paone Corp., 219 A.D.2d 462, 645 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 9146 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff's motion to vacate automatic dismissal of her action and to restore it to trial calendar was properly denied, despite adequate showing of merit of action, where she failed to show reasonable excuse for her delay in prosecuting action, intent not to abandon action, and absence of prejudice to defendants if action, which arose in 1987, were restored. Ramirez v City of New York, 281 A.D.2d 169, 721 N.Y.S.2d 508, 2001 N.Y. App. Div. LEXIS 1893 (N.Y. App. Div. 1st Dep't 2001).

Case in which wife and minor children sought to recover damages from bar owner pursuant to Dram Shop Act would be restored to the calendar if plaintiffs were able to show that the case had merit and that it was not abandoned or that there was a neglect to prosecute, and there was no showing of prejudice to the defendants. Garlinghouse v Nelson, 72 Misc. 2d 432, 339 N.Y.S.2d 538, 1973 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1973).

**70. —Insufficient proof of prejudice**

A motion to restore an action to trial calendar in its regular order would be granted as modified on the law and the facts in the exercise of discretion, to direct the filing of a new statement of readiness within 30 days from the date of the court's order, where plaintiff's continuing serious medical problems and his documentation of unsuccessful efforts to obtain the medical reports of his status constituted sufficient excuse for the delay in moving to restore the case to calendar after it was marked off the calendar on the ninth occasion it appeared. Furthermore, the medical reports presented to the court substantiated prima facie merit to the injury action and there was also no showing of prejudice to the defendants. Kolbasiuk v Printers Bindary, Inc., 93 A.D.2d 739, 461 N.Y.S.2d 286, 1983 N.Y. App. Div. LEXIS 17575 (N.Y. App. Div. 1st Dep't 1983).

Supreme Court properly restored to preferred trial calendar wrongful death action which had been dismissed pursuant to CLS CPLR § 3404 where defendant did not show that it would be prejudiced by restoration, plaintiff appeared to have meritorious cause of action, plaintiff's counsel had suffered debilitating stroke prior to time case was dismissed, and he indicated that he had understood opposing counsel was going to mark case as ready. Smigel v Rensselaerville, 125 A.D.2d 847, 510 N.Y.S.2d 34, 1986 N.Y. App. Div. LEXIS 63046 (N.Y. App. Div. 3d Dep't 1986).

Court properly granted plaintiffs' motion to restore their action to trial calendar where (1) they had no notice of their prior counsel's withdrawal until motion to dismiss was served, whereupon they obtained their prior attorney's file and secured new counsel, (2) their cross motion to restore case to trial calendar was made promptly thereafter, (3) their affidavits and supporting

documentation demonstrated viable cause of action, and (4) there was no indication that defendants were prejudiced by delay. Malpass v Mavis Tire Supply Corp., 143 A.D.2d 890, 533 N.Y.S.2d 397, 1988 N.Y. App. Div. LEXIS 10265 (N.Y. App. Div. 2d Dep't 1988).

It was abuse of discretion to dismiss action as abandoned where (1) during period after note of issue and certificate of readiness were stricken from calendar, parties' attorneys engaged in discovery proceedings and motion practice, and otherwise proceeded with course of conduct evincing lack of intent to abandon, (2) although plaintiffs' counsel failed to meet other time restrictions imposed by court, he filed second note of issue and certificate of readiness on court's final direction that he do so by certain date, and only then did defendants' counsel move to dismiss under CLS CPLR § 3404, and (3) there was no indication of prejudice to defendants. Drucker v Progressive Enterprises, Inc., 172 A.D.2d 481, 567 N.Y.S.2d 837, 1991 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 2d Dep't 1991).

It was error to grant plaintiffs' motion to vacate automatic dismissal of medical malpractice action under CLS CPLR § 3404, even though parties' stipulation obligated defendant to consent to "restoration" of action on timely motion following completion of discovery, since plaintiffs' long delays in seeking to resume prosecution of action were unexplained, there was no showing that those delays had not occasioned prejudice, and plaintiffs failed to submit affidavit by medical expert demonstrating merit to their allegations that defendant departed from good and accepted medical practice. Escobar v Deepdale General Hosp., 172 A.D.2d 486, 567 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 2d Dep't 1991).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to

abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Balance of equities in personal injury action weighed against denial of plaintiff's motion under CLS CPLR § 3404 to restore action to trial calendar where, inter alia, (1) plaintiff's counsel was negligent, but not willfully in default, in repeatedly failing to learn time and place of his required pretrial court appearances and in failing to follow proper procedures for opposing defendant's efforts to dismiss case, (2) most, if not all, relevant witnesses had already been deposed, and (3) plaintiff had provided defendant with medical reports detailing his injuries; thus, there was little danger that lapse of time would cause prejudice from inability of witnesses to recall event. Sanchez v Javind Apt. Corp., 246 A.D.2d 353, 667 N.Y.S.2d 708, 1998 N.Y. App. Div. LEXIS 224 (N.Y. App. Div. 1st Dep't 1998).

Court improperly denied plaintiff's motion to restore action to trial calendar where delay was around 20 months, there was no prejudice to defendant, plaintiff's activities during interim evinced no intent to abandon action, discovery was complete, and plaintiff provided adequate proof of merits of action. Weiss v City of New York, 247 A.D.2d 239, 669 N.Y.S.2d 33, 1998 N.Y. App. Div. LEXIS 984 (N.Y. App. Div. 1st Dep't 1998).

Court erred in denying plaintiff's motion to restore case to trial calendar, even though plaintiff submitted unsigned, unsworn affidavit of merit, where verified complaint and bill of particulars revealed that he was seriously and permanently injured, there were numerous family tragedies suffered by his counsel, there was no intent to abandon action, and delay prejudiced plaintiff more than defendants. Nicholos v Cashelard Restaurant, 249 A.D.2d 187, 672 N.Y.S.2d 98, 1998 N.Y. App. Div. LEXIS 4681 (N.Y. App. Div. 1st Dep't 1998).

Motion to vacate dismissal was properly granted on showing of merit made in verified complaint, reasonable excuse for 15 months it took plaintiff to serve amended bill of particulars, including extensive medical treatment and difficulties in procuring medical records, and absence of prejudice to defendant. Lebron v New York City Hous. Auth., 257 A.D.2d 541, 685 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff was entitled to restoration of action to trial calendar, even though she did not so move within one year after action was marked off calendar, where her showing of meritorious cause of action, reasonable excuse for delay, and lack of prejudice to defendant was uncontroverted by defendant, who did not oppose motion. Mahon v Rothschild, 273 A.D.2d 23, 708 N.Y.S.2d 863, 2000 N.Y. App. Div. LEXIS 6359 (N.Y. App. Div. 1st Dep't 2000).

Action should not have been dismissed for failure to restore it to trial calendar after note of issue had been stricken where plaintiffs' intention to prosecute was demonstrated by their discovery activities, filing of motion to restore, compliance with court's conditional order of dismissal, engaging in settlement discussions, and filing of motion to vacate dismissal, portion of delay was caused by court's in camera inspection of records, and opposing parties' allegations of prejudice were belied by fact that key witnesses had been deposed. McGuire v Tishman Constr. Corp., 275 A.D.2d 249, 712 N.Y.S.2d 522, 2000 N.Y. App. Div. LEXIS 8715 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff was not entitled to vacatur of dismissal of action under CLS CPLR § 3404 where (1) unsubstantiated assertions of plaintiff's attorney were insufficient to show either meritorious cause of action or absence of prejudice to defendant or third-party defendant if action were restored to trial calendar, and (2) intermittent periods of disability claimed by plaintiff's attorney were not reasonable excuse for delay, absent showing that disability was continuous throughout period in question. Bray v Thor Steel & Welding Ltd., 275 A.D.2d 912, 713 N.Y.S.2d 400, 2000 N.Y. App. Div. LEXIS 9671 (N.Y. App. Div. 4th Dep't 2000), app. denied, 738 N.Y.S.2d 254, 2000 N.Y. App. Div. LEXIS 13584 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 778, 725 N.Y.S.2d 633, 749 N.E.2d 203, 2001 N.Y. LEXIS 640 (N.Y. 2001).

Although acts complained of occurred in 1980s, defendants would not suffer prejudice by passage of time if case was restored to trial calendar inasmuch as case went to trial in 1990, ending in mistrial, such that it could reasonably be inferred that testimony of relevant witnesses and documentary evidence had been preserved, and defendants did not oppose court's striking of note of issue to give plaintiffs' time to secure legal counsel although it appeared that they

would need lengthy time to do so. Cippitelli v Town of Niskayuna, 277 A.D.2d 540, 715 N.Y.S.2d 110, 2000 N.Y. App. Div. LEXIS 11112 (N.Y. App. Div. 3d Dep't 2000).

Court improperly denied plaintiffs' motion to restore case to calendar where defendant city did not identify any particular prejudice, aside from mere passage of time, matter was marked off calendar for reasons unrelated to plaintiffs' default or neglect, plaintiffs showed as least some activity during year case was marked off, and action involved lead paint ingestion by infant. Peterson v City of New York, 286 A.D.2d 287, 730 N.Y.S.2d 58, 2001 N.Y. App. Div. LEXIS 8311 (N.Y. App. Div. 1st Dep't 2001).

Tenant's claim that she was prejudiced by a landlord's 18-month delay in moving to restore its non-primary residence holdover proceeding to the trial calendar by the fact that the passage of time had impaired her ability to recollect her past living habits was not legally sufficient to justify the trial court's denial of the landlord's motion to restore its proceeding to the trial calendar. Berger E. Corp. v Grigg, 792 N.Y.S.2d 285, 6 Misc. 3d 76, 2004 N.Y. Misc. LEXIS 2814 (N.Y. App. Term 2004).

**71. —Lack of prejudice**

Plaintiff was not entitled to have breach of contract action restored to trial calendar 2 ½ years after it was stricken since (1) he failed to sustain his burden of showing lack of prejudice to defendants where one defendant, who was crucial witness, had died prior to bringing of motion, and defendants also contended that whereabouts of 2 nonparty defense witnesses were presently unknown, and (2) sending of 3 letters inquiring as to certain witness' availability for deposition did not establish reasonable excuse for his lengthy delay in moving to restore action, and thus he failed to make sufficient showing to excuse his failure to proceed expeditiously. Tucker v Hotel Employees & Restaurant Employees Union, Local 100, 134 A.D.2d 494, 521 N.Y.S.2d 279, 1987 N.Y. App. Div. LEXIS 50689 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was not entitled to order vacating dismissal of her action where action had been dismissed 5 years earlier under CLS CPLR § 3404, and (1) clerk's failure to enter certificate of

dismissal was no excuse for delay in moving for restoration since dismissal pursuant to § 3404 is automatic and entry of such dismissal is merely ministerial, and (2) plaintiff failed to establish that restoration would not be unduly prejudicial to defendants. Rosser v Scacalossi, 140 A.D.2d 318, 527 N.Y.S.2d 552, 1988 N.Y. App. Div. LEXIS 4615 (N.Y. App. Div. 2d Dep't 1988).

Case should be restored to calendar where plaintiff showed merit and lack of prejudice to defendants, lack of activity in case was partly attributable to defendants' failure to reschedule depositions, and no parties had received notice of conference that had prompted court's action when parties did not appear. Kisch v St. Vincent's Hosp. & Med. Ctr., 279 A.D.2d 341, 718 N.Y.S.2d 356, 2001 N.Y. App. Div. LEXIS 438 (N.Y. App. Div. 1st Dep't 2001).

**72. —Question of prejudice not raised**

It was error to restore wrongful death action to trial calendar where excuse for failure to proceed in timely fashion was not established, claim that meritorious cause of action existed was set forth in conclusory fashion without supporting evidence, and question of possible prejudice to defendant if case were restored was not even addressed. Public Adm'r of County of New York v Heil Corp., 126 A.D.2d 533, 510 N.Y.S.2d 655, 1987 N.Y. App. Div. LEXIS 41669 (N.Y. App. Div. 2d Dep't 1987).

Action for property damage, personal injuries, loss of income, and severe emotional distress as result of water seepage into plaintiffs' apartment would not be dismissed for want of prosecution under CLS CPLR § 3216 where series of misfortunes provided excuse for delay, plaintiff daughter underwent 2 surgical procedures for broken leg and surgery for abdominal condition, plaintiff father was in failing health during pendency of action from effects of coronary bypass surgery and stroke, he devoted his time to caring for his elderly wife who suffered from Parkinson's disease, credibly meritorious claim could be gleaned from affidavit detailing damage to apartment and stipulation granting rent abatement, and defendants alleged no particular prejudice from delay. Weppler v Pretium Assocs., 245 A.D.2d 249, 666 N.Y.S.2d 643, 1997 N.Y. App. Div. LEXIS 13407 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff's action should have been restored to trial calendar under CLS CPLR § 3404, although it was based on alleged police misconduct that occurred 11 years earlier, where (1) delay was caused by excusable law office failure, (2) deposition transcript supported merits of claim, (3) having filed statement of readiness without opposition, plaintiff established intent not to abandon claim, and (4) defendants never raised claim of prejudice before motion court and court never mentioned issue of prejudice. Zabari v City of New York, 242 A.D.2d 15, 672 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1998).

Motion to vacate dismissal of proceeding under CLS RPTL Art 7 was not adequately supported by allegation that settlement negotiations excused delay, since attorney's affidavit failed to address other factors—merits of claim, absence of intent to abandon, and lack of prejudice. State v Town of Clifton, 275 A.D.2d 523, 712 N.Y.S.2d 652, 2000 N.Y. App. Div. LEXIS 8418 (N.Y. App. Div. 3d Dep't 2000).

It was error for court to vacate automatic dismissal under CLS CPLR § 3404 and to restore action to trial calendar, where case was marked off calendar as result of unexplained failure of plaintiff's counsel to proceed to trial, plaintiff did not offer any excuse for waiting 11 months and 3 weeks to move to restore, plaintiff's expert failed to establish sufficient evidentiary foundation for his conclusion that defendant committed malpractice, and plaintiff failed to even allege that defendant would not be prejudiced if action were restored. Michitsch v Katz, 276 A.D.2d 605, 714 N.Y.S.2d 135, 2000 N.Y. App. Div. LEXIS 10365 (N.Y. App. Div. 2d Dep't 2000).

**73. —Sufficient proof of prejudice, generally**

The granting of a motion to vacate dismissal of an action and restore the case was an improvident exercise of discretion, which resulted in prejudice to the defendant, as plaintiff's injuries were not severe and there was no valid and reasonable excuse for an almost four years delay in the prosecution of the action after it had been marked off the calendar. Gamerov v Cunard S.S. Co., 34 A.D.2d 824, 312 N.Y.S.2d 698, 1970 N.Y. App. Div. LEXIS 4700 (N.Y. App. Div. 2d Dep't 1970).

**74. — —Delay for 3 or more years**

Plaintiffs whose cause of action for recovery for personal injuries was deemed abandoned were not entitled to restoration of case pursuant to CLS CPLR § 3404 where (1) papers supporting motion were insufficient since they did not contain evidentiary facts but relied only on conclusory allegations of injured plaintiff's mother (who had no personal knowledge of circumstances leading to injury) and on physicians' reports and bill of particulars dealing only with damages, not liability, (2) plaintiffs' excuse for delay in prosecuting case was inadequate since plaintiffs did not lack capacity during period of delay and proffered reason for delay related only to medical reports of damages rather than to liability issues, (3) defendants were clearly prejudiced by 16-year period since accident occurred, and (4) plaintiffs failed to rebut presumption of abandonment since they were able to show only 2 isolated instances of pretrial discovery as examples of recent action on case. Rodriguez v Middle Atlantic Auto Leasing, Inc., 122 A.D.2d 720, 511 N.Y.S.2d 595, 1986 N.Y. App. Div. LEXIS 59258 (N.Y. App. Div. 1st Dep't 1986), app. dismissed, 69 N.Y.2d 874, 514 N.Y.S.2d 723, 507 N.E.2d 317, 1987 N.Y. LEXIS 15923 (N.Y. 1987).

Court improperly vacated dismissal of negligence action which was commenced in November, 1976, marked off trial calendar in October, 1980 (because plaintiffs' counsel had lost contact with plaintiffs and thus they were unavailable to submit to depositions 10 days prior to trial), and automatically dismissed for neglect to prosecute in October, 1981, since (1) plaintiffs failed to adequately rebut presumption of abandonment created by dismissal pursuant to CLS CPLR § 3404, (2) no reasonable excuse was offered for 5-year delay in moving to reinstate cause, and (3) plaintiffs failed to show that defendants would not be prejudiced by reinstatement of case in view of delay. Resto v Kohen, 124 A.D.2d 722, 508 N.Y.S.2d 228, 1986 N.Y. App. Div. LEXIS 62026 (N.Y. App. Div. 2d Dep't 1986).

In opposing motion to restore case to trial calendar, defendant showed that she would be prejudiced by plaintiffs' 3-year delay in filing note of issue after completion of discovery, where

more than 7 years had passed since date of accident, during which one of defendant's material witnesses had died. Ware v Porter, 227 A.D.2d 214, 642 N.Y.S.2d 278, 1996 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1st Dep't 1996).

Defendants would be significantly prejudiced if action were restored to trial calendar where 10 years had passed since accident that allegedly caused plaintiff's injuries. McKenna v Solomon, 255 A.D.2d 496, 681 N.Y.S.2d 59, 1998 N.Y. App. Div. LEXIS 12656 (N.Y. App. Div. 2d Dep't 1998).

Court erred in restoring personal injury action to trial calendar because plaintiff's claim that he was unaware of trial conference amounted to inexcusable law office failure, plaintiff failed to rebut presumption of abandonment given his inactivity during 28-month delay in moving to restore action, and defendant would be prejudiced if action was restored where more than 9 years had elapsed between accident and plaintiff's motion to restore. Cruz v Volkswagen of Am. Inc., 277 A.D.2d 340, 716 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 12149 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff's motion to restore property damage action to trial calendar was properly denied on ground that defendants and third-party defendants would be prejudiced if they were forced to defend action based on events which occurred in 1982 and 1983, where there was no activity in case for more than 3 years following its dismissal, evincing plaintiff's intent to abandon, and plaintiff did not demonstrate reasonable excuse for delay in moving to restore. Furniture Vill., Inc. v Schoenberger, 283 A.D.2d 607, 725 N.Y.S.2d 860, 2001 N.Y. App. Div. LEXIS 5500 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 929, 733 N.Y.S.2d 364, 759 N.E.2d 363, 2001 N.Y. LEXIS 3114 (N.Y. 2001).

Plaintiff's motion to restore her medical malpractice action to trial calendar was denied as (1) 10-year-old deposition describing her fall from examination table in defendant's office after allegedly being left alone for 40 minutes was insufficient to establish meritorious claim, without medical evidence as to whether leaving her alone deviated from accepted practice, (2) unexplained failure of her court reporting service to keep track of case did not excuse her 5-year delay in

moving to vacate automatic dismissal under CLS CPLR § 3404, (3) there was no course of conduct to rebut presumption of abandonment that attached after automatic dismissal, and (4) 14-year gap between alleged malpractice and application to vacate dismissal was significantly prejudicial to defendant. Gold v Steinmetz, 186 Misc. 2d 245, 717 N.Y.S.2d 478, 2000 N.Y. Misc. LEXIS 465 (N.Y. Civ. Ct. 2000).

**75. — —Witness unavailability**

Plaintiffs in action for breach of contract were not entitled to restoration of case to trial calendar where claims on which action was based accrued in 1979, action was commenced in February, 1980, action was marked off calendar in December, 1982, and restoration was sought as of May, 1985, since defendants would suffer severe prejudice in defending litigation after such delay, and several witnesses and documents necessary to defense had become unavailable. Ornstein v Kentucky Fried Chicken, Inc., 121 A.D.2d 610, 503 N.Y.S.2d 643, 1986 N.Y. App. Div. LEXIS 58597 (N.Y. App. Div. 2d Dep't 1986).

Plaintiff was not entitled to vacatur of dismissal pursuant to CLS CPLR § 3404 where he failed to explain 4-year delay in moving to restore case to trial calendar after receiving notice of its having been struck, he failed to explain 15-month delay in moving for vacatur after receiving notice of dismissal, and he failed to rebut defendants' showing that 2 of 3 witnesses could no longer be located. Jones v Manhattan Leasing Systems, Inc., 181 A.D.2d 547, 581 N.Y.S.2d 48, 1992 N.Y. App. Div. LEXIS 3788 (N.Y. App. Div. 1st Dep't 1992).

Defendant was not entitled to have his cross-claims and counter-claims restored to calendar where (1) he did not move to vacate dismissal and restore case to calendar until 29 months after case was stricken from calendar by plaintiff, (2) he failed to explain his failure to timely attend to matter, (3) he did not establish merits of his claim, and (4) during 29-month period his true adversary in action, and principal witness to facts underlying his claims, had died. Todd Co. v Birnbaum, 182 A.D.2d 505, 582 N.Y.S.2d 414, 1992 N.Y. App. Div. LEXIS 6096 (N.Y. App. Div. 1st Dep't 1992).

In opposing motion to restore case to trial calendar, defendant showed that she would be prejudiced by plaintiffs' 3-year delay in filing note of issue after completion of discovery, where more than 7 years had passed since date of accident, during which one of defendant's material witnesses had died. Ware v Porter, 227 A.D.2d 214, 642 N.Y.S.2d 278, 1996 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1st Dep't 1996).

**II. Under Former Civil Practice Laws**

**76. Generally**

Where an action for separation was commenced by wife in 1934 and it was abandoned and dismissed in 1940 by the clerk of the court under the rules of New York County Supreme Court applicable to Special Term, Rule VIII, subdivision 8, and in 1944 the wife obtained a judgment for accrued temporary alimony without advising the court that the action had been marked off, and in 1955 the husband obtained an order granting his motion to dismiss the complaint nunc pro tunc as of 1940 and granting his motion to vacate the 1944 judgment, the judgment of the Appellate Division must be affirmed; the Appellate Division stated that the 1944 judgment entered by the wife without right was automatic and self-executing and the 1944 judgment could be attacked collaterally. Wheelock v Wheelock, 4 N.Y.2d 706, 171 N.Y.S.2d 99, 148 N.E.2d 311, 1958 N.Y. LEXIS 1272 (N.Y. 1958).

Where case was called for trial in March, 1954 and then marked off calendar, and was called and again marked off calendar in March, 1955, and when motion to dismiss was made it had not been restored to calendar and was consequently deemed abandoned, it was clerk's duty to make appropriate entry of dismissal of complaint without further order. Walsh v Ben Riley's Arrowhead Inn, Inc., 2 A.D.2d 714, 153 N.Y.S.2d 651, 1956 N.Y. App. Div. LEXIS 4884 (N.Y. App. Div. 2d Dep't 1956).

Defendant's motion to dismiss complaint for lack of prosecution was granted with leave to plaintiff to vacate the dismissal on a showing that the cause was with merit and that there was a

reasonableness for the long delay in prosecution. Though a separate trial of one of the issues raised in the answer was necessary before the trial of the present cause of action, it was nevertheless plaintiff's responsibility to obtain a prompt trial of that issue as well as a speedy prosecution of the present action. Balaka v Stork Restaurant, Inc., 3 A.D.2d 857, 161 N.Y.S.2d 735, 1957 N.Y. App. Div. LEXIS 5773 (N.Y. App. Div. 2d Dep't 1957).

Delay of between 2 and 3 years in serving complaint was held excused where due to the neglect of the plaintiff's attorney, of which plaintiff personally was unaware. Rospo v Picto Corp., 5 A.D.2d 738, 168 N.Y.S.2d 628, 1957 N.Y. App. Div. LEXIS 3547 (N.Y. App. Div. 3d Dep't 1957).

Where record shows history of more than five years' inactivity on application to vacate dismissal pursuant to RCP 302, denial of motion to vacate dismissal affirmed. Emrick v Paramount Restaurant, Inc., 6 A.D.2d 686, 174 N.Y.S.2d 327, 1958 N.Y. App. Div. LEXIS 5742 (N.Y. App. Div. 1st Dep't 1958).

Where an action has been marked off the calendar and not restored within one year thereafter, it is deemed to be abandoned. Roe v Kurkhill, 6 A.D.2d 716, 174 N.Y.S.2d 573, 1958 N.Y. App. Div. LEXIS 5888 (N.Y. App. Div. 2d Dep't 1958).

RCP 302 was not in conflict with or precluded by CPA § 181 (§ 3210, herein). Pomerantz v Cave, 10 A.D.2d 569, 195 N.Y.S.2d 437, 1960 N.Y. App. Div. LEXIS 12034 (N.Y. App. Div. 1st Dep't), app. denied, 8 N.Y.2d 707, 1960 N.Y. LEXIS 1804 (N.Y. 1960), app. dismissed, 8 N.Y.2d 707, 1960 N.Y. LEXIS 1805 (N.Y. 1960), app. dismissed, 8 N.Y.2d 707, 1960 N.Y. LEXIS 1803 (N.Y. 1960).

Removal of counsel's office was not sufficient excuse for failing to move within year's time to restore case to calendar. Malekian v McLean Trucking Co., 10 A.D.2d 825, 198 N.Y.S.2d 345, 1960 N.Y. App. Div. LEXIS 10641 (N.Y. App. Div. 1st Dep't 1960)(order permitting case to be restored to calendar reversed).

Where an action was dismissed because it was not restored within one year after it had been marked off, it was error for special term to grant defendant's motion to dismiss the complaint for

failure to prosecute unless the case was restored to the calendar and noticed for trial since there was no action pending and therefore there was no cause that could be restored, and although special term could vacate the dismissal, so that the cause could then be restored to the calendar, a motion for such relief upon proper papers had to be made. Colombik v Heinrich, 11 A.D.2d 1026, 205 N.Y.S.2d 921, 1960 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 2d Dep't 1960).

On a motion under RCP 302 there had to be a substantial demonstration of a valid excuse or a justification for the failure to proceed expeditiously with the action and in addition there had to be an affidavit of merits by the plaintiff and the court had authority to relieve plaintiffs from strict compliance and in a proper case could exercise its discretion to grant such a motion. Imberman v Alexander, 12 Misc. 2d 630, 176 N.Y.S.2d 881, 1958 N.Y. Misc. LEXIS 3052 (N.Y. Sup. Ct. 1958).

A motion by defendants to dismiss a complaint on the ground that plaintiffs have unreasonably neglected to proceed will be denied where the parties had stipulated that actions were marked off the calendar without prejudice of right to move for restoration and the defendants did not regard the case as abandoned where settlement negotiations had continued and such case must be restored to the calendar. Fontheim v Fred F. French Investing Co., 13 Misc. 2d 620, 177 N.Y.S.2d 77, 1958 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1958).

A case marked off the calendar and not restored within one year thereafter is deemed abandoned and the complaint automatically dismissed, with the clerk having the duty to make appropriate entry without further order; the rule is automatic and self-executing. Cantor v Mahana Textiles, Inc., 17 Misc. 2d 809, 187 N.Y.S.2d 885, 1959 N.Y. Misc. LEXIS 3909 (N.Y. Sup. Ct. 1959).

Where a cause of action is pending in County Court, and through inadvertence a note of issue is filed in Supreme Court, the order of the Supreme Court in ordering a removal and consolidation of the action with another action pending in another inferior court, and the subsequent order of the Supreme Court dismissing for failure to prosecute, had no effect on County Court action.

Molampy v Valestian, 20 Misc. 2d 561, 191 N.Y.S.2d 416, 1959 N.Y. Misc. LEXIS 2948 (N.Y. County Ct. 1959).

Action must be deemed abandoned, where action for separation was commenced in April 1950 and plaintiff wife was awarded alimony pendente lite which defendant failed to pay, resulting in appointing receiver and sequestering his property, without acquiring any property, and separation action was marked off calendar on May 16, 1953, and where plaintiff obtained valid Florida divorce decree on August 8, 1954, without provision for alimony, marital rights and obligations of parties terminated, including sequestration order. Jacobson v Jacobson, 140 N.Y.S.2d 917, 1955 N.Y. Misc. LEXIS 2455 (N.Y. Sup. Ct. 1955).

**77. Dismissal of cause**

Where plaintiff physician suing for services delayed for 7 years to move for judgment by default, defendant’s motion to dismiss summons was properly denied, as parties were friends and plaintiff’s delay was matter of forbearance during negotiations for settlement. Burke v Ward, 278 A.D. 1000, 105 N.Y.S.2d 819, 1951 N.Y. App. Div. LEXIS 5477 (N.Y. App. Div. 1951).

Delay by plaintiff for six years to enter judgment on defendant’s default in action for personal injury required dismissal of complaint where plaintiff offered no excuse. Lanzone v Cariola, 279 A.D. 980, 111 N.Y.S.2d 532, 1952 N.Y. App. Div. LEXIS 5511 (N.Y. App. Div. 1952).

Codefendant, who was added as party only few days before making motion to dismiss action for lack of prosecution commenced against defendants 15 years before, was not entitled to such dismissal. Howell v Greenfield, 283 A.D. 800, 128 N.Y.S.2d 597, 1954 N.Y. App. Div. LEXIS 5369 (N.Y. App. Div. 1954).

The Rule is automatic and self-executing; if the clerk fails to make an entry as to the dismissal, the action nevertheless is considered dismissed as of the proper date. Sanick v Schauder, 15 A.D.2d 801, 226 N.Y.S.2d 701, 1962 N.Y. App. Div. LEXIS 11610 (N.Y. App. Div. 2d Dep't), app.

dismissed, 11 N.Y.2d 1060, 230 N.Y.S.2d 216, 184 N.E.2d 187, 1962 N.Y. LEXIS 1119 (N.Y. 1962).

**78. Alternative relief**

Where defendant in separation action withdrew his answer when case came to trial in February, 1951, but judgment for separation was never entered, though court had granted plaintiff's motion at conclusion of trial, and where defendant in June, 1953 moved to dismiss for failure to prosecute, or to vacate inquest taken in February, 1951, and restore case to calendar, alternative relief granted on conditions. McConnell v McConnell, 282 A.D. 960, 126 N.Y.S.2d 198, 1953 N.Y. App. Div. LEXIS 5573 (N.Y. App. Div. 1953).

**79. Opening default**

Restoration to calendar of case dismissed by clerk under RCP 302 was improper, but plaintiff could move to open his default. Klein v Vernon Lumber Corp., 269 A.D. 71, 54 N.Y.S.2d 248, 1945 N.Y. App. Div. LEXIS 2923 (N.Y. App. Div. 1945).

Order granting plaintiff's motion to open default, vacate dismissal of action and to restore case to trial calendar was in discretion of special term. Schlesinger v Spingler-Van Beuren Estates, Inc., 269 A.D. 950, 57 N.Y.S.2d 912, 1945 N.Y. App. Div. LEXIS 4714 (N.Y. App. Div. 1945).

Where defendant evaded examination before trial for two years, plaintiff's motion to restore case to calendar two years after dismissal for lack of prosecution was properly granted. Adriance v Clifford, 278 A.D. 735, 103 N.Y.S.2d 285, 1951 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 1951).

In personal injury action, order opening default in failing to prosecute action and restoring case to calendar for trial, was denied. Niewiadowski v Kulp--Waco, Inc., 281 A.D. 1072, 122 N.Y.S.2d 420, 1953 N.Y. App. Div. LEXIS 4361 (N.Y. App. Div. 1953).

Where action was marked “off” when not answered on call of calendar and one year thereafter was marked “dismissed” and five months thereafter plaintiff applied to restore action to reserve trial calendar, his application was denied. Cassidy v Times-Transcript, Inc., 283 A.D. 1069, 131 N.Y.S.2d 305, 1954 N.Y. App. Div. LEXIS 6343 (N.Y. App. Div. 1954).

Wife’s application to reopen default on counterclaim to annul action and to restore case to calendar was improperly denied without further exploration of facts, where she had been patient in state hospital for three years. Weisbaum v Kastenbaum, 284 A.D. 882, 134 N.Y.S.2d 545, 1954 N.Y. App. Div. LEXIS 3938 (N.Y. App. Div. 1954).

Plaintiff’s motion to vacate a default judgment dismissing its complaint and to restore the case to the calendar was granted where plaintiff made adequate explanation of the delay and it appeared that both parties were in part responsible for the overall delay. H. R. Jacoby, Inc. v Kushner, 3 A.D.2d 905, 162 N.Y.S.2d 657, 163 N.Y.S.2d 403, 1957 N.Y. App. Div. LEXIS 5392 (N.Y. App. Div. 1st Dep't 1957).

Although the opening of default and vacating of dismissal was proper since a reasonable excuse for default had been presented and plaintiff’s affidavit had indicated a meritorious claim, the case should not have been restored to the calendar where no statement of readiness had been filed. Radar-Electronics, Inc. v Oscar Leventhal, Inc., 8 A.D.2d 778, 186 N.Y.S.2d 107, 1959 N.Y. App. Div. LEXIS 8362 (N.Y. App. Div. 1st Dep't 1959).

Where a case was stricken from the calendar because of failure to file statement of readiness, a motion to restore had to extend the time to file statement was granted even though motion was made after lapse of year, where no prejudice was shown by the delay, and movant pleaded ignorance of rule. Shanack v Long Island Daily Press Publishing Co., 8 A.D.2d 836, 190 N.Y.S.2d 163, 1959 N.Y. App. Div. LEXIS 8181 (N.Y. App. Div. 2d Dep't 1959).

Special Term was held to have erred in denying plaintiff’s motion for renewal and reconsideration of motion to open default and for leave to file statement of readiness on ground that by instituting a second action identical with first plaintiff had abandoned the first one, where

record indicated that plaintiff had instituted second action in mistaken belief that his rights would be preserved thereby if his motion to open default was denied, that he had a meritorious cause of action, and reasonable excuse for delay, and that defendant had not been prejudiced. Stein v Zitelli, 10 A.D.2d 728, 198 N.Y.S.2d 785, 1960 N.Y. App. Div. LEXIS 11142 (N.Y. App. Div. 2d Dep't 1960).

Where plaintiffs offered no reasonable excuse for waiting 8 months after complaint had been dismissed pursuant to RCP 302 before moving to restore case to calendar, the granting of their motion was reversed. Renzo v Kelton, 10 A.D.2d 859, 199 N.Y.S.2d 116, 1960 N.Y. App. Div. LEXIS 10837 (N.Y. App. Div. 2d Dep't 1960).

Where case was marked “off” calendar for nonappearance of counsel and not restored within one year and then was dismissed by clerk, plaintiff could not have case restored to calendar, but proper remedy was to move to open default to vacate dismissal and then move to restore to calendar. Siegel v Addison, 127 N.Y.S.2d 578, 207 Misc. 1005, 1954 N.Y. Misc. LEXIS 1966 (N.Y. Sup. Ct. 1954).

Where it did not appear that plaintiffs intended to abandon further prosecution of an action which was instituted in January 1952 and dismissed in 1957, and defendants acquiesced in conduct of litigation and did not move to dismiss for lack of prosecution, and an affidavit of merits was presented with plaintiffs’ statement that they were prepared to bring the case to a conclusion, plaintiffs’ default was vacated. Imberman v Alexander, 12 Misc. 2d 630, 176 N.Y.S.2d 881, 1958 N.Y. Misc. LEXIS 3052 (N.Y. Sup. Ct. 1958).

Plaintiff’s application to open default made two years and nine months after default, without sufficient explanation of delay, following upon six years’ delay in prosecuting the action by plaintiff through no fault of defendant, whose witnesses might not be available, warranted denial thereof. Manzi v Central New York Wire Corp., 15 Misc. 2d 248, 180 N.Y.S.2d 433, 1958 N.Y. Misc. LEXIS 2178 (N.Y. Sup. Ct. 1958), app. dismissed, 9 A.D.2d 636, 193 N.Y.S.2d 632, 1959 N.Y. App. Div. LEXIS 7122 (N.Y. App. Div. 4th Dep't 1959), app. dismissed, 10 A.D.2d 598, 196 N.Y.S.2d 633, 1960 N.Y. App. Div. LEXIS 12243 (N.Y. App. Div. 4th Dep't 1960).

**80. —Where default caused by military service**

Plaintiff whose complaint was dismissed under RCP 302 when he was inducted into the United States Army could have his action restored to the calendar without submitting an affidavit of merits, since military service justified the relaxation of the requirement of such affidavit. Oquendo v 15 West 39th Street, Inc., 9 Misc. 2d 785, 170 N.Y.S.2d 377, 1957 N.Y. Misc. LEXIS 2056 (N.Y. Sup. Ct. 1957).

**81. —Affidavit of merits**

Affidavit of merits was a sine qua non on motion to vacate dismissal of complaint under RCP 302 and to restore case to calendar. Charles Barnett Co. v St. Paul Fire & Marine Ins. Co., 7 A.D.2d 897, 181 N.Y.S.2d 890, 1959 N.Y. App. Div. LEXIS 10088 (N.Y. App. Div. 1st Dep't 1959).

Since the same consequences flow from plaintiff’s failure to restore an action to trial calendar within one year after being marked off as upon failure to prosecute, the same considerations should apply to both motions, and an affidavit of merits is necessary on both motions. Malekian v McLean Trucking Co., 10 A.D.2d 825, 198 N.Y.S.2d 345, 1960 N.Y. App. Div. LEXIS 10641 (N.Y. App. Div. 1st Dep't 1960).

**82. Effect of denial of motion to open default**

Denial of a motion to open default to vacate dismissal for failure to prosecute is not a determination on the merits so as to preclude the institution of a new action for the same relief. Mintzer v Carl M. Loeb, Rhoades & Co., 10 A.D.2d 27, 197 N.Y.S.2d 54, 1960 N.Y. App. Div. LEXIS 11627 (N.Y. App. Div. 1st Dep't), reh'g denied, 10 A.D.2d 911, 202 N.Y.S.2d 202, 1960 N.Y. App. Div. LEXIS 10280 (N.Y. App. Div. 1st Dep't 1960).

**83. Effect of dismissal**

Dismissal of a prior action for failure to prosecute is not a dismissal on the merits and will not bar the institution of a new action for the same relief. Mintzer v Carl M. Loeb, Rhoades & Co., 10 A.D.2d 27, 197 N.Y.S.2d 54, 1960 N.Y. App. Div. LEXIS 11627 (N.Y. App. Div. 1st Dep't), reh'g denied, 10 A.D.2d 911, 202 N.Y.S.2d 202, 1960 N.Y. App. Div. LEXIS 10280 (N.Y. App. Div. 1st Dep't 1960).

Dismissal of prior action pursuant to RCP 302 because it had not been restored to calendar within one year after being stricken therefrom for failure to file statement of readiness, and orders thereafter made denying plaintiff’s motion to open default and to vacate judgment therein constituted dismissal for neglect to prosecute said action within purview of CPA § 23 (§ 205 herein). Scott v Rosenwitz, 213 N.Y.S.2d 196 (N.Y. Sup. Ct. 1961)(second action barred by statute of limitations).

## Research References & Practice Aids

**Cross References:**

This rule referred to in § 3216.

**Jurisprudences:**

1 NY Jur 2d Actions §§ 136., 139., 140., 141., 142.

73 NY Jur 2d Judgments §§ 146., 294.

73A NY Jur 2d Judgments § 414.

105 NY Jur 2d Trial §§ 3., 58., 71., 75.

24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 76.– 87.

46 Am Jur 2d, Judgments §§ 634., 635.

62A Am Jur 2d, Pretrial Conference and Procedure §§ 53.– 56.

75B Am Jur 2d, Trial §§ 1995., 1996.

8B Am Jur Pl & Pr Forms (Rev ed), Dismissal, Discontinuance, and Nonsuit, Forms 151.– 178.

**Treatises**

**Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3404, Dismissal of Abandoned Cases.

3 Rohan, New York Civil Practice: EPTL ¶5-4.1.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 31.06.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.06.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 208.07, 209.09.

**Matthew Bender's New York CPLR Manual:**

CPLR Manual § 19.05. Service of pleadings and demand for complaint; sanctions for delay.

CPLR Manual § 21.10. Want of prosecution.

CPLR Manual § 22.02 . Note of issue and certificate of readiness.

CPLR Manual § 22.04. Dismissal of abandoned cases.

CPLR Manual § 22.05. Pretrial conferences.

**Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 7.11. Moving for Entry of Judgment on Default or for Want of Prosecution.

LexisNexis AnswerGuide New York Civil Litigation § 8.04. Filing Note of Issue and Certificate of Readiness.

LexisNexis AnswerGuide New York Negligence § 2.24. Moving Case Toward Trial.

LexisNexis AnswerGuide New York Negligence § 7.39. Engaging in Conferences and Other Calendar Matters.

**Warren's Weed New York Real Property:**

Warren's Weed: New York Real Property § 76.11, 76.12.

**Matthew Bender's New York Evidence:**

1 Bender's New York Evidence § 104.02. Attend Pretrial Conference.

**Annotations:**

Attorney's in action as excuse for failure to timely prosecute action. 15 ALR3d 74.

**Matthew Bender's New York Checklists:**

Checklist for Motion for Default Judgment LexisNexis AnswerGuide New York Civil Litigation § 7.10.

Checklist for Filing Note of Issue and Certificate of Readiness LexisNexis AnswerGuide New York Civil Litigation § 8.02.

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 3401:1 et seq.

LexisNexis Forms FORM 380-17:401.— Affidavit in Support of Motion to Open Default and Restore Case to Calendar Where Case Dismissed by Clerk.

LexisNexis Forms FORM 380-17:403.— Affidavit in Opposition to Motion to Dismiss Complaint on Ground That Action Had Been Abandoned.

LexisNexis Forms FORM 380-17:404.— Affirmation in Opposition to Motion to Restore Case to Calendar and in Support of Cross-Motion for Order of Dismissal.

LexisNexis Forms FORM 380-17:405.— Affirmation in Opposition to Motion to Restore Case to Calendar and in Support of Cross-Motion for Order of Dismissal; Another Form.

LexisNexis Forms FORM 380-17:406.— Affirmation in Opposition to Motion to Restore Case to Calendar.

LexisNexis Forms FORM 380-17:407.— Notice of Motion to Restore Action Dismissed as Abandoned.

LexisNexis Forms FORM 380-17:408.— Affidavit in Support of Motion to Restore Action Dismissed as Abandoned.

LexisNexis Forms FORM 380-17:501.— Demand for Trial De Novo.

LexisNexis Forms FORM 521-20-42.— Notice of Motion to Open Default and to Restore to Calendar Where Case Dismissed by Clerk.

LexisNexis Forms FORM 521-20-43.— Affirmation in Support of Motion to Open Default and Restore to Calendar Where Case Dismissed by Clerk.

LexisNexis Forms FORM 521-20-44.— Order Opening Default and Restoring Note of Issue.

LexisNexis Forms FORM 521-20-45.— Notice of Motion to Open Default and Restore Note of Issue to Direct Defendant to Appear for Deposition, and to Permit Filing of Certificate of Readiness.

LexisNexis Forms FORM 521-20-46.— Plaintiff’s Affidavit in Support of Motion to Restore Note of Issue in Action for Malpractice.

LexisNexis Forms FORM 521-20-47.— Affirmation of Plaintiff’s Attorney in Support of Motion for Order Restoring Note of Issue and Directing Deposition of Defendant in Malpractice Action Where Case Dismissed for Failure to File Certificate of Readiness.

LexisNexis Forms FORM 521-20-48.— Notice of Motion to Restore Action to Calendar Where Attorney Failed to Appear Due to His or Her Mistake as to Date of Trial.

LexisNexis Forms FORM 521-20-49.— Plaintiff's Affirmation in Opposition to Defendant's Motion to Dismiss for Neglect to Prosecute.

LexisNexis Forms FORM 521-20-50.— Affirmation in Opposition to Motion to Restore Note of Issue.

LexisNexis Forms FORM 521-20-50A.— Affirmation in Opposition to Motion for Order Vacating Dismissal.

LexisNexis Forms FORM 1434-19161.— CPLR 2214, 3402, 3404: Notice of Motion to Restore Action Dismissed as Abandoned.

LexisNexis Forms FORM 1434-19162.— CPLR 2214, 3402, 3404: Affidavit in Support of Motion to Restore Action Dismissed as Abandoned.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 17:101 et seq .(calendar practice; trial preference).

**Texts:**

1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 2.20.

1 New York Trial Guide (Matthew Bender) §§ 1.20, 1.30.

**Hierarchy Notes:**

NY CLS CPLR, Art. 34

## Forms

**Forms**

**Form 1**

**Body of Notice of Motion to Restore Action Dismissed as Abandoned**

PLEASE TAKE NOTICE that on the annexed affidavits of _____, and _____, sworn to the _____ day of _____, 20 _____, and the _____ day of _____, 20 _____, respectively, and on all the pleadings and proceedings heretofore had herein, a motion will be made pursuant to CPLR 3404 at a _____ Term, Part _____ thereof, of this court to be held in and for the County of _____ at the courthouse thereof at _____ on the _____ day of _____, 20 _____, at _____ o'clock in the _____ noon of that date, or as soon thereafter as counsel can be heard for an order opening the default of plaintiff in permitting the above-entitled action to be marked "off" the calendar when it appeared thereon for trial on the _____ day of _____, 20 _____, and in failing to have it restored to such calendar within one year thereafter, and restoring the said action to the calendar for trial on the grounds that said default was excusable and not wilful, that plaintiff had no intention of abandoning this action and has a valid and meritorious cause of action which he has prosecuted and intends to prosecute diligently and in good faith, and for such other and further relief as the court may seem just.

**Form 2**

**Body of Affidavit in Support of Motion to Restore Action Dismissed as an Abandoned Cause**

_____, being duly sworn, deposes and says:

1 I am the plaintiff in the above-entitled action.

2 This action was commenced on the _____ day of _____, 20 _____; by the service of a summons and complaint herein. Defendant served his answer in which he interposed a general denial.

3 The action was thereafter noticed for trial and appeared on the day calendar of the trial term Part _____ of this court on the _____ day of _____, 20 _____, and for the reasons hereafter set forth was unanswered by either my attorney or by the defendant and because of that fact was marked “off” said calendar on the said _____ day of _____, 20 _____.

4 For the reasons herein set forth no application was made on my behalf to restore the said case to the calendar within one year after it had been so marked “off” said calendar.

5 [State in detail why action was permitted to be marked “off” the calendar and why it was not restored within one year thereafter]

6 [Set forth evidentiary facts showing in detail a valid and meritorious cause of action]

7 [Set forth facts which will show plaintiff’s efforts to diligently prosecute the action, and will negate any presumption of abandonment of the cause]

8 I respectfully submit that the default which resulted in having this action marked “off” the calendar was not intentional or wilful; that I had no intention of abandoning this action: that I have been prosecuting this action diligently insofar as I have been able to do so under the circumstances; that I intend to prosecute this action diligently and in good faith; and that I have a valid and meritorious cause of action. For the foregoing reasons I should not be deprived of my day in court.

**Form 3**

**Body of Order Restoring Action Dismissed as Abandoned**

Plaintiff having moved for an order opening his default which resulted in this action having been marked “off” the calendar, opening his default in moving to restore the action to the calendar

within one year thereafter, and restoring this action to the calendar of this court for trial, and the said motion having duly come on to be heard before this court,

NOW, upon reading and filing the notice of motion dated the _____ day of _____, 20 _____, and the affidavits of _____ and _____, sworn to the _____ day of _____, 20 _____, and the _____ day of _____, 20 _____, respectively, in support of the said motion, and the affidavit of _____, sworn to the _____ day of _____, 20 _____, in opposition thereto, and after reading all the pleadings heretofore had herein, and after hearing _____ of counsel for plaintiff in support of said application, and _____ of counsel for the defendant in opposition thereto, and due deliberation having been had thereon, it is

ORDERED that the said motion be and the same hereby is in all respects granted, and it is further

ORDERED that the default of plaintiff in answering the calendar call of _____, 20 _____, be and the same hereby is opened and excused, and it is further

ORDERED that the default of plaintiff in failing to restore the above-entitled action to the calendar for trial within one year after it had been marked “off” the said calendar be and the same hereby is opened and excused, and it is further

ORDERED that the county clerk of _____ County be and he hereby is directed to place the above-entitled action at the foot of the day calendar for trial at a trial term, Part _____, of this court to be held at the courthouse thereof at _____ on the _____ day of _____, 20 _____ [or otherwise provide for the restoration of the case to the calendar as required by the rules of the particular court].

R 3404. Dismissal of abandoned cases.



End of Document