

CPLR 3402: Second Department Conditions Restoration to Calendar on Payment of Money by Plaintiff's Attorney to Defendant

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wise proper motions may be denied. However, due to the nature of the section, such doubts are properly resolved in favor of the defendant. The extra expenses incurred when a plaintiff finds it necessary to serve a complaint are minimal in comparison to the costs of appealing from summary determinations which may have failed to recognize all the equities present.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3402: Second department conditions restoration to calendar on payment of money by plaintiff's attorney to defendant.

In *Barrada v. Target Construction Corp.*,¹¹² the Appellate Division, Second Department, reversed a supreme court order denying plaintiff's motion to restore the case to the trial calendar (following dismissal for failure to appear at a calendar call) on the condition that plaintiff's attorney pay defendant two hundred and fifty dollars.

Since CPLR 3404 provides for *automatic* dismissal by the court clerk of all cases abandoned for more than one year, it is apparent that the instant case involved a timely motion to restore within the designated one year period although the facts do not so indicate.

The *Barrada* opinion appears to strike a balance between the onerous consequences which would have flowed from dismissal, and the harm to the defendant resulting from plaintiff's default. If the lower court decision had been allowed to stand, the plaintiff's attorney might have been found guilty of malpractice, and therefore liable for all the associated consequences; whereas, by allowing the plaintiff's attorney to pay the defendant two hundred and fifty dollars in lieu of any expenses incurred as a result of the delay, both parties are placed in nearly the same position they were in before dismissal, and both may proceed with the litigation on the merits.

The court has thus placed the financial responsibility upon the party presumably at fault—the attorney for the plaintiff. Of course, a warning to all practitioners is in order. The reason plaintiff's attorney missed the calendar call is not stated and one must, accordingly, presume that it was not for a frivolous purpose. The court, however, indicates that the facts and circumstances must be weighed in each particular case, and future cases may well arise wherein the court is not so lenient with counsel.

¹¹² 31 App. Div. 2d 810, 299 N.Y.S.2d 708 (2d Dep't 1969).