

--- N.Y.S.3d ----, 2019 WL 611421 (N.Y.A.D.
1 Dept.), 2019 N.Y. Slip Op. 01139

**This opinion is uncorrected and subject to revision
before publication in the printed Official Reports.**

*1 Danuta Michaluk, as Administratrix
of the Estate of Jan Michaluk,
Deceased, et al., Plaintiffs-Appellants,
v.
New York City Health and Hospitals
Corporation, Defendant-Respondent.

OPINION

Supreme Court, Appellate Division,
First Department, New York
8390 805304/13
Decided on February 14, 2019

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

APPEARANCES OF COUNSEL

Hogan & Cassell, LLP, Jericho (Michael Cassell of
counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York
(Susan Paulson of counsel), for respondent.

Order, Supreme Court, New York County (George J.
Silver, J.), entered May 16, 2018, which, in this action
alleging medical malpractice and wrongful death, granted
defendant's motion to dismiss the complaint pursuant
CPLR 3126(3), unanimously reversed, on the law and the
facts, without costs, and the motion denied.

The court improvidently exercised its discretion in
determining that dismissal of the complaint was
warranted. Defendant failed to make a clear showing that
plaintiffs' failure to timely comply with their discovery
obligations was wilful,

contumacious or in bad faith (see *Ellis v Park*, 93 AD3d
502 [1st Dept 2012]; *Cespedes v Mike & Jac Trucking
Corp.*, 305 AD2d 222, 222-223 [1st Dept 2003]). The
record does not show that the delay in conducting the
deposition of a certain doctor was clearly attributable to
plaintiffs or that defendant has been prejudiced by the
delay (see *Corinno Civetta Constr. Corp. v City of New
York*, 67 NY2d 297, 319 [1986]). Although the parties
blame each other for why the deposition of the witness
was not completed on or before November 28, 2017,
as required by the September 2017 order, the record
shows that it did not go forward on December 28, 2017,
because plaintiffs' counsel was injured in a motor vehicle
accident two weeks earlier, which is a reasonable excuse
for their failure to proceed. Since defendant never sought
to compel disclosure or to have preclusionary language
added to any of the parties' compliance orders, its motion
to dismiss pursuant to CPLR 3126(3) was premature given
the lack of evidence that plaintiffs' delay in conducting
the deposition was willful, contumacious or due to bad
faith (see *W & W Glass, LLC v 1113 York Ave. Realty
Co. LLC*, 83 AD3d 438 [1st Dept 2011]). Furthermore,
warnings in prior court orders that the deposition was not
to be adjourned is not notice to plaintiffs that dismissal
of the complaint may result should it not go forward (see
Armstrong v B.R. Fries & Assoc., Inc., 95 AD3d 697, 698
[1st Dept 2012]).

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

ENTERED: FEBRUARY 14, 2019

CLERK

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