

Supreme Court, Appellate Division, Second
Department, New York.

Fran KOMYATHY, an infant, etc. et al., Appellants,
v.
EAST HAMPTON UNION FREE SCHOOL
DISTRICT, Respondent.

March 16, 1981.

Plaintiffs appealed from order entered by the Supreme Court, Suffolk County, Baisley, J., denying their motion to extend time to appear for examinations and dismissing complaint. The Supreme Court, Appellate Division, held that plaintiffs' conduct of failing to timely comply with ordered examinations was not willful default such as precluded extending time to appear for examinations or such as warranted dismissal of complaint where attorney for plaintiffs justifiably relied upon agreement made by employees of defense attorneys to adjourn examinations, upon continuing inaction of attorney for defendant, and upon failure to protest such agreement as not timely compliance with order, and defense attorney subsequently refused to conduct examinations.

Reversed, plaintiffs' motion granted, and defendant's cross motion to dismiss denied.

West Headnotes

Damages  **206(8)**
[115k206\(8\) Most Cited Cases](#)

Plaintiffs' conduct of failing to timely comply with ordered examinations was not willful default such as precluded extending time to appear for examinations or such as that warranted dismissal of complaint where attorney for plaintiffs justifiably relied upon agreement made by employees of respective attorneys to adjourn examinations, upon continuing inaction of attorney for defendant, and upon failure to protest such agreement as not timely compliance with order, and defense attorney subsequently refused to conduct examinations. [General Municipal Law § 50-h.](#)

****14** George David Rosenbaum, New York City (Michael Mermer, New York City, of counsel), for appellants.

Kennelly & Grefe, Westbury (John H. Grefe, Jr., of counsel), for respondent.

Before GIBBONS, J. P., and RABIN, GULOTTA and MARGETT, JJ.

MEMORANDUM BY THE COURT.

***873** In a negligence action to recover damages for personal injuries, etc., plaintiffs appeal from an order of the Supreme Court, Suffolk County, dated August 24, 1979, which, inter alia, denied plaintiffs' motion to extend their time to appear for examinations pursuant to [section 50-h of the General Municipal Law](#) and dismissed the complaint.

Order reversed, without costs or disbursements, plaintiffs' motion granted and defendant's ****15** cross motion to dismiss the complaint denied. Plaintiffs' time to comply with order of February 15, 1979 is extended for a period of 30 days after service upon them of a copy of the order to be made hereon, with notice of entry.

The justifiable reliance by the attorney for the plaintiffs upon the agreement concededly made by the employees of the respective attorneys to adjourn the examinations (directed by a prior order to be held by May 15, 1979) to May 18, 1979, the continuing inaction of the attorney for the defendant and his failure, prior to May 15, to protest such agreement as not a timely compliance with the order, and his refusal thereafter to conduct the examinations on May 18, 1979, constituted a course of conduct which lulled the plaintiffs' attorney into believing that the agreement would be kept, and militates against the conclusion that plaintiffs' failure to timely comply with the order was willful or deliberate. To the extent that, under such circumstances, Special Term may have treated this conduct as a willful default, it erred.

437 N.Y.S.2d 14, 80 A.D.2d 873

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