

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D12852
C/mv

_____AD3d_____

Submitted - October 11, 2006

STEPHEN G. CRANE, J.P.
ROBERT A. SPOLZINO
ANITA R. FLORIO
JOSEPH COVELLO, JJ.

2005-11540

DECISION & ORDER

St. Vincent's Hospital & Medical Center, a/a/o
Rockeya Begum, respondent, v Allstate Insurance
Company, appellant.

(Index No. 4572/05)

McDonnell & Adels, P.C., Garden City, N.Y. (Martha S. Henley of counsel), for
appellant.

Joseph Henig, P.C., Bellmore, N.Y., for respondent.

In an action to recover no-fault medical payments, the defendant appeals from an order of the Supreme Court, Nassau County (Lally, J.), dated November 3, 2005, which denied its motion to vacate a clerk's judgment of the same court entered May 11, 2005, upon its failure to appear or answer, and for leave to serve a late answer.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, the motion is granted, the clerk's judgment is vacated, and the answer annexed to the defendant's motion papers is deemed served on the plaintiff.

A defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate a "reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene DiLorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138, 141; *see New York & Presbyt. Hosp. v American Home Assur. Co.*, 28 AD3d 442). The defendant

July 24, 2007

Page 1.

ST. VINCENT'S HOSPITAL & MEDICAL CENTER, a/a/o BEGUM
v ALLSTATE INSURANCE COMPANY

demonstrated a reasonable excuse for its failure to timely appear and answer the complaint and a potentially meritorious defense. Accordingly, the Supreme Court improvidently exercised its discretion in denying the defendant's motion to vacate the clerk's judgment entered upon its failure to appear or answer, and for leave to serve a late answer.

CRANE, J.P., SPOLZINO, FLORIO and COVELLO, JJ., concur.

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DECISION & ORDER ON MOTION

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Motion by the respondent on an appeal from an order of the Supreme Court, Nassau County, dated November 3, 2005, to strike portions of the appellant's brief on the ground that those portions of the brief refer to matter de hors the record. By decision and order on motion of this court dated June 30, 2006, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the motion is denied.

CRANE, J.P., SPOLZINO, FLORIO and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

July 24, 2007

Page 2.

ST. VINCENT'S HOSPITAL & MEDICAL CENTER, a/a/o BEGUM
v ALLSTATE INSURANCE COMPANY