

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

D26245
O/kmg

_____AD3d_____

Submitted - January 27, 2010

STEVEN W. FISHER, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2009-05712

DECISION & ORDER

Christopher Geliga, et al., respondents,
v Karibian, Inc., et al., appellants.

(Index No. 5128/05)

Philip J. Rizzuto, P.C., Carle Place, N.Y. (Kristen N. Reed of counsel), for appellants.

The Yankowitz Law Firm, P.C. (Gary P. Kauget, P.C., Brooklyn, N.Y. of counsel),
for respondents.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),
for respondent Christopher Geliga on the counterclaim.

In an action to recover damages for personal injuries, etc., the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bayne, J.), dated April 17, 2009, as denied that branch of their motion which was to vacate a prior order of the same court dated December 19, 2007, precluding the defendant David Cruz from testifying at trial unless he appeared for an examination before trial on or before March 19, 2008.

ORDERED that the order is affirmed insofar as appealed from, with costs.

To avoid the adverse impact of the conditional order of preclusion, the defendants were required to demonstrate an excusable default and a meritorious defense to the action (*see Lee v Arellano*, 18 AD3d 620, 621; *Jenkinson v Naccarato*, 286 AD2d 420, 421; *Felicciardi v Town of Brookhaven*, 205 AD2d 495, 496). Since the defendants failed to demonstrate an excusable default,

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that branch of their motion which was to vacate the order of preclusion was properly denied.

FISHER, J.P., SANTUCCI, ANGIOLILLO, HALL and LOTT, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court