

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

D27743
O/prt

_____AD3d_____

Submitted - May 19, 2010

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2009-06544

DECISION & ORDER

Auristella Legaretta, et al., appellants,
v Lucky Ekhstor, et al., respondents
(and a third-party action).

(Index No. 12357/07)

Sim & Park, LLP, New York, N.Y. (Sang J. Sim of counsel), for appellants.

Hardin, Kundla, McKeon & Poletto, P.A., New York, N.Y. (Stephen Murray of counsel), for respondents.

Mendolia & Stenz, Westbury, N.Y. (Tracy Morgan of counsel), for third-party defendants.

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of Supreme Court, Queens County (Nelson, J.), dated May 15, 2009, which denied their motion, in effect, to vacate so much of a prior order of the same court dated March 28, 2008, as granted, without opposition, that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted by the plaintiffs Edward Hernandez and Eva M. Lamota on the ground that those plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order dated May 15, 2009, is affirmed, with costs to the respondents.

June 8, 2010

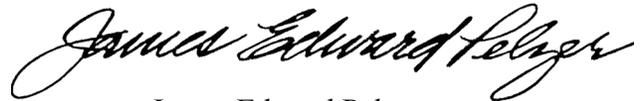
LEGARETTA v EKHSTOR

Page 1.

To vacate their default in opposing the defendants' motion for summary judgment, the plaintiffs were required to demonstrate both a reasonable excuse for their default and a potentially meritorious claim (*see Donovan v Chiapetta*, 72 AD3d 635; *Aurora Loan Servs. v Grant*, 70 AD3d 986). The determination of what constitutes a reasonable excuse lies within the trial court's discretion (*see Zarzuela v Castanos*, 71 AD3d 880; *Santiago v New York City Health & Hosps. Corp.*, 10 AD3d 393, 394). Under the circumstances of this case, the plaintiffs' claim of law office failure was insufficient to excuse their failure to oppose the defendants' motion for summary judgment.

RIVERA, J.P., FLORIO, DICKERSON, CHAMBERS and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court