

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

D27762
H/hu

_____AD3d_____

Argued - May 18, 2010

MARK C. DILLON, J.P.
HOWARD MILLER
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2009-04057
2009-10003

DECISION & ORDER

Rita Siculan, appellant, v Ifigenia Koukos, et al.,
defendants-respondents, Hopeful Enterprises, Inc.,
defendant third-party plaintiff/second third-party
plaintiff-respondent; J.S.S. Plumbing, Heating,
Sprinkler Contractors, LLC, et al., third-party
defendants-respondents, Sal Schettina, third-party
defendant/third third-party plaintiff-respondent,
J.R.M. Construction Corp., second third-party
defendant/third third-party defendant-respondent,
Ridge Preparatory School, third third-party defendant-
respondent.

(Index No. 26580/04)

Reingold & Tucker, Brooklyn, N.Y. (Abraham Reingold of counsel), for appellant.

Cohen, Kuhn & Associates, New York, N.Y. (Shahab Katirachi of counsel), for
defendant third-party plaintiff/second third-party plaintiff-respondent.

Pillinger Miller Tarallo, LLP, Elmsford, N.Y. (William A. Elder of counsel), for
third-party defendant/third third-party plaintiff-respondent.

Alexander M. Dudelson, Brooklyn, N.Y., for third-party defendant-respondent
J.S.S. Plumbing, Heating, Sprinkler Contractors, LLC.

James J. Toomey, New York, N.Y., for second third-party defendant/third third-party defendant-respondent.

In an action to recover damages for personal injuries, the plaintiff appeals (1), as limited by her brief, from so much of an order of the Supreme Court, Kings County (Hurkin-Torres, J.), dated February 27, 2009, as denied her motion, in effect, to vacate the dismissal of the action pursuant to 22 NYCRR 202.27 and to restore the action to the calendar, and (2) from an order of the same court dated September 21, 2009, which denied her motion for leave to renew and reargue her prior motion.

ORDERED that the appeal from so much of the order dated September 21, 2009, as denied that branch of the plaintiff's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated February 27, 2009, is affirmed insofar as appealed from; and it is further,

ORDERED that the order dated September 21, 2009, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

Contrary to the plaintiff's contention, the action was dismissed pursuant to 22 NYCRR 202.27(b) for counsel's failure to appear at a scheduled conference (*see Chechen v Spencer*, 68 AD3d 801, 801-802; *Saunders v Riverbay Corp.*, 17 AD3d 137, 138). Indeed, counsel acknowledged as much before the Supreme Court (*see DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270, 270-271). Consequently, in order to vacate the dismissal of the action, the plaintiff was required to demonstrate a reasonable excuse for her failure to appear and a potentially meritorious cause of action (*see e.g. Brooks v Haidt*, 30 AD3d 365). The excuse offered, an unexplained occurrence of law office failure, was not a reasonable one (*see Chechen v Spencer*, 68 AD3d at 802; *Matter of Denton v City of Mount Vernon*, 30 AD3d 600, 601; *Montalvo v Nel Taxi Corp.*, 114 AD2d 494, 495). Moreover, the affidavit of merit, which was improperly submitted for the first time in reply, was insufficient to demonstrate the existence of a potentially meritorious cause of action (*see Bustamante v Green Door Realty Corp.*, 69 AD3d 521; *Brownfield v Ferris*, 49 AD3d 790, 791-792). Accordingly, the Supreme Court properly denied the plaintiff's motion, in effect, to vacate the dismissal of the action pursuant to 22 NYCRR 202.27 and to restore the action to the calendar (*see Brownfield v Ferris*, 49 AD3d at 792).

The Supreme Court also properly denied that branch of the plaintiff's motion which was for leave to renew her prior motion. The plaintiff failed to provide a reasonable justification for the failure to present the new facts in support of her prior motion (*see CPLR 2221[e][3]*; *Chechen v Spencer*, 68 AD3d at 802) and, in any event, "[t]he new evidence submitted by the plaintiff in support of that branch of the motion would not have change the prior determination" (*Cohen v*

Wallace & Minchenberg, 39 AD3d 690, 690; *see* CPLR 2221[e][2]; *Khan v Nelson*, 68 AD3d 1062, 1063).

DILLON, J.P., MILLER, CHAMBERS and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large initial "J".

James Edward Pelzer
Clerk of the Court