

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

D32791
Y/kmb

_____AD3d_____

Argued - October 18, 2011

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2010-02899
2010-10882

DECISION & ORDER

Zaina N. Thapt, et al., appellants, v Lutheran Medical Center, et al., defendants, Ayman Shahin, respondent.

(Index No. 7855/01)

Berkman Law Office, LLC, Brooklyn, N.Y. (Daniel Shimko of counsel), for appellants.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York, N.Y. (Angela M. Ribaldo of counsel), for respondent.

In an action to recover damages for medical malpractice and lack of informed consent, etc., the plaintiffs appeal (1) from an order of the Supreme Court, Kings County (Steinhardt, J.), dated December 11, 2009, which denied their motion to vacate their default in opposing a motion of the defendant Ayman Shahine for summary judgment dismissing the complaint insofar as asserted against him, and (2), as limited by their brief, from so much of an order of the same court dated September 13, 2010, as, upon renewal, adhered to the original determination in the order dated December 11, 2009.

ORDERED that the appeal from the order dated December 11, 2009, is dismissed, as that order was superseded by the order dated September 13, 2010, made upon renewal; and it is further,

ORDERED that the order dated September 13, 2010, is affirmed insofar as appealed from; and it is further,

November 9, 2011

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ORDERED that one bill of costs is awarded to the defendant Ayman Shahine.

To vacate their default in opposing the motion of the defendant Ayman Shahine for summary judgment dismissing the complaint insofar as asserted against him, the plaintiffs were required to demonstrate a reasonable excuse for not opposing the motion and a potentially meritorious opposition to the motion (*see* CPLR 5015[a][1]; *Bazoyah v Herschitz*, 79 AD3d 1081, 1081-1082). The Supreme Court providently rejected the plaintiffs' excuse of law office failure, as the record shows that the alleged mistake was not isolated, but rather part of a pattern of willful delay and default (*see Santiago v New York City Health & Hosps. Corp.*, 10 AD3d 393; *Roussodimou v Zafiriadis*, 238 AD2d 568, 569). Moreover, the Supreme Court properly determined that the conclusory affidavit of merit presented by the plaintiffs was insufficient to establish a potentially meritorious opposition to the motion (*see Donovan v Chiapetta*, 72 AD3d 635, 636).

Accordingly, upon renewal, the Supreme Court properly adhered to its original determination denying the plaintiffs' motion to vacate their default.

RIVERA, J.P., ENG, BELEN and AUSTIN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court