

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

D33463
C/mv

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Submitted - November 30, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-00709

DECISION & ORDER

Ashley Walker, etc., et al., appellants, v
Manual Kabzar Mohammed, et al., respondents.

(Index No. 2437/08)

Kaplan & Kaplan, Brooklyn, N.Y. (Cary H. Kaplan of counsel), for appellants.

Robert P. Tusa (Sweetbaum & Sweetbaum, Lake Success, N.Y. [Marshall D. Sweetbaum], of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Vaughan, J.), dated November 3, 2010, which denied their motion pursuant to CPLR 5015 to vacate a prior order of the same court dated June 2, 2010, granting the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff Ashley Walker did not sustain a serious injury within the meaning of Insurance Law § 5102(d), upon their failure to oppose the defendants' motion.

ORDERED that the order dated November 3, 2010, is reversed, on the law and in the exercise of discretion, with costs, and the plaintiffs' motion to vacate the order dated June 2, 2010, is granted.

To vacate their default in opposing the defendants' motion for summary judgment, the plaintiffs were required to demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (*see* CPLR 5015[a][1]; *Casali v Cyran*, 84 AD3d 711; *Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389, 392). Whether an excuse is reasonable is a determination within the sound discretion of the Supreme Court (*see SS Constantine & Helen's Romanian Orthodox Church of Am. v Z. Zindel, Inc.*, 44 AD3d 744, 745).

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Here, the Supreme Court improvidently exercised its discretion in concluding that the plaintiffs' excuse for their default, which was based on law office failure, was not reasonable (*see* CPLR 2005). Moreover, the plaintiffs's submissions were sufficient to establish the existence of a potentially meritorious opposition to the motion. Under these circumstances, and cognizant that public policy favors the resolution of cases on the merits, the Supreme Court should have granted the plaintiffs' motion pursuant to CPLR 5015 to vacate the order dated June 2, 2010.

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court