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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 5

Index Number : 116616/2002

WIN, KHIN MYA

VS

ECHEVARRIA, ANGEL

Sequence Number : 004

VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/4/07

EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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KIN MYA WIN and TOE OUNG,
Plaintiffs,

- against -

ANGEL ECHEVARRIA and THE CITY OF NEW YORK,
Defendants.

----------X

Index No.
116616/02

DECISION/ORDER
Seq No.: 004

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained by plaintiff, Khin Mya Win ("Ms.Win"), when she was hit by a car driven by Angel Echevarria on East 42nd Street New York, New York on December 14, 2001. Plaintiffs allege that the City of New York ("City") controlled the area of the roadway where Ms. Win was hit. Toe Oung, Ms. Win's husband, brings a derivative action. On July 10, 2006, the Honorable Justice Gammerman dismissed the instant case from the trial calendar for plaintiffs' failure to appear. Plaintiffs move for an order: (1)vacating the dismissal of their complaint and restoring the case to the trial calender; (2) granting leave to amend plaintiffs' Verified Bill of Particulars and complaint, and deem the complaint and bill of particulars amended nunc pro tunc. City opposes the motion. Defendant Angel Echevarria does not oppose.

A summons and complaint was filed on July 26, 2002 and the case was placed on the trial calendar on February 23, 2005. A mediation conference was held on June 6, 2006. A settlement was not reached at that conference and the parties were directed to proceed to jury selection on July 10, 2006. The stipulation produced by this conference contains a note which states "pltf [sic] is presently in Burma." Plaintiffs did not appear for jury selection on July 10, 2006 and, when City would not consent to an adjournment, Justice Gammerman dismissed the complaint.

As a procedural matter, a motion to vacate a dismissal for failure to appear must be brought within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party. (CPLR 5015(a)(1)). Plaintiffs bring this motion more than a year after the date of non-appearance but claim that there was never an order or judgment of default in this action. Rather, the dismissal was based

on plaintiffs' failure to appear for jury selection on a date stipulated to by all parties. Absent service of the dismissal order with notice of entry, there is no time limit on the making of a motion to vacate the dismissal. (Acevedo v. Navarro, 22 A.D.3d 391[1st Dept. 2005]).

Plaintiffs, in support of their motion, argue that Ms. Win was living in Burma[1] and was unable to travel to the United States for trial due to her injuries. Ms. Wins' husband works for the United Nations and they have multiple residences in different countries, including Burma. At the time of the accident, Ms. Win was visiting New York and staying in an apartment on 116 th Street. Ms. Win returned to Burma in March 2002 because there was no one here to look after her. As a result of the accident, Ms. Win suffered severe fractures to her knees, requiring a month of hospitalization, surgery, braces and crutches. She underwent three years of physical therapy and complains of continuing problems with her knees. In a fax dated July 4, 2006, Ms. Win informed her attorneys that she would be unable to attend the upcoming trial. Ms. Win also faxed a note from a doctor in Burma, Dr. Minsway Zaw, who states that Ms. Win: "can't walk or sit for prolong period . . . she need rest and can't do strenuous work . . . long journey and stress prohibited." Mr. Echevarria consented to an adjournment and City refused. Plaintiffs state that Ms. Wins' trial testimony is necessary in order to establish a prima facie case against the City.

An order dismissing a claim pursuant to 22 NYCRR 202.27 based on a party's failure to appear at a calendar call, should be vacated where the party shows a reasonable excuse for the default and a meritorious cause of action. (Harwood v. Chaliha, 291 A.D.2d 234[1st Dept. 2002]).

The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court . (38 Holding Corp. v. City of New York, 179 A.D.2d 486[1st Dept.1992]). Here, Ms. Win was living in Burma and was unable to travel due to her knee problems. Ms. Win gives a detailed account of her injuries and difficulty traveling in her affidavit of merit (see below) and her claims are substantiated by a letter from her doctor. Thus, plaintiffs have provided a reasonable excuse for their failure to appear for trial on July 10, 2006.

Plaintiffs argue that they have a meritorious claim against the City because it set a "pedestrian trap" and Ms. Win relied on a City sanitation workers' assurances

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[1]The court takes judicial notice that the country formerly known as Burma is now called the Union of Myanmar.

that it was safe for her to cross behind the barricade. Plaintiffs submit Ms. Win's affidavit of merit dated February 21, 2007. The court notes that the affidavit is sent from Burma and is not notarized but is appended to an "Individual Acknowledgment Certificate" signed by Amy Robinson, Consular Associate of the United States of America.

The affidavit of Ms. Win states that the accident occurred as follows: Win was attempting to cross 2nd Avenue when she saw a New York City Police officer directing traffic away from the front of a barricade. The barricade included two Department of Sanitation trucks positioned so as to prevent cars from entering and exiting 42nd Street, East of 2nd Avenue. The trucks were parked perpendicularly across the traffic lanes along with wooden, metal, and cement barricades at or about the intersection of Second Avenue and east 42nd Street. Ms. Win walked to the south east corner and a sanitation worker walked in her direction and moved one of the barriers out of the way which was blocking her access to the crosswalk. The police officer was positioned east of the barricade. *As she approached the sanitation worker, she pointed to the roadway east of the two trucks and asked if it was okay to cross that way. Ms.Win states that the sanitation worker said "it is okay to cross, the street is closed."* (emphasis added). Ms. Win states that she looked in both directions and did not see any vehicles on the road and started to cross. When she was about midway through the roadway, she was hit by a car driven by defendant Angel Echevarria.

Generally, a municipality is immune from a negligence action if the conduct complained of involves the exercise of professional judgment.(Kenavan v. City of New York , 70 N.Y.2d 558[1987]). To hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality. (Kovit v. Hallums 4 N.Y.3d 499[2005]). Establishing a special relationship based on a municipality's assumption of a duty requires: (1) an assumption by a municipality, through promises or actions, to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's reliance on the municipality's affirmative undertaking. (Pelaez v. Seide, 2 N.Y.3d 186[2004]).

Ms. Win states in her affidavit of merit that a City sanitation worker told her it was safe to cross a street; a street blockaded by sanitation trucks. An affidavit of merit along with a reasonable excuse for failure to proceed to trial is sufficient to

warrant a court to vacate a dismissal and restore an action to trial. (Cappel v. RKO Stanley Warner Theaters, Inc, 61 A.D.2d 936[1st Dept. 1978]).

City argues that Ms. Win's affidavit adds new facts never before pleaded aimed at creating a special relationship between plaintiff and City. Indeed, the new affidavit adds facts that Ms. Win was never questioned about at her deposition. Still, it does not contradict her earlier deposition testimony. Where, as here, an affidavit can be reconciled with prior testimony, it cannot be regarded as merely a self-serving allegation calculated to contradict an admission made in the course of previous testimony (Kalt v. Ritman, 21 A.D.3d 321 [1st Dept. 2005]).

Viewing the affidavit of Ms. Win as true, plaintiffs have alleged that there was direct contact between a City sanitation worker and Ms. Win. Further, plaintiffs allege that Ms. Win relied on the statement made by a City sanitation worker that it was safe to cross a street blockaded by sanitation trucks. Thus, plaintiffs have established a meritorious claim against City.

The court now turns to plaintiffs' motion to amend their compliant and bill of particulars in order to allege a special relationship with the City. Pursuant to CPLR 3025(b):

> a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Ms. Win's affidavit of merit alleges a special relationship with the City was formed when the sanitation worker assured her that the roadway was clear for her to cross. Plaintiffs should be permitted to amend their pleadings to include this new allegation. This amendment necessitates further discovery, however. City shall be given the opportunity to depose plaintiff regarding this new allegation. Thus, the Note of Issue shall be stricken, sua sponte. (Prote Contracting Co., Inc. v. Board of Educ. of City, 249 A.D.2d 178[1st Dept.1998]).

Wherefore it is hereby

ORDERED that plaintiffs' motion to vacate the dismissal of their complaint is granted, and it is further

ORDERED that plaintiffs' motion to amend their complaint and Bill of Particulars is granted, and the amended complaint and bill of particulars in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry, and it is further

ORDERED that defendant the City of New York shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that plaintiffs' Note of Issue is hereby stricken; and it is further

ORDERED that the parties shall appear for a compliance conference on DECEMBER 11, 2007, at which time further depositions shall be scheduled; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office(Room 158), and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the Differentiated Case Management Office (Room 102).

This constitutes the Decision and Order of the Court.

All other relief requested is denied.

DATED: October 4, 2007

EILEEN A. RAKOWER, J.S.C.