

<b>Rodriguez v Clearview Gardens First Corp.</b>
2012 NY Slip Op 33818(U)
May 23, 2012
Supreme Court, Queens County
Docket Number: 26092/09
Judge: Bernice D. Siegal
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**ORIGINAL**

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Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

-----X  
Anthony Rodriguez and Lisa Rodriguez,

Plaintiff,

-against-

Clearview Gardens First Corporation,

Defendant.  
-----X

Index No.: 26092/09  
Motion Date: 3/28/12  
Motion Cal. No.: 19  
Motion Seq. No.: 3

The following papers numbered 1 to 12 read on these motions for an order pursuant to CPLR §5015(a) vacating this Court's order dated November 28, 2011, which granted defendant's summary judgment motion on default; (2) permitting defendant's summary judgment motion to be decided on its merits; (3) deeming the within motion papers as plaintiffs' affirmation in opposition; (4) setting down a schedule for defendant to submit a reply to the summary judgment motion; and (5) setting down a date for oral argument of summary judgment motion.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation In Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

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Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiffs move for an order pursuant to CPLR §5015(a) vacating this court's order dated November 28, 2011, wherein the court granted defendants' summary judgment motion without opposition. Plaintiffs also ask the court to deem the within motion papers as plaintiffs' affirmation

in opposition and setting down a schedule for defendants to submit a reply to plaintiffs' opposition to the original motion and for oral argument of the original motion.

#### Facts

This action is for monetary damages for personal injuries arising out of a tripping accident that occurred on May 8, 2009, which caused the Plaintiff, Anthony Rodriguez, to drop a granite counter top. Plaintiff asserts that he was placing a heavy granite counter top into the back of his friend's vehicle when he allegedly tripped and fell and dropped the counter top, which broke and fell onto his foot. Plaintiff claims that he was caused to trip at the defendant's premises due to a broken, cracked, uneven, holey, dangerous and defective sidewalk.

Patrick Mullaney, Esq. ("Mullaney") submits an affirmation in support of vacating the summary judgment decision dated November 28, 2011. Mullaney contends that he worked as an associate at the Law Office of Michael T. Ridge, who was prior counsel for plaintiffs in the within action. Mullaney asserts that he was in the process of leaving the Law Office of Michael T. Ridge, to set up his own law firm, when defendant made the summary judgment motion. Mullaney left the Law Office of Michael T. Ridge in March of 2011. Mullaney states that immediately after leaving the Law Office of Michael Ridge he began trying cases from early March through the end of the summer. In late summer 2011, Mullaney formed a partnership with Nick Gjelij, Esq., forming Mullaney and Gjelij, PLLC.

In opposition, defendants point out that the Law Office of Michael T. Ridge continued to prosecute the within action as the plaintiffs' attorney for months after Mullaney allegedly left the Law Office of Michael T. Ridge. Specifically, on or about April 21, 2011, the Law Office of Michael T. Ridge served and filed a note of issue and statement of readiness in the within action. In addition,

the Law Office of Michael T. Ridge appeared in court on June 3, 2011, with respect to defendant's motion to strike the action from the calendar. Finally, the Law Office of Michael T. Ridge forwarded a stipulation to adjourn defendant's summary judgment motion from August 24, 2011 until September 21, 2011. Defendant also points out that five of the six cases Mullaney contends that he tried after leaving the Law Office of Michael T. Ridge lists the Law Office of Michael T. Ridge as the attorney of record for the plaintiff.

### Discussion

"To vacate their default in opposing the defendant's 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" (*Walker v. Mohammed*, 90 A.D.3d 1034 [2<sup>nd</sup> Dept 2011] *Casali v. Cyran*, 84 A.D.3d 711 [2<sup>nd</sup> Dept 2011].) Plaintiff's motion to vacate their default is granted as more fully set forth below.

### Reasonable Excuse

"The determination of what constitutes a reasonable excuse is left to the sound discretion of the court." (*Id*; see *Scarlett v McCarthy*, *Supra*.) Further, the "Supreme Court has the discretion to accept law office failure as a reasonable excuse ( see CPLR 2005) where that claim is supported by a "detailed and credible" explanation of the default or defaults at issue." (*Swensen v. MV Transp., Inc.*, 89 A.D.3d 924 [2<sup>nd</sup> Dept 2011].)

From the facts presented, the Law Office of Michael T. Ridge was the attorney of record for the plaintiffs until January 25, 2012, when the consent to Change Attorney in this action was executed. Mullaney admits that he should have filed the consent to Change Attorney sooner and that it was this failure that resulted in notices of the underlying summary judgment motion going

to the Law Office of Michael Ridge and not to Mullaney. This court concludes that Mullaney's affidavit was sufficiently "detailed and credible." Therefore, plaintiff has set forth a reasonable excuse for their default.

#### **Meritorious Defense**

"The determination of what constitutes ... a meritorious defense is generally within the sound discretion of the trial court. (*Anamdi v. Anugo*, 229 A.D.2d 408 [2<sup>nd</sup> Dept 1996].) The showing of merit necessary to vacate a default is less than what is necessary for opposing a motion for summary judgment. (*Biton v. Turco*, 88 A.D.3d 519 [1<sup>st</sup> Dept 2011]; citing *Goodwin v. New York City Housing Authority*, 78 A.D.3d 550 [1<sup>st</sup> Dept 2010][holding that attorney affirmation referencing photograph indicating the condition of the walkway was sufficient to show a meritorious cause of action].) In his deposition testimony, Anthony Rodriguez testified that he tripped "from a crack on the floor." Rodriguez was able to point to the area where he tripped in a photograph and that photograph is attached to the moving papers. Defendant contends that the alleged defect is trivial in nature, however, the issue of whether a dangerous condition exists depends on the particular facts of each case, and is generally a question of fact for the jury. (*Turuseta v. Wyassup-Laurel Glen Corp.*, 91 A.D.3d 632 [2<sup>nd</sup> Dept January 10, 2012]; *Schenpanski v. Promise Deli, Inc.*, 88 A.D.3d 982 [2<sup>nd</sup> Dept 2011].)

Based on the facts of the within case, plaintiffs met the requisite proof required to vacate the judgment.

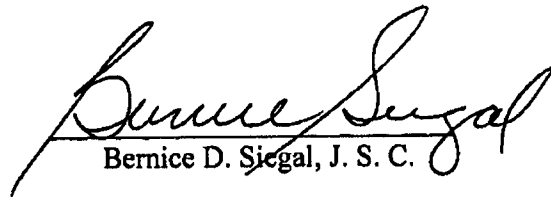
#### **Conclusion**

For the reasons set forth above, plaintiffs' motion pursuant to CPLR §5015(a) vacating the court's order dated November 28, 2011, is granted and plaintiffs' motion is hereby deemed as

plaintiffs' affirmation in opposition to defendant's summary judgment motion. The underlying summary judgment motion is set down for oral argument in Part 19, Courtroom 48 on July 18, 2012 at 9:30AM. Defendant to serve reply papers to the underlying summary judgment motion on or before July 11, 2012.

Plaintiff to Serve a copy of this order with notice of entry upon defendant's counsel without undue delay.

Dated: May 23 2012

  
Bernice D. Siegal, J. S. C.

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