

**Burgos v Azzam**

2023 NY Slip Op 34997(U)

April 11, 2023

Supreme Court, Bronx County

Docket Number: Index No. 21424/2019E

Judge: Veronica G. Hummel

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 20**

<p>MEREDITH LIZARDI BURGOS,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>HESHAM M. AZZAM and YELLOW DIANMON TAXI LLC,</p> <p style="text-align: center;">Defendants.</p>
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**Index No. 21424/2019E**

**HON. VERONICA G. HUMMEL, A.J.S.C.**

**Mot. Seq. No. 3**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in connection with plaintiff MEREDITH LIZARDI BURGOS’s (“Plaintiff”) motion (Seq. No. 3) seeking an order, pursuant to CPLR 5015(a)(1), vacating the Court’s prior order, dated September 27, 2022 (the “Prior Order”), granting, as unopposed, defendants HESHAM M. AZZAM’s and YELLOW DIANMON TAXI LLC’s (together, “Defendants”) motion for summary judgment (Seq. No. 2) dismissing the Complaint due to Plaintiff’s failure to demonstrate that she suffered a “serious injury” under Insurance Law § 5102(d) (the “Serious Injury-SJ Motion”), and, upon vacatur, denying the Serious Injury-SJ Motion.

This is a personal-injury action arising out of a motor-vehicle accident that occurred on September 25, 2018, on the westbound Triborough/RFK Bridge, near the Manhattan Toll Plaza, in the County of New York, New York. Plaintiff alleges that she was slowing her vehicle to a stop due to heavy traffic at the toll plaza when she was struck in the rear by a vehicle operated by defendant AZZAM.

On March 7, 2022, Defendants filed the SJ Motion (Seq. No. 2), which was originally returnable on April 14, 2022. By stipulation dated April 11, 2022, but filed to NYSCEF on April 20, 2022, the parties adjourned the return date to July 14, 2022.

Despite the adjournment, Plaintiff failed to oppose the motion. Consequently, the Court granted the motion as unopposed in the Prior Order.

On October 25, 2023,<sup>1</sup> Plaintiff filed the instant motion to vacate the Prior Order [Mot. Seq. 3]. The motion was returnable on November 21, 2022. Defendants filed opposition to the motion on November 18, 2022, and Plaintiff filed a reply on November 23, 2022. Thus, both the opposition and reply were untimely. Nevertheless, in the interests of resolving the motion on its merits, the Court will consider both.

In an affirmation submitted in support of the motion, Plaintiff's counsel, Valdivia Law Office, PLLC ("Counsel"), explains that they were first retained and appeared in this case as trial counsel when the instant motion was already pending.<sup>2</sup> As a result, the parties entered into the above-mentioned stipulation adjourning the return date. According to Counsel, after the adjournment, "the staff assigned to maintain this file left the firm" and, "[d]ue to missight [*sic*] and office confusion[,] we were unaware that a summary judgment motion was pending." [NYSCEF Doc. 37, ¶ 7]

In support of the motion, Plaintiff also submitted, as one combined exhibit, a 25-page affirmation in opposition to the Serious Injury-SJ Motion; an extensive response to Defendants' statement of material facts originally submitted in support of the Serious Injury-SJ Motion; and more than 600 pages of medical reports and records. [*See id.* Doc. 38]

In opposition to the motion, Defendants merely attempt to cast doubt on Plaintiff's proffered excuse for defaulting on the Serious Injury-SJ Motion, arguing, essentially, that it is unreasonable that Counsel failed to review the file for this case from mid-April (*i.e.*, when the adjournment was agreed upon) until late October (*i.e.*, when Plaintiff filed the instant motion). Defendants do not expressly dispute that Plaintiff may have a meritorious defense to the Serious Injury-SJ Motion; they only reiterate again that opposition to the Serious Injury-SJ Motion was never timely filed. Defendants do ask, however, that if the Court were to grant that part of the motion seeking vacatur of the Prior Order, that the Court also grant Defendants time to file a reply.

In reply, Counsel again explains—this time in slightly more detail—that "[t]he responsibility of tracking and assigning of this matter was placed on a staff member [who]

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<sup>1</sup> There is no dispute as to the timeliness of the instant motion. Nor could there be, as CPLR 5015(a)(1) requires that such a motion be made within one year of service of the underlying order *with written notice of its entry*, and no written notice of entry of the Prior Order was ever filed.

<sup>2</sup> NYSCEF confirms that April 20, 2022, is the date when Counsel registered an appearance on Plaintiff's behalf.

unexpectedly left this firm due to illness in her family” and that “[a] failure then did occur in not calendaring the motion[’]s opposition.” [NYSCEF Doc. 40, ¶ 6]

A party seeking to vacate, pursuant to CPLR 5015(a)(1), an order or judgment entered on her default must demonstrate (a) a reasonable excuse for the default and (b) a potentially meritorious claim or defense in the action or to the motion. *Cruz-Guzman v. 2380-2386 Grand Ave., LLC*, 190 A.D.3d 409 (1st Dep’t 2021); *Hereford Ins. Co. v. Forest Hills Med., P.C.*, 172 A.D.3d 567, 568 (1st Dep’t 2019); *Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257, 258 (1st Dep’t 2001). “Assessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court.” *Mediavilla v. Gurman*, 272 A.D.2d 146, 148 (1st Dep’t 2000); *see also Dayon G. v. Tina T.*, 163 A.D.3d 461, 462 (1st Dep’t 2018); *Shmuklyer v. Feintuch Commc’ns*, 158 A.D.3d 469, 470 (1st Dep’t 2018) (“[T]he drafters of [CPLR 5015(a)] intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee.” (internal quotation marks and citation omitted)). A court must exercise its discretion, however, against the backdrop of New York’s strong policy preference for resolving cases on their merits. *See, e.g., Cornwall Warehousing, Inc. v. Lerner*, 171 A.D.3d 540, 541 (1st Dep’t 2019); *Rugieri v. Bannister*, 22 A.D.3d 299, 302 (1st Dep’t 2005).

“Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors.” *Gecaj v. Gjonaj Realty & Mgmt. Corp.*, 149 A.D.3d 600, 603 (1st Dep’t 2017) (internal quotation marks and citation omitted). In New York, courts have consistently recognized law-office failure, *if adequately supported in evidence and properly explained*, as a reasonable excuse for a default. *See, e.g., CPLR § 2005; Cornwall Warehousing, Inc. v. Lerner*, 171 A.D.3d 540, 540 (1st Dep’t 2019); *Hamilton v. Nat’l Amusements, Inc.*, 167 A.D.3d 431, 431 (1st Dep’t 2018); *Cheri Rest. Inc. v. Eoche*, 144 A.D.3d 578, 579-80 (1st Dep’t 2016); *Dorio v. Cty. of Suffolk*, 58 A.D.3d 594, 595 (2d Dep’t 2009); *Liotti v. Peace*, 15 A.D.3d 452, 453 (2d Dep’t 2005); *Polir Constr. v. Etingin*, 297 A.D.2d 509, 513 (1st Dep’t 2002).

Here, Plaintiff has adequately demonstrated law-office failure by explaining that the staff member responsible for tracking this case left Counsel’s firm unexpectedly and failed to calendar the motion. *Cf. Morales v. Marion Ave. Mgmt. LLC*, 188 A.D.3d 466, 466 (1st Dep’t 2020) (finding excusable law-office failure where counsel’s affirmation explained “that the lawyer who had been handling the case left the firm and failed to pass her work on to the firm’s two partners”); *GG*

*Broadway Terrace, Inc. v. Favin*, No. 654810/16, 2018 WL 2416470, at \*2 (N.Y. Sup. Ct. N.Y. Cty. May 29, 2018) (finding excusable law-office failure based upon “affirmation from the current handling attorney explaining the circumstances of the departure of the former handling attorney”). While Plaintiff’s explanation for the default on the Serious Injury-SJ Motion is not particularly strong, the Court finds that it is nevertheless sufficient in light of the overarching policy in favor of deciding matters on their merits.

Similarly, the Court finds that Plaintiff has satisfied the burden to establish a meritorious action. “The quantum of proof required to prevail [on a motion to vacate a default order or judgment] is not as great as is required to oppose summary judgment.” *Bilodeau-Redeye v. Preferred Mut. Ins. Co.*, 38 A.D.3d 1277, 1277 (4th Dep’t 2007) (alteration in original) (internal quotation marks and citation omitted); *Madatova v. City of N.Y.*, 2020 N.Y. Slip Op. 34236(U), at \*6 (Sup. Ct. Kings Cty. Dec. 18, 2020); *Maurice v. Maurice*, 39 Misc. 3d 1205(A), at \*6 (N.Y. Sup. Ct. Kings Cty. 2013). Indeed, in the same context in which this motion arises, the First Department held a CPLR 5015(a)(1) movant to a more lenient standard of proof than would otherwise have applied on a summary-judgment motion to dismiss for lack of serious injury. *Levy v. N.Y.C. Hous. Auth.*, 287 A.D.2d 281, 281 (1st Dep’t 2001). Here, Plaintiff has submitted voluminous medical reports and records in opposition to the Serious Injury-SJ Motion. Viewing those submissions in light of the less exacting standard applicable to a motion under CPLR 5015(a)(1), the Court, in its discretion, and in the interest of resolving this matter on the merits, finds that Plaintiff has adequately demonstrated that she has a meritorious cause of action against Defendants. It bears noting, as well, that, as previously mentioned, Defendants have not argued any meaningful opposition to Plaintiff’s motion to vacate. *Cf. Infante v. Breslin Realty Dev. Corp.*, 95 A.D.3d 1075, 1077 (2d Dep’t 2012).

Accordingly, that part of Plaintiff’s motion seeking to vacate the Prior Order is **GRANTED**, the Prior Order is **VACATED**, and this action is **RESTORED** to active status. Motion Sequence 2 (*i.e.*, the Serious Injury-SJ Motion) shall, therefore, be marked as open/undecided in all court records.

That being said, that portion of Plaintiff’s motion seeking the denial of the Serious Injury-SJ Motion upon vacatur is **DENIED**.

Instead, given the voluminous amount of material that Plaintiff submitted in opposition to the Serious Injury-SJ Motion, the Court hereby grants Defendants an opportunity to file a reply.

Plaintiff shall file her opposition to the Serious Injury-SJ Motion to NYSCEF as separate documents (*i.e.*, affirmation of support, responding statement of material facts, and medical records to be filed as separate NYSCEF filings) **on or before April 18, 2023**. Plaintiff shall not make any substantive changes to those documents or file any documents in addition to those already filed as a combined exhibit at NYSCEF Doc. 38. Defendants, in turn, shall file a reply to the opposition **on or before May 19, 2023**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

**ORDERED** that plaintiff MEREDITH LIZARDI BURGOS's ("Plaintiff") motion (Seq. No. 3) seeking an order, pursuant to CPLR 5015(a)(1), vacating the Court's prior order, dated September 27, 2022, granting, as unopposed, defendants HESHAM M. AZZAM's and YELLOW DIANMON TAXI LLC's (together, "Defendants") motion for summary judgment (Seq. No. 2) dismissing the Complaint due to Plaintiff's failure to demonstrate that she suffered a "serious injury" under Insurance Law § 5102(d) (the "Serious Injury-SJ Motion"), and, upon vacatur, denying the Serious Injury-SJ Motion is **GRANTED IN PART** in accordance with this Order; and it is further

**ORDERED** that the Clerk shall **VACATE** the prior Order of this Court, dated September 27, 2022 [NYSCEF Doc. 35] resolving Motion Sequence 2, and upon vacatur designate Motion Sequence 2 as "open" to be submitted on May 19, 2023; and it is further

**ORDERED** that the Clerk shall **RESTORE** this action to **ACTIVE** status; and it is further

**ORDERED** that Plaintiff shall file to NYSCEF, **on or before April 18, 2023**, her opposition to Motion Sequence 2 currently filed as NYSCEF Doc. 35, and said opposition shall be filed as *separate correctly labeled* individual documents without any substantive change or additional documents and the failure to upload an individual document correctly may result in said document not be considered by the court; and it is further

**ORDERED** that Defendants shall file to NYSCEF, **on or before May 19, 2023**, their reply to Plaintiff's opposition to Motion Sequence 2; and it is further

**ORDERED** that as this action is a motor vehicle case, the action and Motion Sequence 2 (which is now open and scheduled to be submitted on May 19, 2023) are appropriately transferred to Motor Vehicle part 13, and as such the Clerk shall effectuate said transfer and removed the action and the motion from the inventory of the undersigned justice; and it is further

**ORDERED** that the Clerk shall mark the motion (Seq. No. 3) decided in all court records.

This constitutes the Decision and Order of the Court.

**Dated: April 11, 2023**

**Hon.**   
**HON. VERONICA G. HUMMEL, A.J.S.C.**

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY       CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE  
 FIDUCIARY APPOINTMENT                       REFEREE APPOINTMENT  
 VACATE PRIOR ORDER ON MOT SEQ 2     RESTORE ACTION