

Rodriguez v Malone

2025 NY Slip Op 33360(U)

September 2, 2025

Supreme Court, Kings County

Docket Number: Index No. 502280/2021

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 2nd day of September 2025

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

YVONNE RODRIGUEZ,

Plaintiff(s),

-against-

SHIRLEY MALONE and MD EASIN,

Defendant(s).

DECISION & ORDER

Index No.: 502280/2021

Calendar No.: 35

Motion Seq.: 003

Recitation of the following papers as required by CPLR 2219(a):

**Papers
Numbered**

Notice of Motion and Supporting Documents to Vacate	
Default and Reargue the Order dated 10/24/2024 (NYSCEF 61-67)	1, 2
Affirmation in Opposition (NYSCEF 71-72)	3
Motion Sequence 002 (NYSCEF 40-59) ¹	4

Upon the foregoing papers, the decision and order of the Court is as follows:

This is an action to recover damages for injuries sustained in a motor vehicle accident on 12/20/2019. Defendants previously moved this Court for an order granting summary judgment per CPLR § 3212 on the grounds that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102 [d]. Plaintiff timely served opposition to the prior motion but failed to appear on the return date for oral argument. The Court granted defendants’ motion on default by an order dated 10/24/2024 (NYSCEF 59). Defendants served the order with notice of entry on 12/04/2024.

¹ The parties incorporate by reference their arguments and evidence submitted in support of Motion Sequence 002 that was granted on default by an order dated 10/24/2024.

Plaintiff now moves this Court for an order pursuant to (1) CPLR § 5015, vacating the 10/24/2024 order granted on default, (2) CPLR § 2221 [d] for leave to reargue defendants' motion for summary judgment and upon rearmament, denying the motion as there are material issues of fact as to whether plaintiff sustained a serious injury as defined by Insurance Law § 5102 [d].

In support of the request to vacate the default, plaintiff submits an affidavit by the law office paralegal who inadvertently believed that the motion for summary judgment was returnable before the Central Compliance Part Judge who takes all motions on submission. Therefore, an attorney did not appear on the return date for oral argument. Plaintiff submits that since (1) the motion is made within one year of the default, (2) the affidavit establishes a reasonable excuse for the default and (3) plaintiff has a meritorious cause of action, an order vacating the 10/24/2024 order per CPLR § 5015 [a] [1] should be granted.

It is plaintiff's position that she has a meritorious cause of action because she has sustained a serious injury as defined by Insurance Law § 5102 [d]. Therefore, upon vacating the default, the Court should grant the request to reargue the underlying motion for summary judgment. In support of this branch of the motion, plaintiff relies on the affirmations and certified reports of her treating physicians dated 10/2/2024 and 10/4/2024 submitted in opposition to the underlying motion. Plaintiff argues that at the very least, there are questions of fact concerning whether her injuries and subsequent left shoulder and right knee surgeries have resulted in a permanent and serious injury.

In opposition, defendants argue that plaintiff failed to establish a reasonable excuse for the default, but if the Court determines she has met this initial burden, she has not established a

meritorious cause of action (*Addison v Avshalumov*, 153 AD3d 477 [2d Dept 2017]). Therefore, the motion for an order per CPLR § 5015 [a] [1] must be denied.

Defendants further argue that if the Court grants relief per CPLR § 5015 [a] [1], the motion to reargue the granting of summary judgment must be denied as plaintiff failed to rebut their *prima facie* entitlement to summary judgment. In support of the underlying motion, defendants submitted their orthopedist's and radiologist's affirmed medical reports. The orthopedist examined plaintiff on 10/31/2022 and found that plaintiff's injuries were "resolved." Further, the orthopedist did not find any "objective clinical findings indicative of a present disability and functional impairment, which prevents [her] from engaging in ADL and usual activities including work, school and hobbies." Although defendants did not submit a reply to plaintiff's opposition in the underlying motion, defendants now point out that plaintiff's doctors do not base their opinions on a recent examination of plaintiff. Plaintiff was last examined by her two doctors on 10/13/2021 and 11/10/2021.

It is well established that, "Whether an excuse is reasonable is a determination within the sound discretion of the Supreme Court. However, conclusory and unsubstantiated allegations of law office failure are not sufficient" (*DLJ Mtge. Capital, Inc. v Brewster*, 237 AD3d 902, 903 [2d Dept 2025] [internal citations omitted]). In addition to the grounds set forth in CPLR § 5015 [a], the Court may vacate its own judgment or order "for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

It is also well established that a motion for leave to reargue is likewise addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended matters of fact or the law, or for some reason mistakenly arrived at its earlier decision (see CPLR § 2221 [d] [2]; *JPMorgan Chase Bank, N.A. v Novis*, 157 AD3d

776, 778 [2d Dept. 2018]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept. 2015]). Such a motion “shall not include any matters of fact not offered on the prior motion” (*Williams v Abiomed, Inc.*, 173 AD3d 1115, 1116 [2d Dept. 2019] [internal citations omitted]; CPLR § 2221 [d] [2]). Such a motion is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (*Williams v Abiomed, Inc.*, 173 AD3d 1116).

Here, plaintiff has substantially detailed a reasonable excuse for the law office’s default on 10/24/2024. Therefore, in the Court’s discretion and in the interest of substantial justice, plaintiff’s default is vacated. (*Woodson v Mendon Leasing Corp.*, 100 NY2d 68; *DLJ Mtge. Capital, Inc. v Brewster*, 237 AD3d 903; CPLR § 5015 [a] [1]). The Court is also granting plaintiff’s motion to reargue defendants’ underlying motion for summary judgment (*JPMorgan Chase Bank, N.A. v Novis*, 157 AD3d 778; CPLR § 2221 [d] [2]).

Upon reargument, the Court adheres to its initial determination. Defendants established their *prima facie* entitlement to summary judgment by submitting the orthopedist’s objective findings based on range of motion testing with a hand-held goniometer (*Mitchell v A&A Tr., Inc.*, 230 AD3d 1238, 1239 [2d Dept 2024]). Plaintiff did not submit medical evidence based on a recent examination of plaintiff in opposition to the underlying motion. Therefore, she failed to raise a triable issue of fact to rebut defendants’ entitlement to summary judgment. (*Bacon v Bostany*, 104 AD3d 625, 628 [2d 2013]).

The underlying motion was filed on 02/07/2024 and plaintiff’s medical affirmations were dated 10/2/2024 and 10/4/2024, three years after plaintiff’s last visits to her treating physicians. Thus, the motion must be granted in the absence of such medical evidence explaining her gap in treatment from 2021 through 2024 and ruling out any potential contributory factors that interrupt

the chain of causation between the accident and her claimed injuries (*Pommells v Perez*, 4 NY3d 566, 572, 574 [2005]).

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order pursuant to CPLR § 5015 [a] [1] vacating the 10/24/2024 Order entered on default and CPLR § 2221 [d] granting reargument of the 10/24/2024 Order is granted, and it is further

ORDERED that upon reargument of 10/24/2024 Order, the Court adheres to its initial determination granting defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to demonstrate a serious injury as defined by Insurance Law § 5102 [d], and it is further

ORDERED that this action is dismissed in its entirety.

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.

Dated: 9/2/2025

For Clerks use only:

MG _____

MD _____

Motion seq. # _____