

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

Luciano v. Felix

2020 NY Slip Op 03878 (N.Y. Ct. App. 2020) · No. 11812NA; 11812N; 11811 · Decided July 9, 2020

SUMMARY

The Appellate Division, First Department affirmed the denial of plaintiff's motion to vacate a default under CPLR 5015, finding that law office failure did not provide a reasonable excuse. The court dismissed appeals from nonappealable orders and stated that, if reached, the serious-injury threshold issue would also favor defendants.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Friedman, J.P.; Renwick, J.; Gische, J.; Mazzarelli, J.; Moulton, J.
JURISDICTION	New York
DECIDED	July 9, 2020
DOCKET	11812NA; 11812N; 11811
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed orders denying her motion to vacate a default and restore the action, granting defendants' unopposed motion for summary judgment, and denying leave to renew and reargue.
STANDARD OF REVIEW	Abuse of discretion for denial of relief from a default under CPLR 5015; review of the motion court's exercise of discretion in determining whether a reasonable excuse was shown.
PRECEDENTIAL VALUE	published intermediate appellate opinion
PARTIES	Jennifer Luciano v. Maribel Felix, et al.

TOPICS

default motion for reconsideration summary judgment appellate procedure personal injury

PRACTICE AREAS

civil procedure appellate procedure automobile insurance personal injury

QUESTIONS PRESENTED

1. Whether the appeals from the order granting summary judgment on default and the order denying renewal and reargument were taken from appealable orders.
2. Whether plaintiff established a reasonable excuse for her default sufficient to warrant vacatur under CPLR 5015.
3. Whether the court was required to determine whether plaintiff had a meritorious cause of action when she failed to establish an acceptable excuse for the default.
4. Whether plaintiff's proposed opposition would have raised a triable issue concerning a causally related serious injury under Insurance Law § 5102(d).

HOLDINGS

1. The appeals from the order granting defendants' unopposed motion for summary judgment and the order denying plaintiff's motion for leave to renew and reargue were dismissed because they were taken from nonappealable orders.
2. When summary judgment has been granted on default, the proper remedy is a motion to vacate the default under CPLR 5015, rather than a motion to renew or reargue.
3. Plaintiff failed to establish a reasonable excuse for her default, and law office failure was insufficient under the circumstances.
4. Because plaintiff failed to provide an acceptable excuse for the default, the court was not required to decide whether she demonstrated a meritorious cause of action.

FACTUAL BACKGROUND

Plaintiff failed to submit opposition to defendants' summary-judgment motion, which sought dismissal for lack of a causally related serious injury arising from a minor accident. Plaintiff attributed the failure to law office error, but counsel did not explain why he believed a requested adjournment had been granted, did not seek reargument until three months after dismissal, and did not submit the proposed opposition with the renewal or reargument motion. The proposed opposition also lacked medical evidence causally relating plaintiff's injuries to the accident and did not address degeneration shown in her MRI.

PROCEDURAL HISTORY

Supreme Court, Bronx County, granted defendants' unopposed motion for summary judgment dismissing the complaint for failure to establish a causally related serious injury under Insurance Law § 5102(d). The court later denied plaintiff's motion to renew and reargue and denied her motion under CPLR 5015 to vacate the default and restore the matter. The Appellate Division affirmed the CPLR 5015 order and dismissed the appeals from the summary-judgment and renewal/reargument orders as taken from nonappealable orders.

DISPOSITION

affirmed

CASES CITED

- Bank Leumi Trust Co. of N.Y. v. Sibthorpe, 161 A.D.2d 325 (1st Dep't 1990)
- Vasquez v. Koret, Inc., 151 A.D.2d 448 (1st Dep't 1989)
- Perez v. New York City Hous. Auth., 47 A.D.3d 505, 505-506 (1st Dep't 2008)
- Agosto v. Western Beef Retail, Inc., 175 A.D.3d 1192, 1192-1193 (1st Dep't 2019)
- Fernandez v. Santos, 161 A.D.3d 473, 474 (1st Dep't 2018)
- Riollano v. Leavey, 173 A.D.3d 494, 495 (1st Dep't 2019)
- Moreira v. Mahabir, 158 A.D.3d 518, 518 (1st Dep't 2018)
- Rodriguez v. Konate, 161 A.D.3d 565, 566 (1st Dep't 2018)
- Alvarez v. NYLL Mgt. Ltd., 120 A.D.3d 1043, 1044 (1st Dep't 2014), *aff'd*, 24 N.Y.3d 1191 (2015)
- Williams v. Laura Livery Corp., 176 A.D.3d 557, 558 (1st Dep't 2019)

OPINION

PER CURIAM.

Luciano v Felix (2020 NY Slip Op 03878) Luciano v Felix 2020 NY Slip Op 03878 Decided on July 9, 2020 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on July 9, 2020 Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ. 11812NA 11812N 11811 [*1] Jennifer Luciano, Plaintiff-Appellant, vMaribel Felix, et al., Defendants-Respondents.

Michael T. Altman, Woodmere, for appellant. Marjorie E. Bornes, Brooklyn, for respondents. Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 8, 2019, which denied plaintiff's motion to vacate the prior orders and restore the matter pursuant to CPLR 5015 on the basis that she lacked a reasonable excuse for the default, unanimously affirmed, without costs.

Appeals from order, same court and Justice, entered May 1, 2018, which granted defendants' unopposed motion for summary judgment dismissing the complaint for lack of a causally related serious injury within the meaning of Insurance Law § 5102(d), and from order, same court and Justice, entered November 19, 2018, which denied plaintiff's motion for leave to renew and reargue, unanimously dismissed, without costs, as taken from nonappealable orders.

Since the order granting summary judgment dismissing the complaint was granted on default, the court properly denied plaintiff's motion to renew and reargue. The proper remedy for plaintiff was to move to vacate the default pursuant to CPLR 5015 (*Bank Leumi Trust Co. of N.Y. v Sibthorpe*, 161 AD2d 325 [1st Dept 1990]; *Vasquez v Koret, Inc.*, 151 AD2d 448 [1st Dept 1989]), which plaintiff ultimately did.

However, Supreme Court providently exercised its discretion in denying plaintiff's motion pursuant to CPLR 5015. Under the circumstances, plaintiff's claim that her failure to submit

opposition to defendants' summary judgment motion was caused by law office failure is insufficient to establish a reasonable excuse for the default, because counsel offered no explanation as to why he believed a requested adjournment had been granted by the court and did not seek reargument until three months after the action was dismissed (see *Perez v New York City Hous.*

Auth., 47 AD3d 505, 505-506 [1st Dept 2008]). Furthermore, plaintiff's counsel failed to submit the proposed opposition to the motion, which included medical affirmations prepared months after the proposed adjourn date, with the motion to renew or reargue. Given plaintiff's prolonged delay, the motion court did not abuse its discretion in finding that it need not decide the issue of whether her action has merit (see *Agosto v Western Beef Retail, Inc.*, 175 AD3d 1192, 1192-1193 [1st Dept 2019]).

Because plaintiff failed to provide an acceptable excuse for the default, it is unnecessary for this Court to address whether she demonstrated a meritorious cause of action (see *Fernandez v Santos*, 161 AD3d 473, 474 [1st Dept 2018]). If we were to review the serious injury threshold issue, we would find that defendants established their initial burden to show that plaintiff did not sustain a serious injury causally related to the minor accident (see *Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]).

Plaintiff's proposed opposition does not contain medical evidence causally relating to the accident, other than the conclusory statement of one provider who relied on the history provided by plaintiff and did not address the evidence of degeneration in plaintiff's own [*2]MRI report (see e.g. *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Williams v Laura Livery Corp.*, 176 AD3d 557, 558 [1st Dept 2019]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: JULY 9, 2020 CLERK