

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

EDNA FERNANDEZ, RINA MIRANDA, ROSA RAMIREZ and ERIN SUAZO,

Plaintiffs

-against-

WILLI F. SANTOS, VIGOR LEASING CORP. and JILL J. WILLIAMS

Defendants.

X

Index No: **20951/2012**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **4** read on this **motion to vacate decision/judgment**

No On Calendar of **September 14, 2016**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1**
Answering Affidavit and Exhibits	**2, 3**
Replying Affidavit and Exhibits	**4**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiffs move pursuant to CPLR 5015(a) and/or in the interest of justice to vacate the decision and order of this Court dated May 22, 2015 that dismissed this action as against defendants, Jill J. Williams and Vigor Leasing Corp.

Pursuant to CPLR 5015(a)(1), a motion to vacate an order on grounds of excusable default must be made "within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." Defendants have provided an affidavit of service indicating that the notice of entry was served upon plaintiffs on June 1, 2015. The instant motion to vacate the May 22, 2015 order was served on July 27, 2016, in excess of the one year allowed by CPLR 5015(a)(1). However, "the delay in seeking vacatur [was not] dispositive,

since the court has the inherent power to consider applications seeking relief from a default judgment made more than one year after entry of the default judgment (CPLR 2004; *Luna Baking Co. v Myerwold,* 69 AD2d 832)." *Hunter v. Enquirer/Star Inc.,* 210 A.D.2d 32, 33 [1st Dept 1994]).

> An application to vacate an order of default may be granted if the movant can establish that the default was excusable and the existence of a meritorious claim. A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (CPLR 5015 [a] [1]; *38 Holding Corp. v City of New York,* 179 AD2d 486, 487). CPLR 2005 specifically permits the court to exercise its discretion in the interest of justice and excuse a default resulting from law office failure *(Magie v Fremon,* 162 AD2d 857, 858).
>
> *Hunter v. Enquirer/Star Inc.,* 210 A.D.2d 32, 33 [1st Dept 1994]).

Plaintiffs' attorney avers that he timely prepared the opposition papers but due to law office failure the opposition was never filed. He explained that he learned of the dismissal of the complaint in the May 22, 2015 order when he received the notice of entry dated June 23, 2016 of an order of this Court dated May 10, 2016, that transferred the venue of a related action. As such, plaintiffs' counsel has established that the default in opposing the underlying motion was excusable.

With respect to the merits, defendants underlying motion to dismiss the complaint was based upon an order of Justice O. Peter Sherwood, dated October 2, 2012, that was decided on default, that declared that the no-fault insurance carrier

had no obligation to pay medical claims of no-fault medical providers as plaintiff's were not involved in an accident within the meaning of the no-fault carrier's insurance policy. The holding was based upon allegations and presumably evidence that the collision was "staged." Defendants argue that Justice Sherwood's order should be given res judicata and collateral estoppel effect.

However, res judicata effect is not given to orders decided on default.

> Plaintiff did not oppose the motion, which was granted "on default," with no indication that dismissal was on the merits or with prejudice. Under the circumstances, the doctrine of res judicata does not apply (*see Wynn v Security Mut. Ins. Co.*, 12 AD3d 1100, 1100 [2004]; *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [2006]; *Boorman v Deutsch*, 152 AD2d 48, 52 [1989], *lv dismissed* 76 NY2d 889 [1990]), and plaintiff was free to commence this action without having to contest the dismissal of the prior action (*see Espinoza*, 32 AD3d at 327).
>
> *Sumar v. Fox*, 90 A.D.3d 577 [1st Dept 2011]).

> In order to invoke the doctrine of collateral estoppel, two prongs must be satisfied: (1) the identical issue was necessarily decided in the prior proceeding and is decisive of the present action; and (2) there was a full and fair opportunity to contest that issue in the prior proceeding (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d at 665-666).
>
> *Zimmerman v. Tower Ins. Co. of N.Y.*, 13 A.D.3d 137, 139 [1st Dept 2004]).

The issue decided in Justice Sherwood's order was that the no-fault carrier need not pay the no-fault claims of the no-fault medical providers, as the collision was not an accident within the no-fault carrier's insurance policy. Therefore, it

was not necessarily decided in Justice Sherwood's order that defendant, Jill J. Williams was not negligent for the collision herein.

> "[t]he question as to whether a party had a full and fair opportunity to litigate a prior determination involves a practical inquiry into the realities of litigation" (*Singleton Mgt., Inc. v Compere*, 243 AD2d 213, 217 [1998]). The matter of Tower's coverage of Skate Key has not been specifically litigated because Skate Key defaulted in the declaratory judgment action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]). While there was a hearing before a referee, it was necessarily one-sided as no one appeared for Skate Key and no party was allowed to intervene. As there was no actual litigation regarding this issue, there is no identity of issues between the present action and the prior determination in the declaratory judgment action (*id.* at 456). Thus, preclusive effect cannot be given to the prior determination
>
> *Zimmerman v. Tower Ins. Co. of N.Y.*, 13 A.D.3d 137, 140 [1st Dept 2004]).

Thus, collateral estoppel is inapplicable on both grounds elucidated in *Zimmerman*.

Accordingly, plaintiffs' motion to vacate the decision and order of this Court dated May 22, 2015 is granted and upon vacatur, the underlying motions of defendants, Vigor Leasing Corp. and Jill J Williams are denied.

The foregoing constitutes the decision, order and of the Court.

Dated: 11/23/2016

KENNETH L. THOMPSON JR. J.S.C.