

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Ruiz v 575 E. 137th St. Real Estate</b>                                                                                                                                                                                     |
| 2019 NY Slip Op 34067(U)                                                                                                                                                                                                       |
| July 25, 2019                                                                                                                                                                                                                  |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: 22579/2018E                                                                                                                                                                                                     |
| Judge: Howard H. Sherman                                                                                                                                                                                                       |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

*E*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX – PART: 04

-----X

Iveliz Ruiz

*Plaintiff*

- against -

**Decision and Order**

Index No. 22579/2018E

Seq. 002

575 E. 137<sup>th</sup> St. Real Estate, and

Millbrook Grocery, Inc.,

*Defendants*

Howard H. Sherman

-----X

JSC

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers  
Notice of Motion and Affidavits, Exhibits A-I

Numbered  
1

Plaintiff, Iveliz Ruiz, moves pursuant to CPLR 5015(a), for an order vacating the order of this court (Douglas, J.) dated January 31, 2019 dismissing this action on the grounds that she has a reasonable excuse for the defaults in appearance at pre-note conferences, and a meritorious cause of action. Defendant does not oppose.

Plaintiff commenced this action on March 6, 2018, seeking damages for personal injuries alleged to have been sustained on March 2, 2017 when she fell in premises owned and maintained by defendants. 575 E 137<sup>th</sup> St. Real Estate, Inc. (“575 E 137<sup>th</sup> St”) served an answer, and a motion seeking a default judgment against co-defendant Millbrook Grocery, Inc. (“Millbrook Grocery”) was granted on September 28, 2018. Subsequently, plaintiff agreed to vacate the default judgment and permit

Millbrook Grocery to serve a late answer. Prior to this, the Chartwell Law Group had taken over representation of both defendants. Plaintiff exchanged a bill of particulars, and responded to discovery demands, and on December 3, 2018, requested a Preliminary Conference. The Court scheduled the conferences for January 6<sup>TH</sup> and January 31, 2019. On the latter date, the case was dismissed pursuant to NYCRR 202.27(b), noting that there was no appearance as well on January 6<sup>th</sup>.

Plaintiff's counsel maintains that his firm was not notified of either of the preliminary conference dates, and as a result, was not present for the calendar calls. The motion is supported by counsel's affirmation and the affidavit of the paralegal responsible for the firm's calendar [Exhibit E]. It is noted that the paralegal attests that she confirmed that counsel for defendants neither received the notices nor appeared on either date.

Upon first learning that the case was dismissed via an e-courts search, counsel immediately conducted an investigation as to why the case was dismissed by the court, and why the firm never received notification of the preliminary conference dates. Within days, counsel for both sides entered into, and filed a stipulation restoring the case to active status [Exhibit G].

Movant argues that it has a reasonable excuse for missing the Preliminary Conferences as counsel did not receive the scheduling notices from the court, and upon learning of the dismissal, acted promptly to vacate it. In addition, plaintiff references the procedural history of the case to date, including the expeditious exchange of discovery, and the prompt application here.

In support of the assertion of the merit of her claim, plaintiff submits her affidavit tendered in support of the default judgment, and counsel asserts that the injuries that were sustained as a result of defendants' negligence required surgical intervention.

"The dismissal of an action pursuant to 22 NYCRR 202.27 based upon a plaintiff's failure to appear at a calendar call should be vacated where the plaintiff shows a reasonable excuse for the default and a meritorious cause of action" (*Polir Construction, Inc. v. Etingin*, 297 A.D.2d 509, 511, 747 N.Y.S.2d 20 [1st Dept. 2002]; *Bodden v. Penn-Attransco Corp.*, 20 A.D.3d 334, 334, 800 N.Y.S.2d 129, 130 [1st Dept. 2005].)

The court has discretion to accept law office failure as a reasonable excuse where the claim is supported by a detailed and credible explanation of the default. (*GMAC Mtge., LLC v Guccione*, 127 A.D.3d 1136, 1138, 9 N.Y.S.3d 83 [2d Dept. 2015] [dismissal of an action for a default pursuant to 22 NYCRR 202.27 does not constitute a determination on the merits and is without prejudice]; *Option One Mtge. Corp. v Rose*, 82 N.Y.S.3d 116, 117, 2018 N.Y. App. Div LEXIS 5980, 3 [2d Dept. 2018] [plaintiff's bare allegation of law office failure was insufficient to demonstrate a reasonable excuse for its default; plaintiff failed to provide a reasonable excuse for its lengthy delay in moving to vacate the order of dismissal].)

Plaintiff's excuse for non-appearance is both detailed and under the circumstances here, which include the non-appearance of both sides at the conference dates, credible, and satisfactory. Also, as noted and despite the fact that plaintiff is not required to show an absence of prejudice to defendants, it is clear that

there is none here, as, within days of the order, counsel for defendants agreed to vacate the dismissal.

Plaintiff has also demonstrated that she has stated a meritorious claim for damages for significant personal injuries alleged to be causally connected to the failure of the defendants to maintain steps at the entrance to commercial premises.

Accordingly, for the reasons above-stated,

**IT IS ORDERED**, that the January 31, 2019 Order dismissing the complaint pursuant to 22 NYCRR 202.27(b) be and hereby is vacated and that the above entitled action be restored to active status on the Court's calendar.

**IT IS FURTHER ORDERED**, that the Preliminary Conference will be held in Part 11 (A) on August 14, 2019 at 2:00 PM.

The Clerk of the Court shall mark this matter as restored to active status on the Court's calendar.

This shall constitute the decision and order of this court.

Dated: July 25, 2019

  
\_\_\_\_\_  
**HOWARD H. SHERMAN**