

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13171
C/mv

_____AD3d_____

Submitted - November 15, 2006

ANITA R. FLORIO, J.P.
DAVID S. RITTER
GLORIA GOLDSTEIN
JOSEPH COVELLO, JJ.

2005-08594

DECISION & ORDER

Maria Guayara, respondent, v First
Rockaway Coast Corporation, appellant.

(Index No. 20774/03)

Edwin I. Gorski, New York, N.Y., for appellant.

Harry I. Katz, P.C. (Shayne, Dachs, Stanisci, Corker & Sauer, Mineola, N.Y.
[Jonathan A. Dachs] of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Queens County (Kelly, J.), dated July 27, 2005, which denied its motion to vacate a judgment entered upon its default in answering or appearing.

ORDERED that the order is affirmed, with costs.

Although the defendant's motion to vacate was made under CPLR 5015(a), the defendant correctly contends that such a motion may be treated as a motion pursuant to CPLR 317 if the circumstances so warrant (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142-143; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 968). Nevertheless, the defendant was not entitled to vacatur pursuant to CPLR 317 because it failed to demonstrate that it did not receive actual notice of this action in time to defend (*cf. Tselikman v Marvin Court*, 33 AD3d 908; *Calderon v 1630 Ocean Tenant Corp.*, 27 AD3d 410) and did not present a meritorious defense (*see*

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GUAYARA v FIRST ROCKAWAY COAST CORPORATION

CPLR 317; *General Motors Acceptance Corp. v Grade A Auto Body*, 21 AD3d 447; *New York Hosp. Med. Ctr. of Queens v Insurance Co. of the State of Pa.*, 16 AD3d 391, 392).

FLORIO, J.P., RITTER, GOLDSTEIN and COVELLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court