

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

D13304
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_____AD3d_____

Submitted - November 29, 2006

ROBERT W. SCHMIDT, J.P.
REINALDO E. RIVERA
PETER B. SKELOS
ROBERT J. LUNN, JJ.

2006-05815

DECISION & ORDER

MMG Design, Inc., respondent, v Michael Melnick,
appellant.

(Index No. 100364/05)

Barry R. Feerst, Brooklyn, N.Y., for appellant.

Edward B. Safran, New York, N.Y., for respondent.

In an action to recover damages for breach of contract and conversion, the defendant appeals from an order of the Supreme Court, Richmond County (Minardo, J.), dated April 27, 2006, which denied his motion pursuant to CPLR 3215 for leave to enter a judgment in his favor and against the plaintiff upon its failure to serve a reply to his counterclaim and granted the plaintiff's cross motion pursuant to CPLR 3012(d) for leave to serve a late reply.

ORDERED that the order is affirmed, with costs.

To successfully oppose the defendant's motion for leave to enter a default judgment upon the plaintiff's failure to serve a timely reply to his counterclaim, the plaintiff was required to demonstrate a reasonable excuse for its delay in serving a reply and a potentially meritorious defense (*see Twersky v Kasaks*, 24 AD3d 657, 658; *Beizer v Funk*, 5 AD3d 619; *Bensimon v Fishman*, 242 AD2d 551). In this case, the plaintiff met its burden. Therefore, the Supreme Court providently exercised its discretion in denying the defendant's motion for leave to enter a default judgment based

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upon the plaintiff's failure to timely serve a reply to his counterclaim and in granting the plaintiff's cross motion for leave to serve a late reply.

SCHMIDT, J.P., RIVERA, SKELOS and LUNN, 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