

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

D15119
G/hu

_____AD3d_____

Submitted - April 11, 2007

WILLIAM F. MASTRO, J.P.
DAVID S. RITTER
PETER B. SKELOS
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-08733

DECISION & ORDER

Craig Balchunas, et al., respondents, v
Alitalia-Linee Aeree Italiane-Societa Per Azioni,
appellant.

(Index No. 2014/06)

Kaplan, von Ohlen & Massamillo, LLP, New York, N.Y. (Jennifer Huang of counsel),
for appellant.

Werner & Saffioti, LLP, Newburgh, N.Y. (Jeffrey Russell Werner of counsel), for
respondents.

In an action to recover damages for deceptive business practices and false advertising,
the defendant appeals from an order of the Supreme Court, Orange County (Owen, J.), dated July
19, 2006, which denied that branch of its motion pursuant to CPLR 317 which was to vacate a
judgment entered upon its default in answering and, in effect, denied, as academic, that branch of its
motion which was to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state
a cause of action.

ORDERED that the order is reversed, on the law, with costs, that branch of the
defendant's motion which was to vacate the judgment entered upon its default in answering is
granted, and the matter is remitted to the Supreme Court, Orange County, for a determination on the
merits of the remaining branch of the defendant's motion.

The Supreme Court should have granted that branch of the defendant's motion which

was to vacate the default judgment pursuant to CPLR 317 because the defendant demonstrated that it did not receive notice of the amended summons in time to defend, there is no evidence that the defendant deliberately tried to avoid notice, and the defendant has a potentially meritorious defense (see CPLR 317; *Tselikman v Marvin Ct., Inc.*, 33 AD3d 908; *Franklin v 172 Aububon Corp.*, 32 AD3d 454, 455; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 968; *Calderon v 163 Ocean Tenants Corp.*, 27 AD3d 410, 411; *Marinoff v Natty Realty Corp.*, 17 AD3d 412, 413).

In light of the foregoing, we remit the matter to the Supreme Court, Orange County, for a determination on the merits of the remaining branch of the defendant's motion.

MASTRO, J.P., RITTER, SKELOS, CARNI and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court