

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

D15356  
W/gts

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - April 18, 2007

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

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2006-08172

DECISION & ORDER

Noel Fuestel, respondent, v  
Ardian Gill, appellant.

(Index No. 21971/04)

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Donald T. Rave, Locust Valley, N.Y. (Donald T. Rave, Jr., of counsel), for appellant.

Barry A. Kamen, PLLC, Stony Brook, N.Y., for respondent.

In an action to recover a real estate brokerage commission, the defendant appeals from an order of the Supreme Court, Suffolk County (Pitts, J.), dated August 8, 2006, which denied his motion to vacate a judgment of the same court entered March 28, 2006, upon his default in answering the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion to vacate the judgment entered March 28, 2006, is granted.

The Supreme Court should have granted the defendant's motion to vacate the default judgment pursuant to CPLR 317 because he established that he did not receive notice of the summons in time to defend the action (*see* CPLR 317; *Franklin v 172 Aubobon Corp.*, 32 AD3d 454; *Rios v Starrett City, Inc.*, 31 AD3d 418), and he has a potentially meritorious defense (*see Heelan Realty and Dev. Corp. v Ocskasy*, 27 AD3d 620, 621; *R.R. Ragette, Inc. v D'Incecco*, 17 AD3d 436, 437; *see also Marinoff v Natty Realty Corp.*, 17 AD3d 412, 413).

The defendant's remaining contentions are not properly before this court as they were not raised in the Supreme Court.

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