

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

D18623
O/kmg

_____AD3d_____

Submitted - February 27, 2008

ROBERT A. SPOLZINO, J.P.
DAVID S. RITTER
MARK C. DILLON
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2007-05712

DECISION & ORDER

Louis Grasso, etc., respondent,
v Patrick Tortorello, appellant.

(Index No. 9748/04)

O'Connor Redd, LLP, White Plains, N.Y. (Vincent M. Lyons of counsel), for appellant.

Richard W. Fulfree, Yonkers, N.Y., for respondent.

In an action to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Westchester County (Friedman, J.H.O.), dated April 27, 2007, which denied his motion to vacate a judgment dated June 1, 2006, and entered upon his failure to appear on the scheduled trial date, in favor of the plaintiff and against him in the principal sum of \$61,060.

ORDERED that the order is affirmed, with costs.

To prevail on a motion to vacate a default, a defendant must demonstrate both a reasonable excuse for its default and a meritorious defense (*see Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760; *Matter of Zrake v New York City Dept. of Educ.*, 17 AD3d 603). The determination of what constitutes a reasonable excuse lies within the trial court's discretion (*see Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760; *Ruppell v Hair Plus Beauty*, 288 AD2d 205). Contrary to the defendant's contention, the trial court providently exercised its discretion in rejecting the defendant's

April 1, 2008

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proffered excuse for his failure to appear on the scheduled trial date.

SPOLZINO, J.P., RITTER, DILLON, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court