

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

D20440
W/kmg

_____AD3d_____

Submitted - September 3, 2008

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-06916

DECISION & ORDER

D & W Construction, respondent, v
Milius Israel, et al., appellants.

(Index No. 17918/04)

Jacob Rollings, Mount Vernon, N.Y., for appellants.

Jeanette M. Westphal, New York, N.Y., for respondent.

In an action to recover damages for breach of contract, the defendants appeal from a judgment of the Supreme Court, Westchester County (Friedman, J.), dated July 9, 2007, which, upon an order of the same court (Colabella, J.), entered January 30, 2007, denying the defendants' motion, in effect, to vacate an order of the same court (Colabella, J.), entered September 12, 2006, sua sponte, striking their answer pursuant to 22 NYCRR 202.27 upon their default in appearing at a preliminary conference, is in favor of the plaintiff and against them in the principal sum of \$40,000.

ORDERED that the judgment is reversed, on the facts and in the exercise of discretion, with costs, the motion to vacate the order entered September 12, 2006, is granted, and the order entered January 30, 2007, is modified accordingly.

The defendants' assertion that they never received notice of the scheduled preliminary conference constituted a valid and reasonable excuse for their failure to appear at that conference (*see Birky v Katsilogiannis*, 37 AD3d 631, 631-632; *Vollaro v Bevilacqua*, 33 AD3d 910; *Adamo v State of New York*, 13 AD3d 472). Furthermore, the defendants made a prima facie showing of a potentially meritorious defense (*see Vollaro v Bevilacqua*, 33 AD3d 910; *Lichtman v Sears, Roebuck*

September 23, 2008

Page 1.

D & W CONSTRUCTION v ISRAEL

& Co., 236 AD2d 373). Accordingly, the defendants' motion to vacate the order sua sponte striking the answer upon their default in appearing at the preliminary conference should have been granted (see CPLR 5015[a][1]).

We reject the plaintiff's alternative argument that the motion to vacate was made only on behalf of a single "defendant" (see *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545). Under the circumstances of this case, it is appropriate to disregard the clerical error in the motion and to treat the motion as having been made by both defendants (see CPLR 2001; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d at 544-545).

RIVERA, J.P., FLORIO, ANGIOLILLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court