

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

D21335
O/kmg

_____AD3d_____

Submitted - October 15, 2008

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
HOWARD MILLER
THOMAS A. DICKERSON
RANDALL T. ENG, JJ.

2007-10013

DECISION & ORDER

Lori J. MacLean Belfiore, respondent, v
Andrew Belfiore, appellant.

(Index No. 2197/04)

De Podwin & Murphy, Nanuet, N.Y. (Andrew H. De Podwin of counsel), for
appellant.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Scarpino, J.), entered September 19, 2007, as denied that branch of his motion which was pursuant to CPLR 5015(a)(1) to vacate a judgment dated September 11, 2006, granting the plaintiff a divorce upon his default in opposing the proposed judgment of divorce submitted by the plaintiff.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the defendant's motion to vacate the judgment dated September 11, 2006, is granted, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

The parties entered into a stipulation of settlement but had not finally agreed upon certain financial figures when the Special Referee directed both parties to submit proposed findings of fact and judgments. Under the circumstances, the Special Referee's instruction was, in effect, a direction to settle judgment, which contemplates notice to the opposing party with a copy of the proposed judgment and the opportunity to submit a counter proposal (*see* 22 NYCRR 202.48[a],[c][1]; *Funk v Barry*, 89 NY2d 364, 367). The proposed judgment must be submitted with

December 9, 2008

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proof of service on the opposing party (*see* 22 NYCRR 202.48[a],[c][1]). Here, the plaintiff failed to produce proof of service of the proposed judgment which was ultimately signed by the Special Referee (*see Brady v Brady*, 271 AD2d 563, 564). Thus, the plaintiff failed to rebut the defendant's contention that he did not receive notice of settlement with a copy of the proposed judgment, and the defendant established excusable default sufficient to vacate the judgment entered upon his default (*see* CPLR 5015[a][1]; *Daulat v Helms Bros., Inc.*, 32 AD3d 410).

SPOLZINO, J.P., SANTUCCI, MILLER, DICKERSON and ENG, 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