

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

D27660
C/ct

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Submitted - May 19, 2010

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2009-11008

DECISION & ORDER

Maria Canales Agudo, respondent, v Gloria Zhinin,
defendant, Dana Kosits, et al., appellants.

(Index No. 3576/08)

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck, N.Y. (Sara Luca Salvi and Elizabeth M. Hecht of counsel), for appellants.

Osorio & Associates, LLC, White Plains, N.Y. (Michael H. Joseph of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Dana Kosits and Lisa Kosits appeal from an order of the Supreme Court, Westchester County (Scheinkman, J.), dated October 6, 2009, which denied their motion to vacate an order of the same court (Colabella, J.), entered February 10, 2009, granting the plaintiff's unopposed motion for leave to enter a judgment against them upon their failure to appear or answer and setting the matter down for an inquest on the issue of damages.

ORDERED that the order dated October 6, 2009, is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Westchester County, for a hearing to determine the validity of service of process upon the defendants Dana Kosits and Lisa Kosits and thereafter for a new determination of their motion to vacate their default.

Inasmuch as there is a triable issue of fact as to whether the premises at which “nail and mail” service was made was the “dwelling place or usual place of abode” (CPLR 308[4]), of the defendants Dana Kosits and Lisa Kosits, the Supreme Court should not have denied their motion to vacate the order granting the plaintiff’s motion for leave to enter a judgment against them without conducting a hearing (*see Thomas v Maloney*, 289 AD2d 222).

FISHER, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, 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