



motion was stayed until July 5, 2007. Fidelity's opposition to Higgins' motion was, thus, due to be served on July 2, 2007. On June 28, 2007, Fidelity served its opposition and a cross motion. Fidelity brought its opposition to the motion and a cross motion to the motion support office on June 29, 2007 for filing. The papers were stamped received. Fidelity then left the papers with motion support. Fidelity's counsel claims that they were unaware that they had to take the papers back and bring them to the courtroom at the call of the motion calendar on the return date. Fidelity's counsel, therefore, did not appear at the call of the motion calendar and did not properly submit Fidelity's papers. The court, thus, issued an order of default against Fidelity in a memorandum decision dated July 5, 2007. Fidelity has moved to vacate the memorandum decision. Thereafter, the court entered a judgment against Fidelity on August 9, 2007. Fidelity has also moved to vacate the judgment in addition to the memorandum decision.

An application to vacate an order of default may be granted if the movant can establish both that the default was excusable and the existence of a meritorious claim (Oyebola v Makuch, 10 AD3d 600 [2004]). The determination of whether the excuse is reasonable is within the discretion of the court (see SS Constantine & Helen's Romanian Orthodox Church of Am. v Z. Zindel, 44 AD3d 744 [2007]). In appropriate circumstances a court has the discretion to find that law office failure is a reasonable excuse (see SS Constantine & Helen's Romanian Orthodox Church of Am., 44 AD3d at 744; Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A., 42 AD3d 380 [2007]). Here, while Fidelity did not properly submit the papers, Fidelity did serve its papers in a timely manner. Fidelity then filed its papers with motion support. Fidelity's counsel was unaware and claims they were never told that they had to submit the papers at the calendar call. Fidelity's counsel learned of their mistake when it received its cross motion and opposition papers in the mail on July 5, 2007. Fidelity's counsel upon learning of their mistake, sent out a clerk to resubmit the papers to the IAS Part, but found out that calendar call had already finished. The next day Fidelity's counsel sent a letter to this court requesting the court accept the papers for consideration, however, at that time this Court had already entered an order of default. Fidelity then promptly moved to vacate the default. Fidelity has, thus, demonstrated a reasonable excuse for its default. Fidelity also has shown that it has a meritorious defense. The necessary amount of proof required to show a meritorious defense is not as high as required to defeat a summary judgment motion (see Clark v MGM Textiles Indus., 307 AD2d 520 [2003]). Here, Fidelity's argument regarding noncooperation is sufficient to show a meritorious defense. Accordingly, it is ordered that the memorandum decision dated

July 5, 2007, and the judgment dated August 9, 2007, are vacated and the court will accept the defendant's papers in support of its cross motion and in opposition to the plaintiff's summary judgment motion. The court will now consider the motion and cross motion based on the papers accepted as submitted.

On June 28, 2004, Higgins purchased the property known as 133-05 Higgins Street, Queens, New York (the Premises). Higgins purchased the Premises from 32nd Avenue LLC, the prior owner of record who had acquired the property from GAMS Construction Corp. On June 28, 2004 Fidelity issued to Higgins a policy of title insurance for the Premises. Under the policy Fidelity agreed to defend Higgins from suits challenging Higgins' title to the Premises. On January 6, 2006 32nd Avenue LLC commenced a lawsuit entitled, 32 Avenue LLC v Angelo Holding Corp., et al., Index No. 473/2006, in Queens County Supreme Court. This lawsuit requests a judgment voiding the deed from 32nd Avenue LLC to Higgins. 32nd Avenue LLC alleges that the person who signed on its behalf to transfer the deed to Higgins lacked the authority to execute the deed. The complaint also alleges that Higgins acted knowingly, intentionally, recklessly and negligently and conspired to defraud the 32nd Avenue LLC of the Premises. Higgins has denied fraud in its answer to this complaint.

On January 11, 2006, Higgins' counsel sent a letter on behalf of Higgins to Fidelity requesting defense and indemnification. Fidelity responded to the Higgins' request by refusing to provide Higgins with any defense or indemnification. Fidelity claimed that there was no coverage for the underlying lawsuit, because the underlying lawsuit accuses Higgins of fraud. After being served with this action, Fidelity changed its position and offered to appoint counsel to represent Higgins in the underlying action. Fidelity made this agreement to defend subject to a reservation of rights and requested this non-waiver be signed by Higgins.

Higgins has moved for summary judgment seeking a declaration that Fidelity must defend it in the underlying action. Fidelity has cross-moved for summary judgment seeking a declaration that Higgins by failing to cooperate with Fidelity has relieved Fidelity of any duty to defend or indemnify.

Higgins has met its burden of establishing an entitlement to summary judgment on its claim for a defense pursuant to the Fidelity policy (see Kidalso Gas Corp. v Lancer Ins. Co., 27 AD3d 779 [2005]). "An insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the

allegations fall within a policy exclusion" (Frontier v Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d 169 [1997]). Here, the allegations in the complaint include allegations that potentially are within the coverage of the policy. In opposition, Fidelity has failed to raise a triable issue of fact. Fidelity cannot show that the allegations in the complaint are solely and entirely within the policy exclusions.

Fidelity's argument that Higgins must cooperate with Fidelity's personal counsel and allow Fidelity's counsel prior review of the work done in the underlying action is without merit. Fidelity wants the same counsel it chose to try to defeat coverage to review the documents in the underlying case. In light of Fidelity's initial refusal to defend at the outset and the fraud claims pled in the underlying action, which are excluded under the policy, Fidelity's interest in defending the underlying action is in conflict with Higgins' interest. Therefore, Higgins is entitled to a defense by attorneys of its own choosing without having their work reviewed by Fidelity's counsel (see Curtis v Nutmeg Ins. Co., 204 AD2d 833 [1994]).

Finally, Fidelity has failed to establish its noncooperation defense as a matter of law and is not entitled to summary judgment on its cross motion dismissing the complaint (see High Fashions Hair Cutters v Commercial Union Ins. Co., 145 AD2d 465 [1988]). In light of the original denial coverage by Fidelity, Higgins was relieved at that time of its duty to cooperate with Fidelity (see Raymond v Allstate Ins. Co., 94 AD2d 301 [1983]). Furthermore, during the time that Fidelity insisted on a non-waiver agreement before it would agree to defend, Higgins was not required to cooperate with the investigation (see e.g. Charlton v U.S. Fire Ins. Co., 165 Misc 2d 90 [1995]). In light of the court's determination that Fidelity must defend Higgins, however, Higgins is now required to cooperate with Fidelity's investigation and produce requested documents and submit to an examination under oath.

Accordingly, it is ordered that plaintiff's motion is granted and defendant's cross motion is denied. It is ordered that a judgment is entered declaring that the defendant Fidelity is obligated to defend the plaintiff with respect to the Supreme Court, Queens County action, captioned, 32 Avenue LLC v Angelo Holding Corp., et al. and filed under Index Number 473/2006 and to reimburse the plaintiff for the defense costs incurred to date, all of which shall be computed at the end of the underlying action. It is further declared that the plaintiff shall be entitled to appoint counsel of its own choosing in the underlying action with all reasonable fees to be paid by the defendant. It is

further declared that the defendant shall not have the right to a prior review of the work performed by plaintiff's counsel in the defense of the underlying action. It is further declared that the issue of indemnification shall await the determination of the underlying action. It is further ordered that the plaintiff cooperate with defendant's investigation and submit to an examination under oath and produce requested documents.

Dated:12/13/07

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J.S.C.