

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

D20423
X/kmg

_____AD3d_____

Submitted - September 3, 2008

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

2008-02467

DECISION & ORDER

Teresa Papandrea, appellant, v
Yahaira Acevedo, respondent.

(Index No. 30677/07)

Lee Michael Huttner, New York, N.Y., for appellant.

James G. Bilello, Westbury, N.Y. (Patricia McDonagh of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Miller, J.), dated February 11, 2008, which denied her motion for leave to enter judgment against the defendant upon the defendant's default in appearing or answering the complaint and granted the defendant's cross motion to compel her to accept an answer.

ORDERED that the order is affirmed, with costs.

A defendant seeking to vacate his or her default in appearing or answering the complaint must provide a reasonable excuse for the default and demonstrate the existence of a meritorious defense to the action (*see* CPLR 5015[a][1]; *Krieger v Cohan*, 18 AD3d 823). The court has the discretion to accept law office failure as a reasonable excuse (*see* CPLR 2005; *White v Incorporated Vil. of Hempstead*, 41 AD3d 709, 710).

In a detailed affirmation, the defendant's attorney explained that he promptly prepared an answer in response to the summons and complaint, but due to a clerical error the answer was

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mailed to a former address of the plaintiff's counsel. The excuse of law office failure, which was corroborated by a notarized affidavit of service indicating that the answer was timely mailed to the wrong address, constituted a reasonable excuse for the default (*see De Bartolo v De Bartolo*, 46 AD3d 739, 741; *Rockland Tr. Mix, Inc. v. Rockland Enters., Inc.*, 28 AD3d 630, 630-631; *Troiano v Otsego Mut. Fire Ins. Co.*, 99 AD2d 719). Furthermore, the defendant demonstrated that she has a potentially meritorious defense based upon the issue of whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see Marrache v Akron Taxi Corp.*, 50 AD3d 973, 974; *Cruz v Calderone*, 49 AD3d 798). Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiff's motion for leave to enter a default judgment and granting the defendant's cross motion to compel the plaintiff to accept her answer.

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

ENTER:



James Edward Pelzer
Clerk of the Court