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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 117089/2009

SCOTTSDALE INSURANCE COMPANY

VS.

D D INSULATION INC.

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~:

The court denies plaintiff's motion for a default judgment and extends defendant's time to answer, pursuant to the accompanying decision. C.P.L.R. §§ 3012(d), 3215.

FILED

OCT 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/2/11

Lucy Billings
LUCY BILLINGS J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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SCOTTSDALE INSURANCE COMPANY, Index No. 117089/2009

Plaintiff

- against - DECISION AND ORDER

D D INSULATION INC.,

Defendant

----------x

LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover the balance of insurance premiums defendant owes for an insurance policy plaintiff provided to defendant at its request. After defendant failed to answer the complaint, plaintiff moved for a default judgment. C.P.L.R. § 3215(e). Upon oral argument, for the reasons explained below, the court denies plaintiff's motion.

I. DEFENDANT'S DEFAULT AND EXCUSE FOR DEFAULTING

Plaintiff shows it served the summons and complaint in this action on defendant by delivery to defendant's managing agent, who identified herself as "Jasmine" or "Jane," December 18, 2009. C.P.L.R. § 311(a)(1). Service by this means required defendant to serve an answer or responsive motion within 20 days after December 18, 2009. C.P.L.R. § 3012(a). See C.P.L.R. § 3012(c).

In opposition, defendant's President attests that defendant never employed a woman or anyone named "Jasmine" or "Jane" in December 2009, never received the pleadings, and consequently never responded to them until defendant received and opposed

plaintiff's motion for a default judgment. Even if this denial of service on defendant's managing agent or employee and of defendant's receipt is insufficient to dismiss the complaint, particularly without a motion to dismiss due to deficient service, C.P.L.R. § 3211(a)(8), this explanation at minimum furnishes a reasonable excuse for defendant's failure to answer. Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 41 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008); Obermaier v. Fix, 25 A.D.3d 327 (1st Dep't 2006); Wilson v. Sherman Terrace Coop., Inc., 14 A.D.3d 367 (1st Dep't 2005).

II. APPLICABLE STANDARDS

Although defendant does not expressly move to extend its time to answer, C.P.L.R. § 3012(d), its opposition to plaintiff's motion does request permission to answer. Particularly in the context of a motion for a default judgment, the court may extend the time to answer absent a cross-motion for that relief. Id.; Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Mufalli v. Ford Motor Co., 105 A.D.2d 642, 643 (1st Dep't 1984). See Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008); Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999).

C.P.L.R. § 3012(d) allows a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just." Although the latter provision may include a showing of a meritorious defense, § 3012(d) does not specifically require a

meritorious defense against plaintiff's claims, and such a showing is unnecessary to support acceptance of a late answer. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 41 Equities LLC, 57 A.D.3d at 81; Spira v. New York City Tr. Auth., 49 A.D.3d 478.

III. ALLOWING DEFENDANT'S LATE ANSWER

Defendant's explanation for failing to answer timely, absent any discernible prejudice to plaintiff, satisfactorily excuses his late answer. Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 41 Equities LLC, 57 A.D.3d at 81. Defendant's factual allegations regarding service of the pleadings, supporting its excuse for answering late, also supports the affirmative defense of deficient service, C.P.L.R. §§ 311(a)(1), 3211(a)(8), which is not conclusively refuted by plaintiff's showing for a default judgment. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Nason v. Fisher, 309 A.D.3d 526 (1st Dep't 2003). See Jones v. 41 Equities LLC, 57 A.D.3d at 81; Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229. Defendant's excuse for failing to respond to the complaint until after defendant received plaintiff's motion also constitutes grounds to deny a default judgment against defendant. Spira v. New York City Tr. Auth., 49 A.D.3d 478; Guzetti v. City of New York, 32 A.D.3d 234 (1st Dep't 2006); Rodriquez v. Dixie N.Y.C., Inc., 26 A.D.3d 199,

200 (1st Dep't 2006); Terrones v. Morera, 295 A.D.2d 254, 255 (1st Dep't 2003). See Mayerson Stutman, LLP v. Most, 30 A.D.3d 261 (1st Dep't 2006); Tulley v. Straus, 265 A.D.2d at 401.

Plaintiff's motion, moreover, lacks admissible evidence supporting its claims. C.P.L.R. § 3215(f). Plaintiff fails to establish a prima facie breach of contract claim because the insurance application that plaintiff presents for the truth of its contents is not authenticated by a witness with personal knowledge, nor does plaintiff present any other evidence of a contract to which defendant agreed. Colbourn v. ISS Intl. Serv. Sys., 304 A.D.2d 369, 370 (1st Dep't 2003); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003); Bank of New York v. Dell-Webster, 23 Misc. 3d 1107 (Sup. Ct. Bronx Co. 2008). Plaintiff's witness, its Manager of Direct Collections, indicates no personal knowledge of defendant's application for insurance and therefore is not in a position to authenticate the application.

Plaintiff fails to establish a prima facie account stated claim because plaintiff fails to produce any admissible evidence that plaintiff transmitted an invoice to defendant or that it made any partial payment of the bill. Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421 (1st Dep't 2009); RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005); Bartning v. Bartning, 16 A.D.3d 249, 250 (1st Dep't 2005).

Although plaintiff produces a statement of account and the affidavit by plaintiff's Manager of Direct Collection that the statement was "rendered" to defendant, she nowhere indicates personal knowledge that the statement was mailed or otherwise transmitted to defendant, nor attests to any regular business mailing procedures that plaintiff followed. Aff. of Linda Ryan ¶ 6. Neither does the statement itself indicates it was mailed or otherwise transmitted to defendant. Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d at 161-62.

Finally, plaintiff's motion nowhere indicates any prejudice from defendant's long delay in answering, nor articulates how plaintiff has changed its position as a result. E.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011). The delay at this juncture, from allowing defendant's answer, is between the denial of plaintiff's pending, inadequately supported motion and its opportunity now, after receiving defendant's answer, to move promptly for summary judgment with the necessary support. In sum, little discernible prejudice results from the minimal ensuing delay, DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582; Mut. Mar. Off., Inc. v. Joy Constr. Corp., 39 A.D.3d 417, 419 (1st Dep't 2007); Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307-308 (1st Dep't 2005); Forastieri v. Hasset, 167 A.D.2d 125, 126 (1st Dep't 1990), which provides just terms on which to allow defendant's answer. Forastieri v. Hasset, 167 A.D.2d at 126. See Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d at

504; Aloizos v. Trinity Realty Corp., 171 A.D.2d 426, 427 (1st Dep't 1991).

IV. CONCLUSION

On the grounds set forth above, the court denies plaintiff's motion for a default judgment and extends defendant's time to serve and file an answer to 20 days after service of this order with notice of entry. C.P.L.R. §§ 3012(d), 3215. If defendant fails to do so, plaintiff may move again for a default judgment upon admissible evidence supporting plaintiff's claims within 60 days after defendant's time to answer expires. C.P.L.R. § 3215(c) and (f). This decision constitutes the court's order.

DATED: May 2, 2011

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.