

<b>New York City Hous. Auth. v Boyd</b>
2016 NY Slip Op 32583(U)
December 15, 2016
Supreme Court, New York County
Docket Number: 452910/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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NEW YORK CITY HOUSING AUTHORITY,

Index No. 452910/2015

Plaintiff

- against -

DECISION AND ORDER

NATHANIEL BOYD, SANDRA BOYD, and  
JULIA ROBERTSON,

Defendants  
-----X

LUCY BILLINGS, J.S.C.:

I. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT AND SEVERANCE

The court denies plaintiff's motion for a default judgment against the Boyd defendants and for severance of its action against defendant Robertson based on its nonappearance for the motion and because the motion is unsupported by any documents that are authenticated, AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 637-38 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992), or for which a foundation for admissibility is laid or any other evidence on personal knowledge. This inadmissible hearsay is thus insufficient to support a default judgment on defendants' liability for breach of their lease. C.P.L.R. § 3215(f); Manhattan Telecom Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 202-203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't 2013); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't

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2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517, 517 (1st Dep't 2010).

## II. DEFENDANT'S CROSS-MOTION TO SERVE AND FILE A LATE ANSWER

The court grants defendant Nathaniel Boyd's cross-motion to serve and file a late answer. 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," the most critical being the absence of prejudice to plaintiff. Delay alone, without any demonstrated prejudice to plaintiff from the delay, is not a basis to preclude the answer. Gazes v. Bennett, 70 A.D.3d 579, 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521, 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008). See, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011).

Mr. Boyd attests that he never received plaintiff's summons and complaint until its second mailing pursuant to C.P.L.R. § 3215(g)(3) in November 2015. In December 2015, he attempted to follow the court clerk's instructions for answering the complaint by leaving his answer with the clerk for filing, but then was notified two months later for the first time that this action was electronically filed, and therefore his answer was not electronically filed as necessary. Mr. Boyd did not receive plaintiff's prior notice of its electronic filing because plaintiff served the notice with the original service of the summons and complaint that he never received. Although Mr. Boyd does not explain why he did not serve his answer, electronic

filing also would have constituted service of his answer. 22 N.Y.C.R.R. § 202.5-bb(c)(1). When plaintiff moved for a default judgment, he obtained an adjournment of the motion and then timely cross-moved for acceptance of a late answer that he included with his cross-motion.

Mr. Boyd's delay in answering was short and is excused by his nonreceipt of plaintiff's original service of the summons and complaint and notice of its electronic filing. His prompt attempt to answer after plaintiff's second mailing of its summons and complaint and his service and filing of his answer after plaintiff's motion demonstrate the absence of a willful default on his part, which plaintiff nowhere rebuts with any showing of his willful delay. Tanpinco v. Royal Caribbean Intl., 79 A.D.3d 484, 484 (1st Dep't 2010); Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307 (1st Dep't 2005); Palmieri v. Aliberti, 281 A.D.2d 156, 156 (1st Dep't 2001); Parker v. I.E.S.I. N.Y. Corp., 279 A.D.2d 395, 395 (1st Dep't 2001). Likewise, plaintiff nowhere articulates, nor does the court discern, how Mr. Boyd's delay changed plaintiff's position to its prejudice. E.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582.

Although not required by C.P.L.R. § 3012(d) to support a late answer, Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d at 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81; Spira v. New York City Tr. Auth., 49 A.D.3d 478, 478 (1st Dep't 2008), Mr. Boyd also

presents defenses to the complaint. He specifies reasons why the process server's attempts at personal delivery or substitute service, C.P.L.R. § 308(1) and (2), and ultimate service by affixation to the door of Mr. Boyd's residence, C.P.L.R. § 308(4), lack credibility, which plaintiff attempts to rebut with wholly inadmissible evidence.

Mr. Boyd also shows that in September 2009 he surrendered the premises for which plaintiff claims subsequent rent, so that he is not liable for it. Riverside Research Inst. v. KMGA, Inc., 68 N.Y.2d 689, 691-92 (1986); Sandra's Jewel Box v. 401 Hotel, 273 A.D.2d 1, 3 (1st Dep't 2000); Bay Plaza Estates v. New York Univ., 257 A.D.2d 472, 473 (1st Dep't 1999). In particular, he claims a surrender by operation of law based on plaintiff's actions from September 2009 until its claim here that were inconsistent with the landlord-tenant relationship, indicating an intent to consider the parties' lease terminated. Riverside Research Inst. v. KMGA, Inc., 68 N.Y.2d at 691-92; Forty Four Eighteen Joint Venture v. Rare Medium, Inc., 18 A.D.3d 237, 238 (1st Dep't 2005); Bay Plaza Estates v. New York Univ., 257 A.D.2d at 473. Again, plaintiff's attempted rebuttal is solely based on its attorney's affirmation, without personal knowledge. Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Murray v. City of New York, 74 A.D.3d 550, 550 (1st Dep't 2010); Coleman v. Maclas, 61 A.D.3d 569, 569 (1st Dep't 2009); 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d 288, 289 (1st Dep't 2005).

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III. CONCLUSION

Defendant Nathaniel Boyd's short, excused, and non-willful delay that has not demonstrably prejudiced plaintiff and his showing of meritorious defenses provide just terms on which to allow his answer. C.P.L.R. § 3012(d); Gazes v. Bennett, 70 A.D.3d at 579; Forastieri v. Hasset, 167 A.D.2d 125, 126 (1st Dep't 1990); Shure v. Village of Westhampton Beach, 121 A.D.2d 887, 888 (1st Dep't 1986). See Aloizos v. Trinity Realty Corp., 171 A.D.2d 426, 427 (1st Dep't 1991). Therefore the court grants Nathaniel Boyd's cross-motion to serve and file a late answer, on the condition that Mr. Boyd serves and files the answer attached as Exhibit 8 to his cross-motion within 20 days after entry of this order, and extends his time to serve and file his answer until then. C.P.L.R. §§ 2004, 3012(a) and (d); DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582; Tanpinco v. Royal Caribbean Intl., 79 A.D.3d at 484; Pagan v. Four Thirty Realty LLC, 50 A.D.3d 265, 265 (1st Dep't 2008). See 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 at 307-308.

DATED: December 15, 2016

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.