

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MOSHIK REGEV,

Plaintiff,

Index No. **807562/2021E**

- against -

Hon. **FIDEL E. GOMEZ**
Justice

3612 BRONX BOULEVARD, LLC,

Defendant.

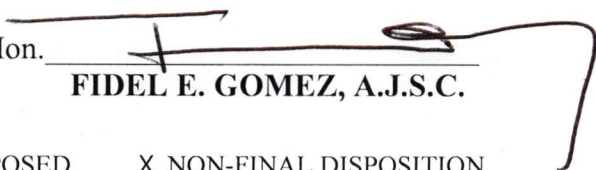
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The following papers numbered 1, read on this motion, noticed on 12/14/2021, and duly submitted as no. 1 on the Motion Calendar of 2/7/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 2/18/2022

Hon. 
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
MOSHIK REGEV,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **807562/2021E**

3612 BRONX BOULEVARD, LLC,

Defendant.

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Defendant 3612 Bronx Boulevard, LLC (“Defendant”) moves for an order dismissing this action pursuant to CPLR § 3012(b). Plaintiff Moshik Regev (“Plaintiff”) does not oppose.

For the reasons which follow, Defendant’s motion is denied.

BACKGROUND:

On May 25, 2021, Plaintiff commenced the instant action against Defendant by filing a summons with notice.

On August 23, 2021, Plaintiff served Defendant with the summons with notice by service upon the Secretary of State of the State of New York pursuant to Limited Liability Company Law § 303.

On November 2, 2021, Defendant filed a notice of appearance.

On November 24, 2021, Defendant filed the instant motion to dismiss. On February 7, 2022, the motion was marked fully submitted.

DISCUSSION:

Defendant moves for an order dismissing this action pursuant to CPLR § 3012(b). Defendant argues that it filed its notice of appearance on November 2, 2021. Defendant argues that since it did not file a demand for service of the complaint, Plaintiff had twenty days from service of the notice of appearance to serve the complaint. Defendant argues that Plaintiff had until November 23, 2021 to serve its complaint, but failed to do so.

CPLR 320(a) states that:

The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons, except that *if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf* or if it was served pursuant to section 303, subdivision two, three, four or five of section 308, or sections 313, 314 or 315, *the appearance shall be made within thirty days after service is complete*. If the complaint is not served with the summons, the time to appear may be extended as provided in subdivision (b) of section 3012 (emphasis added).

CPLR § 3012(b) states that:

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

Service of the summons with notice triggers a defendant's obligation to appear. (*Howard B. Spivak Architect, P.C. v Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]). A defendant must timely appear in an action after being served with a summons with notice in order to avoid a default (Robert L. Haig, 2 NY Prac, Com. Litig. in New York State Courts § 8:92 [5th ed. 2021] ["the response to a summons with notice is a notice of appearance or a demand for a copy of the complaint. Both the notice of appearance and/or the demand are generally to be served within 20 days after service of the summons. However, defendant will have 30 days to appear in response to a summons served without a complaint, and/or to demand a copy of the complaint, if that defendant would have had 30 days to serve its answer had plaintiff actually served a complaint with its summons"]; Robert L. Haig, 2 NY Prac, Com. Litig. in New York State Courts § 8:14 [5th ed. 2021] ["In order to avoid a default when served with a summons with notice, a defendant must timely appear in the action or, at a minimum, serve a written demand for a copy of the complaint upon plaintiff's attorney"]).

If a defendant fails to serve a notice of appearance or an answer after being served with the summons with notice, plaintiff's time to serve the defendant with the complaint does not begin to run (*Howard B. Spivak Architect, P.C.*, 59 AD3d 343 at 344).

Here, the affidavit of service filed with the Court indicates that on August 23, 2021, Defendant was served with the summons with notice by service upon the Secretary of State of the State of New York pursuant to Limited Liability Company Law § 303.

Limited Liability Company Law ("LLC") § 303(a) provides that:

Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. *Service of process on such limited liability company shall be complete when the secretary of state is so served.* The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose (emphasis added).

Service of process upon the New York Secretary of State as agent for a Limited Liability Company constitutes valid service pursuant to LLC § 303(a) (*Drillman v Marsam Realty 13th Ave., LLC*, 129 AD3d 903, 903 [2d Dept 2015]). The receipt of service of a summons with notice by the Secretary of State, as a party's designated agent, constitutes receipt by the party itself (*SP & S Associates, LLC v Insurance Co. of Greater New York*, 80 AD3d 529, 544 [1st Dept 2011]). Service upon a Limited Liability Company is complete upon service to the Secretary of State (*Darbeau v 136 West 3rd Street, LLC*, 144 AD3d 420, 420 [1st Dept 2016]).

A process server's affidavit of service creates a rebuttable presumption that the plaintiff served defendant by delivering a copy of the summons and complaint to the Secretary of State (*Bennett v Patel Catskills, LLC*, 120 AD3d 458, 458 [2d Dept 2014]; *Trini Realty Corp. v Fulton Ctr. LLC*, 53 AD3d 479, 479 [2d Dept 2008]).

Defendant was served with the summons with notice on August 23, 2021, the date on which the Secretary of State was served with the summons with notice (LLC § 303[a]). As such, Defendant had until September 22, 2021 to appear in this action (CPLR 320[a]). Defendant did not appear or serve a demand by that date to extend its time to appear. In fact, Defendant did not

appear until November 2, 2021, over a month after its time to appear had expired. Thus, Defendant did not timely appear in this action, and is in default. Since CPLR § 3012(b) presupposes that a party making a motion under the section has timely appeared or served a demand for a complaint, Defendant's motion must be denied.

Accordingly, Defendant's motion to dismiss this action pursuant to CPLR § 3012(b) is denied.

It is hereby

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendant, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated:

2/18/2022

Hon.


FIDEL E. GOMEZ, A.J.S.C.