

**Lee v 215 W. 88th St. Holdings, LLC**

2012 NY Slip Op 31715(U)

June 21, 2012

Supreme Court, New York County

Docket Number: 116603/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

JANICE LEE,

INDEX NO. 116603/10

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

215 WEST 88<sup>TH</sup> STREET HOLDINGS, LLC and  
URBAN AMERICAN MANAGEMENT,  
Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits 3, 4

Replying Affidavits \_\_\_\_\_

**FILED**

CROSS-MOTION:  YES  NO

JUN 28 2012

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

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/21/12

Donna M. Mills  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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PART 58

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INDEX NO. 116603/10

Plaintiff,

-v-

215 WEST 88<sup>TH</sup> STREET HOLDINGS, LLC  
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Defendants.

DECISION/ORDER

**FILED**

**JUN 28 2012**

DONNA M. MILLS, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff, Janice Lee brings this action for damages against 215 West 88<sup>th</sup> Street Holdings, LLC and Urban American Management (collectively "Defendants") for breach of the warranty of habitability, injunctive relief, punitive damages, and damages for negligence, unlawful retaliation in violation of the real property law.

All of Plaintiff's claims arise out of a mold condition in her apartment at the subject premises. The Summons with Notice was duly served on Defendants by service of the Summons with Notice on the Secretary of State on February 15, 2011. The deadline for each of the above Defendants to have appeared or moved in this action pursuant to CPLR 320 expired 30 days from February 15, 2011 or March 16, 2011. On May 26, 2011, attorneys for the Defendants served a Notice of Appearance and Demand for a Complaint in response to Plaintiff's Summons with Notice. By letter dated June 3, 2011, the Plaintiff's counsel rejected the Notice of Appearance as untimely.

Defendants now move for an Order pursuant to CPLR §§'s 5015(a)(1) and 3012(d) vacating the Defendant's default. Plaintiff cross-moves for an Order pursuant to CPLR 3215 entering judgment on default against Defendants, or in the alternative in the event that Defendants' motion to vacate the default is granted, for an order:

i) deeming the proposed Verified Complaint to have been served on Defendants, and ii) issuing a preliminary injunction against the Defendants.

Supreme Court possesses the discretion to permit late service of an answer upon a showing of a reasonable excuse for the delay and a meritorious defense to the complaint ( see CPLR 3012[d]; Williams v. Charlew Constr. Co., Inc., 82 A.D.3d 1491, 1492, 918 N.Y.S.2d 764 [2011]; Kostun v. Gower, 61 A.D.3d 1307, 1308, 877 N.Y.S.2d 529 [2009]; Huckle v. CDH Corp., 30 A.D.3d 878, 879, 817 N.Y.S.2d 707 [2006] ). “[W]hether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (Rickert v. Chestara, 56 A.D.3d 941, 942, 867 N.Y.S.2d 262 [2008] [internal quotation marks and citations omitted]; accord Dinstber v. Allstate Ins. Co., 75 A.D.3d 957, 957–958, 906 N.Y.S.2d 636 [2010]; see Watson v. Pollacchi, 32 A.D.3d 565, 565, 819 N.Y.S.2d 612 [2006] ).

Usually, a plaintiff commences an action by filing and serving a summons and

complaint, which shifts the onus to the defendant to serve the answer. When a plaintiff opts to serve the summons without a complaint, using a notice under CPLR 305 (b) instead, the onus shifts to a defendant to serve a demand for the complaint on plaintiff's attorney under CPLR 2103 (b). Defendant should serve such demand within whatever time defendant has to appear.

Pursuant to CPLR 320, defendant appears by either serving an answer or a notice of appearance or by making a motion which has the effect of extending the time to answer, within 20 days after service of the summons, except that where service upon the defendant is by delivery to an official of the State authorized to receive service in his behalf, the appearance shall be made within 30 days after service is complete. It is undisputed that the notice of appearance served on behalf of all defendants was untimely.

In the light of the fact that Plaintiff waited until being served with a motion to vacate the default to cross-move for a default judgment this Court strongly believes that matters should be resolved on its merits and finds no prejudice inured to Plaintiff when Defendants filed their Notice of Appearance a little over sixty days late. This Court also finds that Defendants have a reasonable excuse for the default and a meritorious defense.

Plaintiff's cross-motion is granted to the extent of deeming the proposed Verified Complaint annexed to its papers to have been served on Defendants.

That branch of Plaintiff's cross-motion for a preliminary injunction is denied at this time. To obtain a preliminary injunction pursuant to CPLR 6301, plaintiff must demonstrate a probability of success on the merits. An irreparable injury in the absence of an injunction, and a balance of equities in his favor. See Post v Killian, 73 AD3d 507, 508 (1<sup>st</sup> Dept 2010). Even if plaintiff could show that it was likely to succeed on the merits of its claim for declaratory relief, it failed to demonstrate that its potential damages are not compensable in money and capable of calculation, and thus, that it will suffer irreparable harm in the absence of the requested injunction (see Credit Index v RiskWise Int., 282 AD2d 246, 247 [2001]).

Accordingly it is

ORDERED that Defendants' motion to vacate its default in not timely answering is granted; and it is further

ORDERED that Plaintiff's cross-motion is granted only to the extent of deeming the proposed Verified Complaint to have been served on Defendants; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on August 3, 2012, at 10:00 AM.

Dated: 6/21/12 **FILED** [Signature]  
 JUN 28 2012  
 CLERK OF THE COURT, J.S.C.