

**Astoria 20-05 30th LLC v SSA Constr. Servs., Inc.**

2016 NY Slip Op 31653(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 159565/2015

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

[\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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ASTORIA 20-05 30TH LLC,  
ASTORIA 23-15 30TH LLC,  
ASTORIA 21-80 30TH LLC,  
ASTORIA 21-81 38TH LLC,

Index No. 159565/2015

Plaintiffs

- against -

DECISION AND ORDER

SSA CONSTRUCTION SERVICES, INC. d/b/a  
SSA CONSTRUCTION GROUP d/b/a  
LTSD/SSA CONSTRUCTION GROUP,

Defendant

-----x  
LUCY BILLINGS, J.S.C.:

I. PLAINTIFFS' MOTION FOR A DEFAULT JUDGMENT

Plaintiffs move for a default judgment against defendant, declaring that defendant is not entitled to any damages from plaintiffs and, instead, they are entitled to damages from defendant, due to its breach of an agreement between plaintiffs and defendant and its negligent construction work for plaintiffs. C.P.L.R. §§ 3001, 3215. The only evidence supporting plaintiffs' motion is their complaint incorporated in an affidavit from the sole member of each of plaintiff limited liability companies.

Plaintiff's witness Laurent Morali refers to "a written agreement," Aff. of Laurent Morali Ex. A (Compl.) ¶ 11, but fails to present it. Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); US Bank N.A. v. Lieberman, 98 A.D.3d 422, 423 (1st Dep't 2012). His recitation of the document's contents is rank hearsay and "not an acceptable substitute" for the

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document itself, People v. Joseph, 86 N.Y.2d 565, 570 (1995), particularly when he does not indicate it is currently inaccessible. Cole v. Homes for the Homeless Inst., Inc., 93 A.D.3d 593, 594 (1st Dep't 2012); Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d 341, 342 (1st Dep't 2008); Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337, 338 (1st Dep't 2008); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007). This inadmissible hearsay is thus insufficient to support a default judgment on defendant's liability for breach of the agreement. 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 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517, 517 (1st Dep't 2010).

The complaint alleges defendant's negligent construction work, in that defendant "incorrectly installed appliances," Morali Aff. Ex. A ¶ 31; "caused damage to the roof" of at least two of plaintiffs' buildings, id. ¶ 32; and performed work "in a shoddy manner." Id. ¶ 33. The complaint further alleges how defendant's negligence damaged plaintiffs. It required them "to hire additional contractors and expend additional money to correct defendant's negligent work." Id. ¶ 61. Defendant's negligent work prevented plaintiffs' tenants, who already had entered leases, from moving into the buildings' units, causing a loss of rental income to plaintiffs, and prevented them from leasing further units during the summer when the leasing business

is typically at its peak. Thus the complaint sufficiently supports a default judgment on defendant's liability for damages due to its negligence. C.P.L.R. § 3215(f).

## II. DEFENDANT'S LATE ANSWER

Defendant, on the other hand, served an answer only 14 days late. Its delay was due to its attorney's inadvertence while the parties sought to resolve their dispute via mediation.

Immediately upon realizing he had overlooked the deadline for answering, defendant's attorney rectified his error.

Defendant's Senior Partner Saul Sutton attests to the merits of its defenses and counterclaims. Plaintiffs breached the parties' agreement, which defendant presents and Sutton authenticates, by terminating it without written notice seven days in advance as the agreement required. People v. Frye, 94 A.D.3d 589, 589 (1st Dep't 2012); People v. Pierre, 41 A.D.3d 289, 291 (1st Dep't 2007); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001). Contrary to the complaint, Sutton attests that defendant provided the necessary materials, labor, and supervision at the construction site to accomplish the agreement's scope of work completely and adequately, but plaintiffs' hiring of electrical and plumbing contractors to work at the same time and site as defendant impeded its work. Defendant claims that plaintiffs have not fully paid it for the work it completed before they precipitously terminated the agreement, regardless of what it would have earned had they not

terminated the agreement. Defendant accompanies its opposition to plaintiffs' motion with its Answer and Counterclaims served and filed November 20, 2015.

Although defendant does not cross-move to extend its time to answer, defendant requests that relief in opposition to plaintiffs' motion, and in the context of a motion for a default judgment the court may grant permission to serve and file a late answer without a cross-motion for that relief. C.P.L.R. § 3012(d); M&E 73-75 LLC v. 57 Fusion LLC, 121 A.D.3d 528, 529 (1st Dep't 2014); Higgins v. Bellet Constr. Co., 287 A.D.2d 377, 377 (1st Dep't 2001); Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229, 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989). See Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484, 484 (1st Dep't 2010); Spira v. New York City Tr. Auth., 49 A.D.3d 478, 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," the most critical being the absence of prejudice to plaintiffs. Delay alone, without any demonstrated prejudice to plaintiffs 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).

Defendant's delay in answering was short and is excused by its attorney's oversight. Its prompt answer as soon as its attorney realized his oversight demonstrates the absence of a willful default on its part, which plaintiffs nowhere rebut with any showing of willful delay by defendant. Tanpico v. Royal Caribbean Intl., 79 A.D.3d at 484; 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, plaintiffs nowhere articulate, nor does the court discern, how defendant's delay changed plaintiffs' position to their prejudice. E.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582.

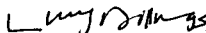
### III. CONCLUSION

Defendant's short, excused, and non-willful delay that has not demonstrably prejudiced plaintiffs and its showing of meritorious defenses and counterclaims provide just terms on which to allow its 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 extends defendant's time to serve and file its answer to November 20, 2015. C.P.L.R. §§ 2004, 2005, 3012(d); DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582; Tanpico 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.

In the face of plaintiffs' failure to support their breach of contract claim and defendant's answer with its defense to plaintiffs' negligence claim, the court denies plaintiffs' motion for a default judgment on defendant's liability. C.P.L.R. § 3215(a) and (f). The court extends plaintiffs' time to reply or defendant's counterclaims until 20 days after service of this order with notice of entry. C.P.L.R. § 3012(a).

DATED: April 12, 2016



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
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