24-1889

In The United States Court of Appeals For The Second Circuit

SERAFIM GEORGIOS KATERGARIS,
Plaintiff – Appellant,

v.

CITY OF NEW YORK,
Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX OF APPELLANT

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Introduction

Substantively, this case concerns whether the Due Process Clause requires the City of New York (the "City") to provide property owners with an opportunity to contest fines or appeal an adverse decision from the City's Department of Buildings ("DOB"). That is not what this appeal is about, however. Instead, this appeal deals with the threshold question of whether the Plaintiff-Appellant here, Serafim Katergaris ("Mr. Katergaris"), filed his challenge to a notice of violation issued by the DOB within the three-year statute of limitations for federal civil rights suits in New York state. Even though Mr. Katergaris filed suit within three years of when he first learned of the notice of violation at issue here, the City argued, and the district court below agreed, that the "mailbox rule" created a presumption that Mr. Katergaris knew or should have known of the notice more than three years prior to filing, and therefore his suit was untimely. The mailbox rule is a presumption that a letter's intended recipient received a mailing when "the record establishes office procedures, followed in the regular course of business, pursuant to which notices have been addressed and mailed." *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 92 (2d Cir. 2009).

Mr. Katergaris's challenge was timely for three reasons, however. First, the mailbox rule does not apply here. A party triggers the mailbox rule when he or she produces testimony by someone with personal knowledge of the established office procedure of the entity that mailed the notice. The City did not do this. The City produced evidence of its procedures for generating notices of violation, and evidence of its interactions with a third party with which it contracted, but neither of these entities mailed the notice at issue here (if it was mailed). That mailing was purportedly done by yet another company with which the DOB's contractor contracted and of which the City was apparently unaware. The City produced no testimony by anyone from this entity with firsthand knowledge of what that company's regular office practices were, or whether the company followed them here. Because the City failed to trigger the presumption, the mailbox rule does not apply here.

Second, if the City did trigger the presumption, the district court erred because it minimized the direct and circumstantial evidence produced by Mr. Katergaris that he never received the letter. He submitted a declaration that he never received it, and he produced circumstantial evidence consistent with his not having received it. The

district court, however, employed a strong presumption of receipt identical to the presumption of receipt for certified mail. However, the contractor that purportedly mailed the notice did so by first-class mail. The district court thus erred in using a strong presumption of receipt and by finding that Mr. Katergaris's evidence did not rebut it.

Finally, a presumption of receipt should not dictate the result here because the mailbox rule is a factual presumption, not a legal conclusion. That is, it is "not a conclusive presumption of law, but a mere inference of fact." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884) (cleaned up). Mr. Katergaris testified that he did not receive the notice of violation. In doing so, he created an issue of fact unsuitable for resolution by summary judgment. By denying receipt and offering evidence consistent with non-receipt, Mr. Katergaris rebutted this inference. However, this Court, unlike other federal courts, holds that denial of receipt does not raise a question of fact, and thus the district court held that denial was insufficient to raise a fact issue. This Court should adopt the position of every other federal circuit court to consider the issue, and the approach of the Federal Rules of Evidence, and hold that a denial of receipt raises a question of fact that a jury should resolve.

Jurisdictional Statement

Mr. Katergaris brought this case on August 30, 2022, pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, which gave the district court federal-question and civil-rights jurisdiction, 28 U.S.C. §§ 1331, 1343. Joint Appendix (JA) 8-36. On June 24, 2024, the United States District Court for the Southern District of New York, the Honorable Paul A. Engelmayer presiding, granted the City's motion for summary judgment pursuant to Fed. R. Civ. P. 56, Special Appendix (SPA) 1-22, and issued judgment on the next day. SPA 23. Mr. Katergaris filed a timely notice of appeal on July 12, 2024. JA 810-11.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because the district court entered a final judgment that disposed of all of Mr. Katergaris's claims. SPA 23.

Statement of the Issues Presented

1. Does a party trigger the mailbox rule when it fails to submit evidence from someone with personal knowledge of the regular office procedures of the entity that mailed the letter at issue?

2. Did Mr. Katergaris produce sufficient evidence of non-receipt to raise a genuine issue of material fact?
3. Should this Court join other federal courts of appeal in holding that denial of receipt is sufficient to rebut the mailbox rule's presumption of receipt and create an issue of material fact?

Statement of the Case

I. Local Rule 28.1 Statement

This is a Fourteenth Amendment suit brought pursuant to 42 U.S.C. § 1983. Mr. Katergaris challenged whether the City's policies for fines issued by its DOB complied with the dictates of the Due Process Clause. JA 8-36.

After he filed his complaint, the City moved to dismiss. JA 37-38. Mr. Katergaris amended his complaint, JA 47-133, and the City moved to dismiss that complaint as well, arguing, in part, that Mr. Katergaris's amended complaint was time-barred. JA 134-35. The Honorable Paul A. Engelmayer of the United States District Court for the Southern District of New York converted the City's motion to dismiss to a motion for summary judgment and directed the parties to conduct limited discovery on the issue of timeliness. JA 142-43. After conducting such discovery, the City moved for summary judgment. JA 145-46. The Court granted the City's motion for summary judgment, concluding that Mr. Katergaris's suit was time-barred. *Katergaris v. City of New York*, No. 22-cv-07400, 2024 WL 3104629, at *1 (S.D.N.Y. June 24, 2024); SPA 1-22.

II. The City's enforcement regime and Mr. Katergaris's experience with it.

The City requires New Yorkers who own homes with low-pressure boilers to file an annual inspection report with the DOB affirming that they have had the boiler inspected and that they have corrected any defects. 1 R.C.N.Y. § 103-01(d)(1); JA 148. If the property owner fails to file such a report, the City may fine the property owner no less than $1,000. 1 R.C.N.Y. § 103-01(f)(1); JA 148.

The City does not assess these penalties immediately, however. JA 745-46. For the calendar year 2013—the year at issue in this case—the City did not issue notices of violation until March 2015. JA 179.

In November 2014 (during the time period between the 2013 reporting period and the mailing of notices of violation in March 2015), Mr. Katergaris and his then-wife purchased the home at issue in this case, which is located at 124 West 132nd Street, New York, New York (the "Property"). JA 718. When the Katergarises purchased the Property, it did not have a boiler. JA 718. Indeed, the Property never had a boiler the entire time they owned it. JA 718, 752. At the time of purchase, Mr. Katergaris still lived in the United Kingdom, but his then-wife moved into the Property full-time in March 2015. JA 719. Although the Property

did not have a mailbox, JA 276, the U.S. Mail delivered mail to Property and Mr. Katergaris's then-wife collected the mail the Post Office delivered. JA 719. She spoke with Mr. Katergaris on the phone daily, and she would let him know whether any mail had come for him. JA 719. She set the mail that had arrived for him aside when he visited the Property prior to his moving there permanently. JA 719.

Mr. Katergaris stayed at the Property for three days in March 2015. JA 719. He collected his mail at this time. JA 719. Neither the mail that he collected nor the mail that his wife set aside for him included a notice of violation from the DOB. JA 719. As far as he knows, he received all letters mailed to him at the Property in March 2015. JA 277, 719.

Mr. Katergaris thus remained oblivious that the City had issued a notice of violation for his Property until 2021, when Mr. Katergaris attempted to sell the Property. It was only through the sale process that he discovered that there was an outstanding notice of violation regarding the Property for failing to file an annual inspection report for the 2013 calendar year. JA 718. That is, this was the first time he became aware that the Property was encumbered by an outstanding notice of violation

for failing to inspect a boiler Mr. Katergaris had never seen, of which he was unaware, and dating from a time when he did not own the Property.

III. The City's process for mailing notices of violation.

The City's process for issuing notices of violation regarding boiler inspection reports was so remarkably casual that the City did not know what entity mailed the DOB's notices of violation in 2015. In addition to not generating notices of violation until months, or even years, after they accrued, the City did not mail the notices itself. Rather, it contracted with a company, which then contracted with another company, which then mailed the notices. The City did not learn this until discovery. The City then produced no evidence whatsoever of the mailing policies of the subcontractor or whether it followed these policies with regard to Mr. Katergaris's notice of violation.

Specifically, the City submitted a declaration from a City employee that the City contracts with a company called Vanguard to mail out the notices. JA 41 ("Vanguard is the sole vendor who has been mailing DOB violations for failing to file annual boiler inspection reports since at least 2001."). The City's statement that Vanguard mailed the notices was not just a typo or one-time error. Instead, the City repeatedly stated that

Vanguard mailed the DOB's notices of violation. JA 41, 138, 173, 174 ("Q: So in 2015, Vanguard mailed out Notice of Violations. A: Yes."); 177-78; 192; 193-94; 728; 729; 730; 731; 732; 734.

Vanguard, however, did not mail out the notices. JA 313-14. Instead, Vanguard contracted out the mailing to yet another company, AST Document Solutions ("AST"), and AST mailed out the notices. JA 313-14; 320. No one from AST testified in this proceeding, however, so who at AST mailed out the notices, what policies (if any) AST had for mailing notices in 2015, whether there were any problems with the mailing that contained Mr. Katergaris's notice of violation, and whether AST deviated from its customs or policies when making such a mailing is unknown. JA 320-22; 362-63.

That the City was unaware that Vanguard contracted out with a third party to mail its notices of violation is unsurprising given how little oversight the City exercised over Vanguard. City personnel were not at Vanguard to supervise the mailing. JA 182-83. The City did not require Vanguard to provide photos of the mailing or a spreadsheet that showed which Notices the Postal Service had mailed. JA 185-86. The City employee in charge of sending the notices never visited Vanguard. JA

189. The City took no steps to ensure that Mr. Katergaris received the notice, that the mailing was ever placed in the U.S. Mail, or that the notice was actually delivered to the Property. JA 196-98. The City never audited Vanguard's mailing of the notices, and it did not inspect Vanguard's facilities in 2015. JA 227-28. The City's representative was unaware of whether the City ever reviewed Vanguard's policies and procedures for mailing the notices of violation. JA 232.

Instead of supervising Vanguard's execution of mailing the notices, what the City did was compile a list of properties that had not submitted boiler reports and email that list to Vanguard. JA 137-38; 174-75. Vanguard would then mail merge the list with a template the City would provide and then provide the City with a sample letter of what Vanguard planned to produce. JA 174-75; 177. Vanguard would then email the City with confirmation of the mailing. JA 181.

Vanguard also presented scant evidence regarding this mailing. Vanguard did not have records from this time regarding the mailing. JA 308. It did not possess a document setting out its procedures or routine office practices regarding the mailing of DOB notices. JA 311; JA 793. Vanguard's representative did not know how long AST had been mailing

the DOB's notices. JA 313-14. Vanguard's representative did not know who at AST mailed the notices at issue or remember who supervised the mailing. JA 320-21. Vanguard did not know whether Mr. Katergaris received the notice or whether the Postal Service delivered it to the Property. JA 325.

We know even less about AST's activities. What we do know is that Vanguard's contact was a man named Joel, whose last name Vanguard's representative could not remember and who no longer works for AST. JA 314-15. Vanguard's supervision of AST's mailing appeared to consist of receiving a confirmation from AST that it had conducted the mailing and sending Vanguard a U.S. Postal Service Form 3600, a form that "describes what is delivered and accepted to USPS." JA 350-51.

AST purportedly sent out the March 2015 notices of violation by regular, first-class mail with no delivery receipt. JA 795. Whatever process AST used to mail the notices, however, it was imperfect. Some of the pieces mailed were damaged, but there is no log of how many pieces there were or whether Mr. Katergaris's notice was among them. JA 795-96. After the mailing, the Postal Service returned hundreds of the

notices—perhaps as many as 500, or close to 3% of the notices—to the City as undeliverable. JA 795-96.

Instead of identifying which notices the Postal Service returned or following up with the property owners, the DOB put the returned notices in a box. JA 186-87. Once it put the notices in a box, it may have shredded them or archived them—the DOB is not sure. JA 186-87. Once a notice was "boxed," the DOB did not take any additional efforts to inform property owners of the notice of violation. JA 186-87. In other words, all the City did about the hundreds of notices mailed by an organization of which it was unaware that never reached their destination is that they ended up in a box, with no record of who did not receive notice, and the City would just leave it at that.

Although there is evidence that the City had his address correct when it sent it to Vanguard, JA 41-42, the City could produce no evidence to establish that there were no other problems with the mailing, such as Mr. Katergaris's notice being one of those damaged in mailing or that the Postal Service had returned Mr. Katergaris's notice to its sender. All Vanguard's representative could confirm for the City was that it had received a Form 3600 from AST for the mailing that purportedly included

Mr. Katergaris's notice. JA 351. This form, of course, does not constitute evidence of what AST's business practices were or whether AST followed them in this instance.

In contrast to everything we do not know about the March 2015 mailing, there is direct evidence that Mr. Katergaris did not receive the notice—namely, he has declared under penalty of perjury that he did not. JA 718. Moreover, he produced meaningful circumstantial evidence that he never received it. This evidence included (i) the fact that he pays or contests any trash or motor-vehicle violation immediately; (ii) when Mr. Katergaris did learn of the violation in 2021, he responded immediately; and (iii) there was no benefit to him in ignoring the notice. JA 719-20.

Summary of the Argument

Mr. Katergaris timely filed his suit in this case. The mailbox rule simply does not apply here because the City produced no evidence from someone with personal knowledge of the business practices of the organization that mailed the notice of violation. Even if the presumption does apply, however, that presumption should be weak because the mailer of the notice did not send it by certified mail. Under the proper presumption, Mr. Katergaris has successfully rebutted the City's train of

assumptions by denying receipt and producing evidence consistent with a lack of receipt. Finally, even if the district court did correctly apply this circuit's precedent to this case, this Court should nevertheless reverse the district court, hold that a denial of receipt is sufficient to raise a contested issue of fact, and permit the issue of receipt to go to trial.

Argument

I. The standard for summary judgment

This Court reviews a district court's decision to grant summary judgment by construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor. Summary judgment is appropriate when there are no genuine disputes as to any material fact and the movant is entitled to judgment as a matter of law. *Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc.*, 62 F.4th 748, 752 (2d Cir. 2023).

II. The mailbox rule does not apply here.

The key facts to consider in deciding whether the mailbox rule applies here are:

- The City did not mail the notice.

- Vanguard did not mail the notice.
- AST purportedly mailed the notice.
- The City did not know AST mailed the notice.
- The City did not supervise Vanguard's mailing of the notice (which Vanguard did not do, even though the City thought it did).
- The City did not supervise AST's mailing of the notice (if it occurred).
- The City produced no evidence from the person at AST who purportedly mailed the notice.
- The City produced no evidence from anyone—much less a person with firsthand knowledge—of AST's policies and practices for mailing notices in this instance.
- The City produced no evidence from anyone—much less a person with firsthand knowledge—of whether AST followed its policies and practices for mailing notices.

The district court nonetheless concluded that the statute of limitations had run on Mr. Katergaris's suit because the City says that someone mailed the notice of violation on March 3, 2015, and Mr.

Katergaris filed his complaint on August 30, 2022, which places the suit outside of the three-year statute of limitations for civil rights claims under 42 U.S.C. § 1983 in New York. To arrive at this decision, the district court applied a version of the mailbox rule that led it to presume that, even though Mr. Katergaris did not learn of the notice of violation until March 2021 (well within three years of his filing suit), his claim was nonetheless untimely.

The district court was correct that the statute of limitations for federal civil rights claims in New York is three years. *Connolly v. McCall*, 254 F.3d 36, 40-41 (2d Cir. 2001). It was also correct that a cause of action under 42 U.S.C. § 1983 accrues when a plaintiff knows or has reason to know of the harm that is the basis of the federal claim. *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994). The district court's error was in concluding that the mailbox rule applies to this case in the first instance.

The mailbox rule is a common-law evidentiary presumption that holds "that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to

whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). A party may trigger the rule's application not just by producing evidence from the person who mailed the letter that they did, in fact, mail it. *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1984). The party may also trigger the rule by presenting evidence of the regular mailing procedures of the business or organization making the mailing: "[A] presumption of receipt arises where … the record establishes office procedures, followed in the regular course of business, pursuant to which notices have been addressed and mailed." *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 92 (2d Cir. 2009). Once the presumption applies, the burden of proof shifts to the party claiming non-receipt to rebut the presumption. *Meckel*, 758 F.2d at 818.

The district court found that the City had produced sufficient evidence to trigger application of the rule here. SPA 13. Specifically, it found that the City had produced evidence from City employee Juan Ruiz regarding how the City compiled lists of property and sent that list to Vanguard. SPA 13. Vanguard, in turn, produced a witness, Mike Muniz, who testified as to general industry practices and having reviewed

contemporaneous communications confirming that Vanguard and AST had mailed out the notices. SPA 13.

However, as discussed above, neither the City nor Vanguard mailed the notices. AST did (perhaps), but the City produced no evidence of what AST's mailing policies were, what AST's regular course of business was, or how it addressed and mailed notices of this nature. Nonetheless, the district court concluded that such evidence was not necessary to invoke the rule. Instead, the court concluded, "[t]he case law requires only personal knowledge of DOB's regular office mailing procedures" and that the "City ha[d] produced such evidence here, triggering the presumption of receipt." SPA 14.

This conclusion was incorrect. The case law is clear that a party must present someone with personal knowledge of regular office procedure of the entity that mailed the letter in question to trigger the presumption. *Meckel*, 758 F.2d at 817 ("Thus, under New York law *personal knowledge is required only to establish regular office procedure*, not the particular mailing." (cleaned up) (emphasis added)). *See also Mason v. Midland Funding LLC,* 815 F. App'x 320, 325 (11th Cir. 2020) ("Nor did Winship attest about the 'specific office procedures' that

supposedly resulted in a mailing … . That's unsurprising. Winship was twice removed from the Pitney Bowes office where the preparation and mailing actually occurred. Thus, Winship's conclusory assertion about the result of those companies' purported process is insufficient to show that Mason was mailed the Mason Card Agreement and its arbitration provision."); *Lupyan v. Corinthian Colls., Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) ("However, because the presumption is weak where proof of receipt is attempted solely by circumstantial evidence, we require the affiant to have personal knowledge of the procedures in place at the time of mailing." (cleaned up); *Leasing Assocs., Inc. v. Slaughter & Son, Inc.*, 450 F.2d 174, 180 (8th Cir. 1971) ("[A] jury finding that clerical personnel performed their duties in properly posting the mail would be permissible only if there were clear testimony by the executive as to the customary practice in his office and his actions in compliance therewith."); *Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 463 (S.D.N.Y. 2004) ("Actual receipt need not be proven; as proof of mailing may be accomplished by presenting circumstantial evidence of customary mailing practices *used in the sender's business*." (cleaned up) (emphasis added)). In other words, the City's failure to produce any witness with

personal knowledge of the *sender's* regular office procedure means no mailbox rule and no presumption of receipt.

It is not just federal courts that have required the proponent of a mailing to provide evidence from someone with personal knowledge of the mailer's practices.[1] New York courts also follow this rule. Specifically, the New York Court of Appeals, in response to questions certified from this Court, recently stated:

> [T]his Court has long recognized a party can establish that a notice or other document was sent … by proof of a *sender's* routine business practice with respect to the creation, addressing, and mailing documents of that nature.
>
> Such proof need not be supplied by the employee charged with mailing the document but can be offered in the form of an affidavit of *an employee with personal knowledge of the practices utilized by the company at the time of the alleged mailing*.

CIT Bank N.A. v. Schiffman, 168 N.E.3d 1138, 1142 (N.Y. 2021) (cleaned up) (emphasis added). In concurrence in that case, Judge Fahey elaborated, "The proof of that standard procedure general should include a description of the practices *utilized by the mailing party* at the time of the alleged mailing to ensure the accuracy of addresses, as well as the

[1] As discussed below, this Court has derived much (indeed, too much) of its jurisprudence regarding the mailbox rule from New York decisions.

office procedures relating to the delivery of mail to the post office." *Id*. at 1146 (Fahey, J., concurring) (cleaned up) (emphasis added). *See also Green Tree Servicing, LLC v. Helmsorig,* 212 N.Y.S.3d 668, 671 (2024) (denying the presumption when proponent's employee "neither attested that he had personal knowledge of the mailings, nor presented proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, including how the mail was transmitted to the post service." (cleaned up)); *Wilmington Tr., N.A. v. Meyerhoffer*, 194 N.Y.S.3d 81, 84 (2023) ("As the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish, prima facie, its entitlement to judgment as a matter of law." (cleaned up)). The district court's conclusion thus contradicts the holdings of this Court, other federal courts, and New York appellate courts.

The district court nonetheless held that the City need not produce anyone with personal knowledge of AST's policies, holding instead that the fact that "those procedures entail the participation of employees of

both the party and a third-party vendor does not render such testimony inadequate." SPA 15 (citing *In re Adler, Coleman Clearing Corp.*, 204 B.R. 99, 104-05 (S.D.N.Y. 1997) (an affidavit from a person overseeing the mailing instead of the person who placed it in the mail was sufficient); *BASF v. Norfolk S. Ry. Co.*, No. 04-CV-9662, 2008 WL 678557, at *5 & n.13 (S.D.N.Y. Mar. 10, 2008) (affidavits from three employees who knew office procedures, oversaw them, and knew those procedures were followed on the day at issue were sufficient); and *In re E. Coast Brokers & Packers, Inc.*, 961 F.2d 1543, 1545-46 (11th Cir. 1992) (testimony establishing standard office procedures sufficient without firsthand knowledge of the specific mailing)).

The cases upon which the district court relied simply stand for the proposition that a party can trigger the mailbox rule by producing evidence from someone with personal knowledge of the sender's established office procedures at the time of the mailing. That is not what is at issue here, however. The question here is whether the City can invoke the mailbox rule when a fourth-party vendor purportedly mailed the notice and none of the City's witnesses had any knowledge—much less personal knowledge—of what this vendor's policies and procedures

were at the time or whether that vendor followed them. Indeed, the City did not just have no personal knowledge of the vendor's policies—it had no knowledge of the vendor, period. No court has ever held that such a tenuous string of assumptions was sufficient to trigger the mailbox rule. Instead, as noted above, the consensus of the courts has been that a party must produce someone with personal knowledge of the sender's practices.

Moreover, even if these cases did apply here, the Eleventh Circuit decision relied upon by the district court specifically states that a party must provide detailed statements with sufficient foundation describing the policies in the mailer's office to trigger the presumption. *See E. Coast Brokers*, 961 F.3d at 1545 ("In order to raise the presumption of mailing, the evidence must consist of more than unsupported conclusory statements of an individual based on how mail was handled in the normal course of business in his office."). If conclusory statements about an entity's own practices are insufficient to trigger the rule, they are certainly insufficient to trigger it when there is no evidence whatsoever of a different entity's practices.

Finally, the requirement of personal knowledge of the sender's organization also makes sense when one considers what a party arguing

non-receipt must prove to rebut the presumption. In this circuit, to rebut the presumption, the "litigant must show that routine office practice was not followed or was so careless that it would be unreasonable to assume that notice was mailed." *Ma*, 597 F.3d at 92 (cleaned up). How can a litigant possibly do that without first knowing what that routine office practice was or whether the organization was careless in its execution of it? Specifically, how could any litigant challenge the presumption when the only evidence of the mailer's practices was essentially "I gave the materials to Joel, whose last name I cannot remember, and he said he mailed them"? Under the district court's decision, the mailbox rule becomes less a presumption and more a legal verity that the purported recipient cannot challenge—exactly what the Supreme Court has stated the presumption is not. *Rosenthal*, 111 U.S. at 193.[2]

[2] Moreover, if the district court's reading is correct, it is unclear how the information upon which the presumption is based is admissible. That is, without testimony from someone with personal knowledge of the business practices of the organization that mailed the letter, there is no basis to admit such evidence under the Federal Rules of Evidence. *See* Fed. R. Evid. 406 ("Evidence of … an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.")

In sum, the City did not present the testimony of anyone with personal knowledge of either this specific mailing or the routine business practices "utilized by the mailing party" in sending out notices of violation. This failure means that the City never triggered the mailbox rule. Because the presumption of receipt does not apply, and there was no evidence rebutting Mr. Katergaris's denial of receipt, the district court should have held that Mr. Katergaris filed his suit within the statute of limitations. The Court should therefore reverse the district court's grant of summary judgment on this point.

III. If the mailbox rule does apply, Mr. Katergaris rebutted the presumption of receipt.

Even if the City's evidence were sufficient to trigger the mailbox rule, the resulting presumption would be extremely weak because the sender did not use a method of mailing that generates proof of delivery. This Court should thus conclude that Mr. Katergaris submitted sufficient evidence to rebut it.

A. The presumption of receipt here is weak because the City and its vendor did not send the notice by return receipt.

The district court applied a strong presumption of receipt here, embracing a patchwork approach to the mailbox rule under which the strength of the presumption depends on the sender, the recipient, and the letter's subject matter. SPA 17. Specifically, the court suggested that a stronger presumption of receipt for certified mail should apply only in the immigration context, SPA 17-18, as if the Postal Service is more or less likely to deliver the mail based on a recipient's immigration status or the importance of the letter's contents.

These are distinctions without a difference, however. Letters placed in first-class mail, with no confirmation of receipt, are all equally likely to arrive at their intended destination—regardless of the recipient's status or the subject of the letter. It should be obvious that there is a stronger presumption that a recipient actually received a letter when there is a delivery receipt. Yet the district court applied an equally strong presumption for first-class mail as would apply to certified mail, in part, because "the DOB is a government entity (not a profit-making concern)" that must send out a lot of letters each year. SPA 18. In the district court's

view, it would be bad policy to incentivize the DOB's use of certified mail because the fines it issues are "quotidian." SPA 18.[3] That, however, is not the point. The DOB is welcome to continue relying on first-class mail to send notices of violations. When it does so, however, the DOB—rather than the recipient—must bear the cost of the DOB's reliance on a cheaper mail service. *See Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 137 (3d Cir. 2019) ("The person or entity mailing a complaint, letter, notice, or other document is in the best position to control whether direct evidence exists later to confirm that mailing if it becomes an issue.")

The issue here, at bottom, is the strength of the evidence tending to show that Mr. Katergaris received the notice that the DOB sent by first-class mail. Because the DOB has no proof of delivery, the presumption of receipt should be weaker than if the DOB had proof of delivery—even though the letter concerned a boiler violation instead of an immigration hearing. The district court erred in concluding otherwise.

[3] Mr. Katergaris notes that while the fine at issue here ($1,000) is not a financial challenge to him, that is not true for many New Yorkers.

B. Mr. Katergaris's evidence rebutted a weak presumption of receipt.

Because the presumption of receipt here is weak, Mr. Katergaris's evidence sufficiently rebutted it. In *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156, 159-60 (2d Cir. 2008), this Court held that, "in light of the reduced reliability of regular mail" and the lack of a "Postal Service paper trail for regular mail," an immigrant need not produce "substantial and probative evidence" of receipt such as documentary evidence from the Postal Service or affidavits from third parties to rebut a presumption of receipt. This Court held that evidence such as "a statement or affidavit by the petitioner" stating whether a petitioner appeared at earlier immigration proceedings and had initiated proceedings to obtain a benefit "should ordinarily suffice to overcome the presumption of receipt." *Id.* at 159.

Mr. Katergaris has done as much here. He has submitted a declaration stating that he never received the notice at issue here. JA 719. He also declared that when he receives a citation or ticket, he would pay it or contest it immediately. JA 719. He also declared that when he did finally learn of the existence of the notice, he responded immediately. JA 720. Under this Court's decision in *Silva-Carvalho Lopes*, this "should

… suffice to overcome the presumption of receipt." 517 F.3d at 160. That Mr. Katergaris's notice originated from the DOB and not the Board of Immigration Appeals should make no difference—the name of the agency sending the mail cannot determine whether the intended recipient received the mailing.

This Court should therefore reverse the district court and remand this issue to the district court for consideration of Mr. Katergaris's claim of non-receipt under the standard set out in *Silva-Carvalho Lopes*.

IV. The Second Circuit should follow its sister courts and the Federal Rules of Evidence to hold that denial of receipt presents a triable question of fact under the mailbox rule.

Even if, at the end of the day, this Court concludes the district court correctly applied this Court's precedent in Mr. Katergaris's case, it should nonetheless reverse the district court and hold that a declaration of non-receipt is sufficient to raise a triable question of fact for purposes of the federal common law mailbox rule. While this Court has held in *Meckel* that a denial of non-receipt is insufficient under New York law, subsequent cases have used *Meckel* to erroneously conflate New York law with federal law, and thus produced a rule that is inconsistent with

both the Federal Rules of Evidence and the reasoning of federal courts in nearly every other circuit outside this one.

This issue is important because in federal circuit courts across this country, Mr. Katergaris would have raised a triable issue of fact by submitting a declaration that he did not receive the notice at issue here. That is, if the Property was in Hoboken, on the west bank of the Hudson River, he would have raised a triable issue of fact, but because the Property lays on the east bank, he did not. This Court should therefore clarify that in the Second Circuit, under the federal common law, a declaration of non-receipt raises a material issue of fact.

A. Federal law and the Federal Rules of Evidence, not New York law, govern the federal mailbox rule.

This Court's divergence from its sister circuit courts stems from its reliance on New York law to define the scope of the federal mailbox rule. In *Meckel*, this Court announced that once the moving party establishes that it is entitled to the presumption of delivery under the mailbox rule, it is also entitled to summary judgment on that issue unless the non-moving party provides additional "evidence rebutting [the] proof of mailing," beyond just a mere denial of receipt. 758 F.2d 811, 817 (2d Cir. 1984). *Meckel*, however, involved state law claims,

such as breach of fiduciary duty, unjust enrichment, and breach of contract. 758 F.2d at 814. Thus, when the *Meckel* court declared that the "mere denial of receipt does not raise a question of fact as to mailing," it was describing "New York law," as reflected in "[o]ne recent New York case." *Meckel*, 758 F.2d at 817 (citing *Engel v. Lichterman*, 467 N.Y.S.2d 642 (1983)).

While *Engel* was of dubious persuasive value even then,[4] the *Meckel* court only relied on it for the limited purpose of describing how the mailbox rule worked under "New York law." 758 F.2d at 817. Unfortunately, subsequent decisions from this Court would later cite *Meckel* for the proposition that denial of receipt is insufficient to raise a triable question of fact under the *federal* mailbox rule, but those decisions never explained why New York law governs an issue of federal law, nor did they cite to any federal authority beyond *Meckel* itself. *See, e.g.*, *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004) (citing

[4] *See Engel*, 467 N.Y.S.2d at 649, 652 (Gibbons, J., concurring in part and dissenting in part) (explaining that the majority's holding that testimony of non-receipt was insufficient to raise a triable question of fact "has been criticized by no less an authority than Dean Wigmore," and "runs counter to a long line of cases which favor disposition concerning a disputed mailing by way of a hearing or at trial").

Meckel, 758 F.2d at 817). Federal law, specifically Fed. R. Evid. 301, governs the federal mailbox rule, not New York law, however. Moreover, federal law, not state law, determines when a cause of action under 42 U.S.C. § 1983 accrues. *Morse v. Univ. of Vt.*, 973 F.2d 122, 125 (2d Cir. 1992). It was thus error to rely on *Meckel*'s description of New York law to define the scope of the federal mailbox rule.

This foundational error thus explains why this Court is an outlier in its formulation of the mailbox rule. Although this Court asserts that mere denial of receipt is insufficient to rebut the presumption of mailing and thus raise a triable question of fact under the federal mailbox rule, *Akey*, 375 F.3d at 235, federal courts in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits all agree that a sworn statement of non-receipt suffices does, in fact, raise a triable question of fact. *See, e.g.*, *Lamonica v. Fay Servicing, LLC*, 352 F. Supp. 3d 138, 140-41 (D. Mass. 2018) (holding that bare denial of receipt presented a triable question of fact); *Lupyan*, 761 F.3d at 322 (holding that "denial of receipt of [a letter] is enough to create a genuine issue of material fact that must be resolved by a factfinder"); *Huffman v. Branch Banking & Tr. Co.*, No. 3:16-cv-8637, 2017 WL 2177351, at *6

(S.D. W. Va. May 17, 2017) (holding that a "sworn statement [of non-receipt] consequently rebuts the presumption that the letter was successfully delivered"); *In re Schepps Food Stores, Inc.*, 152 B.R. 136, 140 (Bankr. S.D. Tex. 1993) ("*Yoder* simply restates the majority rule: when considering whether proper notice was given, denial of receipt raises a question of fact"); *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985) (holding that testimony of non-receipt, standing alone, is sufficient to rebut the presumption of mailing); *Leventhal v. Schenberg*, 484 B.R. 731, 734 (N.D. Ill. 2012) (holding that "[d]enial of receipt … creates a question of fact," that the bankruptcy court properly resolved "after a full trial on the merits"); *Phillips v. Riverside, Inc.,* 796 F. Supp. 403, 408 (E.D. Ark. 1992) (rejecting *Meckel* to "instead follow the better rule" set forth in *Yoder*); *Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995) ("When a movant specifically denies receipt of notice, a district judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing"); *Witt v. Roadway Express*, 136 F.3d 1424, 1430 (10th Cir. 1998) (holding that "denying receipt creates a credibility issue that must be resolved by the trier of

fact"). This consensus reflects the recognition that, as a rebuttable presumption of fact, Rule 301 of the Federal Rules of Evidence governs the federal common law mailbox rule. *See Lupyan*, 761 F.3d at 320; *Yoder*, 758 F.2d at 1118-20; *Nunley*, 52 F.3d at 796. This Court should follow suit and likewise hold that Rule 301 and federal law govern the common law mailbox rule.

Applying the Federal Rules of Evidence to this evidentiary issue on a question of federal law would comport with this Court's practice in other contexts. In that regard, this Court has recognized outside the mailbox rule context that rebuttable presumptions of fact are "best understood by reference to Rule 301 of the Federal Rules of Evidence." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 147-48 (2d Cir. 2007). Because *Meckel* considered how the mailbox rule worked under "New York law," 758 F.2d at 817, however, the court there never even mentioned, let alone considered, Rule 301. It was thus error to rely on *Meckel* as authority for determining how the federal mailbox rule operates. This Court should clearly state that federal courts in this Circuit should apply the federal mailbox rule in relation to Rule 301.

Construing the federal mailbox rule in accordance with the principles of Rule 301 makes clear that evidence of non-receipt suffices to raise a triable question of fact. As this Court previously explained, "proffered evidence is sufficient to rebut a presumption as long as the evidence could support a reasonable jury finding of the nonexistence of the presumed fact." *Punchgini*, 482 F.3d at 149 (internal quotation marks omitted). This means that the "assumption [of a successful mailing] ceases to operate … upon the proffer of contrary evidence." *Id.* at 148 (citing *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 1037 (Fed. Cir. 1992), for the proposition that, "under Rule 301, a 'presumption is not merely rebuttable but completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact'").

Applying this framework here means that Mr. Katergaris needed to only put forth evidence that, "when viewed in the light most favorable to [him], would permit a reasonable jury to infer that" he never received the violation notice. *Punchgini*, 482 F.3d at 149. He did that. Specifically, because Mr. Katergaris's declaration is contrary evidence, the presumption of receipt should cease to operate. *Id*. At the

very least, his denial of receipt raised a triable issue of fact that should have precluded the entry of summary judgment against him. *See Webb v. Chase Manhattan Mortg. Corp.*, No. 2:05-cv-0548, 2008 WL 2230696, at *13 (S.D. Ohio May 28, 2008).

B. A factfinder should decide a contested issue of receipt given the difficulty of proving non-receipt.

Applying federal law to this federal question would not just bring this circuit into conformity with others; it would also promote fairness and justice in proceedings in this circuit. Specifically, allowing testimony of non-receipt to rebut the presumption of mailing at the summary judgment stage promotes justice by helping to ensure that the right party ultimately prevails. It would also not just turn the issue of receipt into "he said he did not get it, so we have to believe him." As other courts have found, allowing testimony of non-receipt to rebut the presumption of mailing does not mean that the party testifying to non-receipt will always prevail; it just means that a factfinder should resolve the issue of receipt. *See Witt*, 136 F.3d at 1429 (holding that testimony of non-receipt "creates a genuine issue of material fact precluding summary judgment").

Thus, sometimes testimony of non-receipt, even though it rebuts the presumption of mailing for procedural purposes at the summary judgment stage, will nonetheless fail to persuade the factfinder, who is still free to infer from the facts that mailing occurred. *See, e.g.*, *United States v. Perez-Almeida*, No. 3:19-cr-61, 2019 WL 3949310, at *12 (E.D. Va. Aug. 21, 2019) (finding that notice was provided after "weigh[ing] the evidence in the record," notwithstanding the fact that the presumption of mailing was initially rebutted by testimony of non-receipt); *see also Lupyan*, 761 F.3d at 322 (holding that testimony of non-receipt means only that there is "a genuine issue of material fact that must be resolved by a factfinder").

This makes sense given the difficulty of proving non-receipt, which essentially requires the alleged recipient to prove a negative. *Lupyan*, 761 F.3d at 322. In other words, "[w]here ordinary mail is used, requiring more than a sworn statement to dispute receipt elevates the weak presumption intended by the [mailbox] rule to a conclusive presumption that would be equivalent to an ironclad rule." *Id.*

Retaining such a "rigid application of a common law presumption" would almost certainly lead to unjust results—as it has here. *Id.*

Indeed, one need only look to cases in other circuits to see the harm such a rule would cause. In *Giumarra Vineyards*, for example, whether the defendant was liable for tens of millions of dollars turned on the contested issue of whether the defendant received a letter. *Bd. of Trs. of the Cal. Winery Workers' Pension Tr. Fund v. Giumarra Vineyards*, No. 1:17-cv-00364, 2018 WL 4510721, at *2 (E.D. Cal. Sept. 9, 2018). Because the Ninth, and not the Second, Circuit heard the case, however, the court made its after it reviewed all the "evidence presented at trial," *Id.* at *3, and did not presume non-receipt.

The court there ultimately determined that the plaintiff "failed to prove by a preponderance of the evidence that" the defendant received the letter at issue, based in part on the court's assessment of the defendant's "background, training, and experience, and … demeanor in Court." *Id.* at *4. Yet, under this Court's rule, the court would have found that the same defendant, with the same facts, would have been liable for tens of millions of dollars without having had the opportunity for a full evidentiary testing of the issue.

* * *

This Court should thus hold that Rule 301, and not *Meckel's* articulation of New York law, governs the federal mailbox rule. Consequently, this Court should also hold that the presumption of mailing "ceases to operate" when contrary evidence is put forth at the summary judgment stage. *Punchgini*, 482 F.3d at 148. Because testimony of non-receipt is sufficient to find the non-existence of the presumed fact of mailing, such testimony rebuts the presumption of mailing at the summary judgment stage. *Witt*, 136 F.3d at 1429. Accordingly, this Court should reverse the district court below and remand with instructions that Mr. Katergaris be allowed to proceed to trial on the contested issue of receipt of the violation notice.

Conclusion

For these reasons, this Court should reverse the district court's grant of summary judgment to the City and remand the issue to district court for consideration of the merits.

Dated: October 21, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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Dated: October 21, 2024

/s/ William R. Maurer
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of October, 2024, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SERAFIM GEORGIOS KATERGARIS, Plaintiff, -v- CITY OF NEW YORK, Defendant.	22 Civ. 7400 (PAE) OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Plaintiff Serafim Georgios Katergaris brings this putative class action under 42 U.S.C. § 1983, alleging that the system used by the City of New York (the "City") for assessing and reviewing fines for property owners who fail to file required inspection reports violates the owners' due process rights. Pending now are the City's motions (1) for summary judgment on the limited issue of timeliness, and (2) to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court, finding Katergaris's sole claim time-barred, grants the City's motion for summary judgment, and dismisses this case.

I. Statement of Facts

A. Factual Allegations Underlying Katergaris's Due Process Claim

Katergaris is a resident of New York City who previously owned a home at 124 W 132nd Street (the "W 132nd St. Property" or the "Property"). Dkt. 28 ("FAC") ¶ 12. Katergaris purchased this property along with his then- (now ex-) wife in November 2014, and sold the property in June 2021. *Id.* ¶¶ 12–13.

The W 132nd St. Property had previously had an active low-pressure boiler, including during 2013. *Id.* ¶¶ 46–54. Under Title 1 of the Rules of the City of New York ("RCNY") § 103-01, owners of certain types of properties with low-pressure boilers must file annual low-

pressure boiler inspection reports with the New York City Department of Buildings ("DOB"). *Id.* ¶¶ 18–20. A property owner who fails to comply with this requirement is fined $1,000. *Id.* ¶ 22; *see also* 1 RCNY § 103-01(f)(1). DOB issues violations to property owners who do not file the required inspection report during a one-year inspection period. *Id.* ¶ 9.

In Katergaris's case, a previous owner of the Property who had been required to file an inspection report for the Property failed to do so for the 2013 annual cycle. *Id.* ¶¶ 46–48. The City first issued a violation for this omission in March 2015, some four months after Katergaris had purchased the Property. *Id.* ¶ 60. At the time of purchase, the Property no longer had a boiler, and had been converted into a two-bedroom home—a type of property for which boiler inspections are not required in any event. Katergaris alleges that, in November 2014, when he and his then-wife purchased the property, they were unaware of the earlier violation. *Id.* ¶¶ 46–56.[1] And, as developed further below in the discussion of the City's motion for summary judgment, Katergaris alleges that he did not receive notice of the violation in March 2015, but first learned of it in 2021 when he went to sell the Property. *Id.* ¶¶ 60, 74–76.

After learning of the violation in 2021, Katergaris alleges, he requested a waiver from the DOB. *Id.* ¶ 79. The DOB denied Katergaris a waiver. *Id.* Katergaris alleges that the process for requesting a waiver did not allow him to present arguments, evidence, witnesses, or exhibits, and that his waiver request was not decided upon by a neutral arbiter. *Id.* ¶ 80. He alleges that the City did not furnish him an opportunity to appeal the denial. *Id.* ¶ 81.

On June 9, 2021, to avoid issues with the sale of the Property, Katergaris paid the outstanding violation "under protest." *Id.* ¶ 82. Katergaris twice requested that the money he

[1] The FAC states that, on November 19, 2014, the DOB's records "were updated to reflect that the Property did not have a boiler that required an annual inspection." FAC ¶ 56. The Katergarises closed on the property on or about November 12, 2014. *Id.* ¶ 53.

paid ($1,000) be returned to him, but the DOB denied his requests. *Id.* ¶¶ 87, 95. Katergaris also requested a hearing from the City's Office of Administrative Trials and Hearings, but this request too, was denied; Katergaris was directed to contact DOB instead. *Id.* ¶ 89.

B. Procedural History

On August 30, 2022, Katergaris filed his initial Complaint. Dkt. 1. On December 5, 2022, the City filed a motion to dismiss. Dkt. 23. On January 17, 2023, after this Court issued an order directing Katergaris to oppose the motion or amend his complaint, Dkt. 25, Katergaris filed the First Amended Complaint, the operative complaint today. Dkt. 28 ("FAC"). Like the initial Complaint, the FAC brought a single claim, under Section 1983, alleging that DOB's practice of issuing fines to property owners violated due process, on the grounds that the property owners did not have a meaningful opportunity to contest the fines or appeal them. See FAC ¶¶ 1–2.

On January 31, 2023, the City filed a motion to dismiss the FAC. Dkt. 32. On February 14, 2023, Katergaris filed a response. Dkt. 33. On March 7, 2023, the City filed a reply. Dkt. 36.

The City's motion to dismiss included the argument that Katergaris's Section 1983 claim was untimely. It contended that the three-year statute of limitations began to run from the date that a notice of violation was mailed to Katergaris, which the City contended was in 2015. In support, the City filed a declaration of DOB-employee Juan Ruiz attesting to DOB's mailing procedures. *See* Dkt. 31. Because the declaration was outside the pleadings, it was not appropriate for consideration on a Rule 12 motion to dismiss. On July 17, 2023, the Court therefore converted the City's motion to dismiss—to the extent it was based on a claim of untimeliness—to a motion for summary judgment, and directed the parties to conduct limited discovery as to the timeliness of the notice of violation. Dkt. 37. The Court set a briefing

schedule for any limited motion for summary judgment on the timeliness issue, stating that, if necessary, it would also rule on the balance of the City's motion to dismiss at the time it resolved the City's summary judgment motion. *Id.*

Consistent with the schedule the Court set, on November 17, 2023, the City filed the instant motion for summary judgment, Dkt. 42, a memorandum of law and declaration in support with attached exhibits, Dkts. 44, 45 ("Def. Br."), and a Rule 56.1 statement, Dkt. 43. On December 1, 2023, Katergaris filed an opposition to the motion, Dkt. 47 ("Pl. Br."), declarations in support with attached exhibits, Dkts. 48–49, and a counter Rule 56.1 statement, Dkt. 50. On December 13, 2023, the City filed a reply, Dkt. 51 ("Def. Reply Br."), an additional declaration, Dkt. 52, and a response to Katergaris's counterstatement, Dkt. 53.

II. The City's Summary Judgment Motion Based on Untimeliness

The Court here first reviews the evidence adduced during discovery bearing on the timeliness of Katergaris's claim. The Court then evaluates the City's motion for summary judgment on the grounds that the claim is untimely.

A. Facts Adduced During Discovery[2]

Katergaris is a banker with 25 years' experience. Katergaris Dep. at 8. Before buying the W 132nd St. Property in November 2014, Katergaris, who during his life has purchased

[2] The Court draws the following facts from the parties' submissions in support of and in opposition to defendant's summary judgment motion. These include the following: (1) the City's Local Rule 56.1 statement, Dkt. 43 ("Def. 56.1"); the declaration of Samantha Schonfeld in support of the motion, Dkt. 44 ("Schonfeld Decl."), and attached exhibits, Schonfeld Decl., Exs. 1 ("Ruiz Dep."), 2 ("Katergaris Dep."), 3 ("Muniz Dep."), 4; the declaration of Juan Ruiz in support of the motion, Dkt. 46 ("Ruiz Decl."), and attached exhibits; Katergaris's Local Rule 56.1 counter-statement, Dkt. 50 ("Pl. 56.1"); his declaration in opposition to the motion, Dkt. 48 ("Katergaris Decl."), and attached exhibits; the declaration of Diana K. Simpson in opposition to the motion, Dkt. 49 ("Simpson Decl."), and attached exhibits; the City's Local Rule 56.1 counter-statement, Dkt. 53 ("Def. Reply 56.1"); and the declaration of Samantha Schonfeld in further support of the motion for summary judgment, and attached exhibits, Dkt. 52.

approximately a dozen properties himself or as a member of an LLC, had lawyers check whether there were any outstanding liens on the Property. Katergaris Dep. at 11. At the time of the purchase, Katergaris lived in England. His then-wife moved into the W 132nd St. property upon the purchase; Katergaris moved in about six months later, in May 2015. Def. 56.1 ¶¶ 49–50. During those six months, Katergaris stayed at the Property when he visited New York, which he did, among other times, on a three-to-four day stay in March 2015. *See id.* ¶ 49; *see also* Def. Reply 56.1 ¶ 49.

1. DOB's Procedures for Mailing Notices of Violation

DOB's procedure for issuing and mailing notices of violation for property owners who fail to file low-pressure boiler inspection reports is as follows.

First, DOB processes all inspection reports that are filed for a given inspection period. *Id.* ¶ 11. DOB then compiles a list of properties for which it did not receive a required inspection report. *Id.* From this, DOB creates a list of the owners of the properties with such delinquencies. *Id.* ¶¶ 11–13; *see also* Pl. 56.1 ¶¶ 12–13. DOB then exports a list of properties and owners and sends that file to a vendor, Vanguard Direct ("Vanguard"), to mail out violation notices. Def. 56.1 ¶ 14.[3] Vanguard has done such work for DOB since 2001. *Id.*

Citations to a party's Rule 56.1 statement incorporate by reference the documents cited therein. Where facts in a party's Rule 56.1 statement are supported by testimonial or documentary evidence, and are denied by a conclusory statement by the other party without citation to conflicting testimonial or documentary evidence, the Court finds such facts true. *See* S.D.N.Y. Local Rule 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."); *id.* at 56.1(d) ("Each statement by the movant or opponent . . . controverting any statement of material fact[] must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).").

[3] Katergaris notes that neither DOB nor Vanguard had put these mailing policies in writing, but he does not dispute that these procedures were, in fact, in place. *See, e.g.*, Pl. 56.1 ¶¶ 27, 34.

Upon receiving the list, Vanguard uses a DOB template to produce sample violation notices, which it sends to DOB for review. *Id.* ¶ 15. Upon DOB's approval, Vanguard mass-produces notices of violation and "arranges for these DOB notices of violation to be mailed out to property owners via U.S. Postal Service First-Class mail." *Id.* ¶ 16. Vanguard subcontracts with a separate company, AST Document Solutions ("AST"), which physically mails out the notices. Pl. 56.1 ¶ 28; *see also* Def. Reply 56.1 ¶ 28. Although it is not clear when Vanguard began subcontracting with AST, or who at DOB knew about AST and when, all agree that at all times relevant here, AST was in charge of mailing out the notices on behalf of Vanguard. *See* Pl. 56.1 ¶ 29; Def. Reply. 56.1 ¶ 29. AST sent notices of violations by first-class mail, which does not produce a delivery receipt. Pl. 56.1 ¶ 40.

In this capacity, AST would run a "CAS certification slash," in which the addresses to be used for the mailing would be validated and then "pre-sorted." Muniz Dep. at 52. Pre-sorting entails placing the mail in order by zip code before delivering it to the post office. *Id.* at 52. After pre-sorting, AST used machinery to stuff the envelopes for mailing. *Id.* at 44–45, 48. At various points in this production process, these mailings would be counted to ensure that the correct number were mailed out. *Id.* at 46. Sometimes, items of mail would be damaged in the inserting process. In that instance, the damaged mailings would be reprinted and an individual at AST would manually put them back into the pre-sort order. *Id.* at 48–49.

When the mailings were ready to go out, AST would fill out a USPS Form 3600 to present to the USPS upon delivery. *Id.* at 55–56. The USPS Form 3600 is "basically an affidavit or a form that describes what is being delivered and accepted to [and by] USPS." *Id.* at 56. USPS would then accept or reject (in whole or part) the mailing, process the items to be mailed, and deposit them into the mail stream. *Id.* at 51, 58–62.

For large-batch mailings like the notices at issue here, AST, through Vanguard, sent out the letters under DOB's permit with USPS. As such, postage was not manually applied. Rather, the mail would be sent out, affixed with DOB's permit number, and the correct postage amount would later be charged to DOB's account. *Id.* at 27–29.

After AST deposited a mailing with USPS, it would provide a confirmation to Vanguard, by phone or email; Vanguard in turn would confirm the mailing with DOB. *Id.* at 33–34. Some time after receiving that confirmation from AST, Vanguard would also receive a completed Form 3600 from AST as part of the normal procedures for closing out mailing projects. *Id.* at 55.

Once mailings were sent out, any notices that could not be delivered were returned to the DOB, the address of which is listed on the envelopes as the return address. *Id.* at 51–52; Ruiz Dep. at 27. The returned notices would go to DOB's mailing unit; the City's 30(b)(6) representative did not recall whether these mailings were then archived or shredded. Ruiz Dep. at 30–31. The City would not then take additional steps to attempt to deliver the returned notices to the property owner addressees. Ruiz Dep. at 31. After receiving confirmation of the mailing, however, DOB would "reflect the violations on each property's publicly accessible profile on DOB's Business Information System ('BIS') website." Def. 56.1 ¶ 18.

2. The Mailing of the 2015 Notice of Violation to Katergaris

Although Katergaris claims to have been unaware that a low-pressure boiler ever existed at the W 132nd St. Property, he does not dispute that (1) during the 2013 inspection cycle period the Property had such a boiler, (2) the then–property owner had been required to file an inspection report for this boiler, and (3) DOB's records reflect that no such report was filed for that cycle. *See* Pl. 56.1 ¶ 19. DOB accordingly registered a violation of the inspection report filing requirement for the W 132nd St. Property.

In early 2015, DOB set into motion the process for mailing notices of violation for the 2013 inspection cycle. Def. 56.1 ¶ 20. The W 132nd St. Property appeared on DOB's final spreadsheet listing properties for which the required inspection report had not been filed; the owner for this address was noted as "Serafim Georgios Katergaris." *Id.* ¶ 20; *see also* Ruiz Decl., Ex. A. The DOB then exported the spreadsheet to a text file to send to Vanguard.

On March 16, 2015, DOB employee Juan Ruiz ("Ruiz") emailed Vanguard employees Mike Muniz ("Muniz") and Aska Asgher ("Asgher"), notifying them that DOB would be mailing a total of 17,919 notices, and asking Vanguard to put together a sample notice for each borough for DOB's review. Def. 56.1 ¶ 21. Muniz provided the requested samples the next day, March 17, 2015. Muniz sent 50 samples for DOB approval, which included samples for the first and last violations on the spreadsheet, and samples from all five boroughs. Ruiz Decl., Ex. B.

In 2015, Vanguard was working with AST to send out DOB notices. *See* Muniz Dep. at 20 (noting that the AST representative at the time, Joel, is no longer employed by AST). Muniz testified that Vanguard followed the procedures set out above when processing DOB's 2015 mailing of notices of violation, including in its dealings with AST. Muniz Dep. at 45–46.[4]

On Monday, March 23, 2015, Ruiz reached out to Muniz to confirm with Vanguard that the notices had been sent the previous Saturday. Ruiz Decl., Ex. B. Muniz responded that he was "checking with operations on a confirmation"; he soon followed up, telling Ruiz that "[t]he mailing was delivered Saturday, but not into the mail stream until today. [Vanguard] did also deliver some reprinted pieces that were damaged during inserting to the post office [that day,

[4] During the 2015 cycle, some notices of violation were damaged during the insertion process; AST notified Vanguard of this and reprinted the damaged pieces for mailing. *Id.* Two items in the 2015 batch did not qualify for presort with the USPS, and thus were sent separately with postage arranged separately. Neither appears to have related to Katergaris. *Id.* at 61–62.

March 23, 2015]." Ruiz Decl., Ex. B. With this confirmation in hand, DOB posted the violations to the BIS website. In addition, after confirming over email that the mailing had been sent out, Vanguard received the completed Form 3600 from AST, covering the 2015 mailings. Muniz Dep. at 33.[5]

Ruiz estimated that, of the approximately 18,000 notices that went out in 2015, no more than 500 would have been returned to the DOB as undeliverable. Ruiz Dep. at 28. The record does not reflect which particular notices in 2015 were returned as undeliverable.

Katergaris attests that neither he, nor his then-wife, received a notice of violation in the mail at the Property in 2015. Pl. 56.1 ¶ 51. He testified that his then-wife's practice had been to collect mail delivered to the Property and set it aside for him, and to tell him when mail had come for him. *Id.* ¶ 50. He testified that he always collected the mail set aside for him when he visited the Property. *Id.* ¶¶ 50–51. He testified that his ex-wife did not check the mail every day, because she "traveled quite a bit," mainly for work. Katergaris Dep. at 12. But, Katergaris testified that he presumes that, on her return, his then-wife would collect mail that had been delivered while she was away. *Id.* at 14. The evidence does not address whether or not Katergaris's then-wife, who was not deposed, was traveling in March 2015. *Id.* at 12 (Q: "Okay. Was she traveling in or around March of 2015?" A: "I don't remember. I don't recall. She's the ex-wife.").

The W 132nd St. Property did not have a mailbox in 2015. *Id.* at 13. Instead, "[s]ome mail would be left in a little plastic bag hanging on the gate. Some would be thrown down in the lower entrance. Sometimes it'd be left on the stoop." *Id.* Katergaris did not recall problems

[5] During discovery, Vanguard obtained the Form 3600 from AST. Pursuant to its standard procedure for destruction of records after seven years, Vanguard had disposed of its records from the 2015 mailing. Muniz Dep. at 13–15.

receiving mail at the property, or any instance in which he expected mail at the W 132nd St. Property but did not receive it. *Id.* at 14–15.

Katergaris states that he did not learn that there had been a notice of violation for 2013 until 2021, when he was selling the Property and his lawyers notified him that the violation had been reported on the purchaser's title report. Katergaris Decl. ¶ 6. At that time, he testified, "because [he] wanted the sale of the Property to go through, [he] paid the violation under protest on June 9, 2021." *Id.* ¶ 21. After making that payment, Katergaris continued to "pursue the issue with the [C]ity," on the ground that, having not owned the Property in 2013, he had not been responsible for the 2013 boiler annual inspection report. *Id.* ¶ 22.

B. Legal Principles Applicable to Summary Judgment Motions

To prevail on a motion for summary judgment, the movant must "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008).

If the movant meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Rather, to survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009).

"Only disputes over facts that might affect the outcome of the suit under the governing law" will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there are genuine issues of material fact, a court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

C. Discussion

In pursuing summary judgment on Katergaris's due process claim, the City argues that his claim was untimely. *See* Def. Br. at 5–15. A three-year limitations period applies to Section 1983 violations that occurred in New York, *Gleason v. McBride*, 869 F.2d 688, 691 (2d Cir. 1989) (citing *Owens v. Okure*, 488 U.S. 235, 251 (1989)), and Katergaris commenced this lawsuit on August 30, 2022, Dkt. 1, making his claim untimely if it accrued before August 30, 2019. The City argues that the claim accrued in 2015 when, it contends, a notice of violation was mailed to Katergaris pursuant to DOB standard procedure. *See* Def. Br. at 6. Katergaris contends, however, that the claim did not accrue until 2021 when, he claims, he first learned of the violation. *See* Pl. Br. at 1.

"Federal law governs the question of when a federal claim accrues notwithstanding that a state statute of limitations is to be used." *Morse v. Univ. of Vt.*, 973 F.2d 122, 125 (2d Cir. 1992). A federal Section 1983 claim "accrues when the plaintiff knows or has reason to know of the harm." *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994). Here, when Katergaris knew or had reason to know of the alleged due process violation turns on whether, in 2015, he had notice of violation by mail.

In considering that question, the Second Circuit applies a common law "mailbox rule." Under that rule, where a party "provides evidence that [mailings] were properly addressed and

mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received." *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004) (quoting *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985)).[6] Where a party produces enough evidence to trigger this presumption of receipt, the burden of proof shifts to the party claiming non-receipt to rebut the presumption and show that a genuine issue of material fact exists as to receipt of the mail in question. *See Meckel*, 758 F.2d at 818 (citing Fed. R. Civ. P. 56(e)).

"Denial of receipt, without more, is insufficient to rebut the presumption." *Akey*, 375 F.3d at 235. Rather, where the presumption has been established based on the existence of regular mailing procedures, "in addition to denial of receipt . . . [there must be] some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable." *Meckel*, 758 F.2d at 817. Such may take the form of "circumstantial evidence rebutting proof of mailing," *id.* Regardless of the form of evidence, the party opposing the presumption must establish "specific facts" supporting a conclusion of non-receipt to defeat the presumption once established, *see In re Great Atl. & Pac. Tea Co., Inc.*, 618 B.R. 57, 67 (S.D.N.Y. 2020), *aff'd sub nom.*, *Great Atl. & Pac. Tea Co., Inc. v. Nat'l Union Fire Ins. Co.*, 850 Fed. App'x 811 (2d Cir. 2021).

The Court considers first whether the City has triggered the presumption and second whether Katergaris has adduced evidence sufficient to rebut it.

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[6] The parties spar over whether the federal or New York State iteration of this presumption applies. *See* Pl. Br. at 5–8; Def. Reply Br. at 2–3. There is limited daylight between these standards. Heeding the Second Circuit's guidance, the Court applies the federal standard, while considering New York cases as persuasive but not controlling authority as to the same. *See, e.g.*, *Leon v. Murphy*, 988 F.2d 303, 309 (2d Cir. 1993) (applying federal mailbox rule to Section 1983 claim, but citing New York case law applying state-law equivalent, because, "[e]ven if New York law is not regarded as controlling on this issue, moreover, we find these authorities persuasive on the facts of this case"); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 92–93 (2d Cir. 2010) (applying federal presumption of receipt).

1. The City's Evidence Triggers the Presumption of Receipt

The City has adduced sufficient admissible evidence both that the mailing to Katergaris was properly addressed and that it was sent pursuant to normal office procedures, so as to trigger a presumption of receipt.

First, it is undisputed that the mailing was properly addressed with the correct address that the City had on file: "124 W 132nd Street, New York, NY 10027-7802." Def. 56.1 ¶ 20 ("An excerpt of DOB's final Excel sheet of low-pressure boilers for which an annual inspection report was not received for the 2013 cycle included 'Serafim Georgios Katergaris' at the [W 132nd St. Address]"); Pl. 56.1 ¶ 20 (not disputing this fact). Thus, there is competent evidence that the notice of violation was properly addressed.

Second, the City has adduced sufficient evidence that the mailing was sent in accordance with regular office procedures. In his deposition testimony and sworn declaration, DOB's Federal Rule of Civil Procedure 30(b)(6) representative, Ruiz, attested to DOB's annual process of compiling a list of properties for which there had been no inspection report filed and matching these properties to the property owners. *See, e.g.*, Ruiz Dep. at 56–57, 63–64; Ruiz Decl. ¶¶ 6–8. Ruiz further attested to DOB's internal processes for assuring the accuracy of this list and its process for sending the list to its mailing vendor Vanguard, which produced sample notices for further DOB review. Ruiz Decl. ¶¶ 6–11. Ruiz also attested to DOB's process for reviewing and approving these samples; for directing Vanguard as to the day on which the mailings were to be sent by Vanguard via first-class mail; and for confirming with Vanguard via email that the mailings had been completed. *See* Ruiz Dep. at 25. Ruiz testified that DOB would then post the violations on its public website. Importantly, both Ruiz and Vanguard's witness, Muniz—each of whom personally participated in this process for 2013 violations—attested that these

procedures were followed in 2015. The City also produced emails corroborating this testimony. *See, e.g.*, Ruiz Decl. ¶¶ 14–20; Muniz Dep. at 23.

That evidence, viewed in totality, is sufficient to establish that regular office procedures for mailing notices of violations existed in 2015 and were followed in connection with the notice of violation the City prepared for Katergaris. *See, e.g.*, *Bronia, Inc. v. Ho*, 873 F. Supp. 854, 859–60 (S.D.N.Y. 1995) (presumption of receipt triggered by testimony from office personnel as to normal office procedures, despite the lack of firsthand knowledge as to specific mailing at issue); *Ma*, 597 F.3d at 92 (presumption of receipt triggered where "the record establishes office procedures, followed in the regular course of business, pursuant to which notices have been addressed and mailed"); *In re East Coast Brokers and Packers, Inc.*, 961 F.2d 1543, 1545 (11th Cir. 1992) (testimony setting out specific office procedures such as that the "[employees] make a photo copy and it goes to the receiver" established presumption of receipt). Accordingly, the City is entitled to a presumption that Katergaris received the 2015 notice of violation.

Katergaris's arguments to the contrary fail. First, he asserts that the City has not come forward with any evidence from an affiant with "personal knowledge" of DOB's "customary mailing practices." Pl. Br. at 8 (quoting *Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 136–37 (3d Cir. 2019)). He bases this claim on the observation that the City has not offered testimony "from the company that actually conducted the mailing"—AST. *Id.* at 9. He thus argues that, to trigger the mailbox rule and the associated presumption of receipt in a case where a party used a third-party vendor to perform the physical mailing at issue, the party must come forward with a witness with personal knowledge of that third-party's mailing practices. *See id.* at 8–11.

The case law does not support such a requirement. Rather, it is sufficient to establish mailing in accordance with normal office procedures to submit an affidavit or testimony from an

individual who oversees these procedures. That those procedures entail the participation of employees of both the party and a third-party vendor does not render such testimony inadequate. *See, e.g.*, *In re Adler, Coleman Clearing Corp.*, 204 B.R. 99, 104–05 (S.D.N.Y. 1997) (affidavit from trustee overseeing mailing of claim packages sufficient to establish presumption even where mailing procedures included use of third-party vendor to assemble, print, and mail such packages and where no affidavit or evidence from third-party vendor was submitted); *BASF Corp. v. Norfolk Southern Ry. Co.*, No. 04 Civ. 9662, 2008 WL 678557, at *5 & n.13 (S.D.N.Y. Mar. 10, 2008) (presumption of receipt established on basis of normal office procedures where last step in mailing procedure was that mail was "carried to the main [company] mailroom in Atlanta for handling and disbursement"); *In re E. Coast Brokers & Packers, Inc.*, 961 F.2d at 1545–46 (evidence of regular office procedures sufficient to trigger presumption where it showed that notices were put together and sent out to regulatory authority and the recipient at the same time, with the "girls in the office" in charge of "carry[ing] out the rest").

Here, the City's affiants—an employee of the City and an employee of its third-party vendor, Vanguard—have each attested to personal knowledge of the normal office procedures used by their respective employers at the relevant time for the types of mailings in question. Vanguard's Muniz, in particular, testified to his personal familiarity not only with Vanguard's procedures, but with the bulk of the mailing practices that its vendor, AST, used, and that these were followed during the period at issue. *See, e.g.*, Muniz Dep. at 27–29 (attesting that AST would mail out notices on the DOB's postal account and permit number, such that USPS would charge DOB postage after the fact rather than requiring that a unique postal charge appear on each envelope). The case law requires only personal knowledge of DOB's regular office mailing procedures. The City has produced such evidence here, triggering the presumption of receipt.

Mason v. Midland Funding LLC, 815 Fed. App'x 320 (11th Cir. 2020), on which Katergaris relies, does not assist his cause. The Eleventh Circuit there held that a declaration from an affiant-employee of the company Bluestem did not evince the required personal knowledge of normal office mailing procedures where the mailing in question was actually carried out by two contracted third parties. *Id.* at 327. In so holding, the Circuit emphasized that Bluestem's affiant not only did not "work for either of the third parties that supposedly completed the mailing" but he also "never attested that he reviewed any of [the third parties'] records showing that the [mailing] was in fact sent to [the appellant]." *Id.* Here, in contrast, there is testimony not only from DOB, but from Muniz, an employee of third-party Vanguard, who attested to Vanguard's mailing procedures based on personal knowledge. *See generally* Muniz Dep. And both Muniz, on behalf of Vanguard, and Ruiz, on behalf of the City, attested to having reviewed records or received contemporaneous communications confirming that Vanguard and AST had mailed out the batch of notices—including that destined for Katergaris. *See, e.g.*, Muniz Dep. at 33 (testifying that he received confirmation from AST that the 2015 mailing had been sent and communicated this to the DOB); Ruiz Dep. at 25 (testifying that Vanguard would confirm with Ruiz when mailings had been sent out). Muniz further testified that, in addition to receiving an informal confirmation from AST to this effect, he later, in the regular course of business, received a USPS Form 3600 from AST confirming that the 2015 mailing had been placed in the mail stream with the USPS. Muniz Dep. at 33. Thus, relative to *Mason*, where the defendants "rel[ied] solely on the [single] declaration to show" that an item

had been placed in the mail, the City here produced a greater breadth and depth of evidence supporting the same.[7] That entitles the City to a presumption of receipt.

Katergaris next argues that any presumption of receipt here should be a weak one, and that a "strong" presumption of receipt is available only where the mailing party utilized certified mail as opposed to the first-class mail used here. Pl. Br. at 12–13.[8] But the Second Circuit has only ever vaguely endorsed such a distinction, and even then only in the immigration context. There, the Circuit has held that a "strong" presumption of receipt as adopted by the Board of Immigration Appeals applied only in the case of certified mail, but that "even in the context of regular mail, a presumption of receipt is proper so long as the record establishes that the notice was accurately addressed and mailed in accordance with normal office procedures." *Lopes v. Gonzales*, 468 F.3d 81, 84 (2d Cir. 2006) (citing *Matter of Grijalva*, 21 I & N Dec. 27 (BIA 1995)). If anything, this holding reaffirms that the default common-law mailbox rule, and the relative strength of the presumption it erects, does not depend on the use of certified mail.

Indeed, the Second Circuit has never drawn such a line in applying the general common law mailbox rule, *see id.* at 85 (noting Circuit's "own holding . . . outside the immigration context," that in the context of regular mail, a "presumption of receipt exists where a piece of mail is 'properly addressed and mailed in accordance with regular office procedures'" (quoting *Akey*, 375 F.3d at 235)). It has not adopted the reasoning of the Third Circuit decision on which

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[7] To the extent that Katergaris reads *Mason* more sweepingly—to demand testimony from an employee of each third-party vendor involved in the mailing process before the presumption is triggered—that out-of-circuit unpublished opinion is not consistent with the Second Circuit caselaw above.

[8] Katergaris also briefly critiques the City's process for dealing with notices returned by mail. That process, however, is not germane to whether the City has triggered a presumption of receipt but to whether Katergaris has rebutted it. The Court considers that issue in the section below.

Katergaris relies, either, under which a "weaker" presumption applies where the sender's regular procedures entailed the use of first-class mail. *See* Pl. Br. at 12–13 (citing *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 319 (3d Cir. 2014)).; *cf. Ma*, 597 F.3d at 92 (applying normal presumption of receipt where mailing sent by regular mail); *Baldwin v. United States*, 921 F.3d 836 (9th Cir. 2019) (analyzing whether statutory/regulatory regime in tax context, which provides presumption of receipt only in the case of certified mail, displaced common-law mailbox rule, which applies to documents sent by regular mail); *see also In re Greenberg*, 526 B.R. 101, 108 (E.D.N.Y. 2015) (rejecting a similar argument based on *Lupyan*).

Further, there is a sound basis for not extending this distinction to the mailings at issue. In some contexts, it would not be "expecting too much to require businesses" or other senders "that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt." *Lupyan*, 761 F.3d at 322. But the context at issue here is relatively quotidian. DOB is a government entity (not a profit-making concern) that annually sends out some 20,000 violation notices concerning low-pressure boilers alone. Katergaris has not explained why it is reasonable to demand that DOB, to secure the presumption of receipt in this context, be obliged to send out these notices by the more expensive and cumbersome process of certified mail. Nor has he identified caselaw conditioning the presumption of receipt on a governmental entity's having used certified mail for such workaday communications. *See, e.g., O'Toole v. U.S. Sec'y of Agric.*, 31 C.I.T. 79, 88 n.13 (2007) ("[I]t bears noting that a close reading of the case law on the mailbox rule suggests that the rule's application in particular areas of the law is, in certain respects, colored by policy or other considerations specific to those individual areas of law."). The presumption instead has its basis on the empirical likelihood of receipt where reasonable mailing procedures have been followed. *Cf. Rosenthal v. Walker*, 111

U.S. 185, 193 (1884) (impetus for mailbox rule was the "inference of fact" based "on the probability that officers of the government [*i.e.*, the post office] will do their duty and the usual course of business").

Accordingly, this Court, having found the presumption of receipt to apply, will give it the same weight the Second Circuit has uniformly given it outside the immigration context.

2. Katergaris Has Failed to Adduce Evidence Sufficient to Rebut the Presumption of Receipt

Katergaris has failed to come forward with evidence of his non-receipt of the notice sufficient to give rise to a genuine issue of material fact. In claiming to be able to rebut the presumption, Katergaris principally relies on three categories of evidence: (1) his testimony denying receipt and describing his practice of paying fines on time; (2) his testimony as to procedures he used to access mail delivered to his W 132nd St. address in 2015; and (3) the City's procedure for handling notices returned as undeliverable. Viewed separately or together, these do not enable him to carry his burden here given the triggering of the presumption.

First, Katergaris's denial of receipt does not raise a genuine issue of material fact as to the fact of receipt. It is well-established in this Circuit that a recipient's mere denial of receipt is not sufficient to rebut the presumption of receipt. *Ma*, 597 F.3d at 92 (citing *Akey*, 375 F.3d at 235). Katergaris offers scant evidence in support: his claim to have paid earlier citations or tickets on time, Katergaris Decl. ¶ 19, and the fact that, on learning of the outstanding boiler violation in 2021, he paid the fine, *id.* ¶¶ 20–21. Katergaris's general and unsubstantiated attestations, which likely could be given by the large majority of persons denying receipt of mail, are insufficient without more to rebut the presumption of receipt. *See, e.g.*, *In re Robinson*, 228 B.R. 75, 82 (E.D.N.Y. 1998) ("The federal courts in New York . . . 'hold quite uniformly that an affidavit of non-receipt is insufficient to rebut the presumption of receipt.'" (quoting *In re*

Malandra, 206 B.R. 667, 673 (E.D.N.Y. 1997)); *Leon*, 988 F.2d at 309 (where only evidence to rebut the presumption of receipt established via affidavits as to regular office procedures were denials by the plaintiff and his wife that they received the mailings, the presumption stood); *cf. Ghounem v. Ashcroft*, 378 F.3d 740, 745 (8th Cir. 2004) (sworn statement denying receipt, coupled with defendant's documented history of appearing for same type of hearing for which he claimed to not have received notice, and defendant's lack of benefit to gain by failing to appear, sufficient to rebut presumption of receipt). And his payment of this fine, which appears to have been necessary to enable him to complete the sale of the Property, does not speak to whether he would have paid the fine in 2015 had he received the notice of violation.

Second, Katergaris's account of his and his then-wife's whereabouts, and their practices with respect to mail at the W 132nd St. Property in March 2015, makes it, if anything, less plausible that the 2015 notice of violation went undelivered—as opposed to having been overlooked or not responded to. As Katergaris testified, he was generally *not* living at the Property in March 2015, save for monthly visits lasting several days, meaning his then-wife was in charge of collecting the mail and setting it aside for him. Pl. 56.1 ¶¶ 50–51. But Katergaris testified that his ex-wife also frequently travelled for work, and the couple did not have anyone collect their mail in her absence. Katergaris Dep. at 12, 14. And Katergaris did not adduce any testimony from his ex-wife. Thus, his account of her practices with respect to handling incoming mail—including whether she was rigorous or not in reviewing and maintaining it—is largely hearsay, and to the extent not, entitled to limited weight. Katergaris also did not adduce any evidence as to his ex-wife's whereabouts during March 2015.

Further undermining his case on this issue, Katergaris admitted that the Property in 2015 lacked a mailbox, such that mail delivered to it would apparently be left in any number of places,

including hung on the Property's fence in a baggy, or on the front stoop. Katergaris Dep. at 13. This portrait of sloppy, if not collegiate, practices with respect to incoming mail is at odds with the inference Katergaris seeks to raise of a system of receiving, collecting, and responding to mail so rigorous and orderly that it would have been improbable for a delivered mailing to have gone unacted-upon.

Finally, Katergaris has not alleged any specific facts concerning the City's process for mailing notices in 2015 to make application of the presumption of receipt unreasonable. He notes that the City admitted that some 500 of the approximately 18,000 notices sent in 2015 were returned to the DOB as undeliverable, and the DOB has not proven that the notice mailed to Katergaris was not among the returned notices. Pl. Br. at 12–13.

That argument does not follow. There is no basis to infer that the mailed notice to Katergaris was among the fewer than 3% of notices estimated to have been returned. On the contrary, it is undisputed that Katergaris's envelope was correctly addressed. It is also undisputed that Katergaris's notice was among those sent out on the DOB's USPS permit, such that insufficient postage could not have interfered with its delivery. And Katergaris himself disclaimed that he had any actual problems with receiving mail at the W 132nd St. address. *See* Katergaris Dep. at 14–15. Moreover, given the tiny share of mailings that were returned, Katergaris's reliance on the purely theoretical possibility that his was among them would undermine the concept of a presumption. On the record at hand, a finder of fact would not have any non-speculative basis to find the presumption of receipt rebutted. *See e.g.*, *Shao Ling Zhang v. Gonzales*, 230 Fed. App'x 57, 58 (2d Cir. 2007) (judge did not abuse discretion in finding that "uncorroborated claim of mailbox vandalism" failed to rebut presumption); *In re FKF 3, LLC*, 501 B.R. 491, 501 (S.D.N.Y. 2013) (presumption of receipt unrebutted where opponent did not

set forth specific facts to substantiate possibility that properly addressed notice was accidentally delivered to different tenant at building); *In re Great Atlantic & Pacific Tea Co., Inc.*, 618 B.R. at 67 (general allegations lacking "any specific instances of mis-delivery or non-delivery or the relevant circumstances" did not rebut presumption); *cf. BASF Corp.*, 2008 WL 678557, at *5 ("Plaintiff provides no proof that there was a breach in procedure or carelessness on the part of the sender as the standard requires.").

The Court accordingly holds that Katergaris has failed to adduce evidence sufficient to rebut the presumption of receipt in this case. Given the unrebutted presumption that he received the notice of violation in 2015, Katergaris's claim based on that notice accrued in 2015, such that the three-year limitations period had long since expired by the time Katergaris filed this lawsuit in 2022.

CONCLUSION

For the foregoing reasons, the Court grants the City's motion for summary judgment and dismisses this case as time-barred. In light of this ruling, the Court does not have occasion to address the City's other arguments for dismissal.

The Clerk of Court is respectfully directed to terminate all pending motions and close this case.

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: June 24, 2024
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SERAFIM GEORGIOS KATERGARIS,

Plaintiff,

-against-

22 **CIVIL** 7400 (PAE)

JUDGMENT

CITY OF NEW YORK,

Defendant.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated June 24, 2024, the Court has granted the City's motion for summary judgment and has dismissed this case as time-barred. In light of this ruling, the Court does not have occasion to address the City's other arguments for dismissal; accordingly, the case is closed.

Dated: New York, New York

June 25, 2024

DANIEL ORTIZ

Acting Clerk of Court

BY: K. Mango

Deputy Clerk

1 R.C.N.Y. § 103-01(d)(1)

(d) Inspection and report filing.

The owner shall be responsible for hiring a qualified boiler inspector to conduct inspections and file low pressure boiler annual inspection reports pursuant to Article 303 of Title 28 of the Administrative Code and in accordance with the following provisions:

(1) Low pressure boiler annual inspection reports must be submitted for each inspection cycle on such forms and in such manner as required by the department. The report must include:

(i) An inspection report for each boiler identifying the qualified boiler inspector or inspection agency;

(ii) An affirmation of correction that identified defects that have been corrected, if applicable; and

(iii) The filing fee as provided in subdivision (h).

1 R.C.N.Y. § 103-01(f)(1)

(f) Civil penalties, low pressure boiler annual inspection report and affirmation of correction.

(1) Failure to file. An owner who fails to file the low pressure boiler annual inspection report or any part thereof for each boiler,

pursuant to Article 303 of Title 28 of the Administrative Code and this section, shall be liable for a civil penalty of not less than one thousand dollars ($1000.00) per boiler. A low pressure boiler annual inspection report not filed within the late filing period shall be deemed expired and shall not be accepted by the department.