

28-34 E. 23rd St. v Abecassis
2017 NY Slip Op 31107(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 653250/2015
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
28-34 East 23RD Street,

Plaintiff,

Index No.
653250/2015

**DECISION and
ORDER**

- against -

Mot. Seq. #001

Yosef Abecassis,

Defendant.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of a guarantee agreement. Plaintiff 28-34 East 23RD Street ("Plaintiff") entered into a commercial lease agreement (the "lease") with tenant Undisputed Corp. for the premises known as 34 East 23rd Street, Apartment Floor 2 New York, NY 10010 (the "premises"). (plaintiff's exhibit 1). The lease, dated September 1, 2005, was for ten years, commencing on October 1, 2005 and expiring on September 30, 2015. (plaintiff's exhibit 1) Plaintiff only entered the lease because Defendant Yosef Abecassis ("Abecassis") entered a guarantee agreement (the "guarantee agreement") with Plaintiff on September 30, 2005. (plaintiff's exhibit 2) Therein Abecassis guaranteed Undisputed Corp.'s performance under the lease. On November 8, 2010, Plaintiff regained possession of the premises through a warrant and eviction. (plaintiff's exhibit 3) Plaintiff claims that Abecassis breached the guarantee agreement by failing to pay the rental arrears in the amount of \$54,705.78.

Plaintiff therefore commenced this action by summons and verified complaint on September 29, 2015 against Abecassis. Plaintiff seeks damages for Abecassis' failure to pay rental arrears in the amount of \$54,705.78 plus interest from February 1, 2010 together with costs and disbursements. Plaintiff now moves for a default judgment pursuant to CPLR 3215 (b) against Abecassis seeking the relief requested in its verified complaint.

In support, Plaintiff submits the Notice of Motion dated January 18, 2017; the affirmation of attorney Laila Elsharkawi, Esq. dated January 18, 2017; the affidavit of Estralda Tudor-Davis dated September 10, 2017; the lease dated September 1, 2005 between Plaintiff and Undisputed Corp.; the guarantee agreement dated September 30, 2005 entered into by Abecassis; the summons and verified complaint dated September 11, 2015; Sherwin Mceachnie's affidavit of service dated April 12, 2016 with respect to the summons and verified complaint served on Abecassis; Michael Robert's affidavit of service dated January 23, 2017 with respect to the Notice of Motion served on Abecassis; the Marshal's Legal Possession document dated November 8, 2010 detailing that Plaintiff has legal possession of the premises and a ledger prepared and kept by Plaintiff in the regular course of business evidencing the \$54,705.78.¹ owed by Undisputed Corp. from June 1, 2007 to November 22, 2010.

Licensed process server Sherwin Mceachnie affirms in an affidavit of service that on April 10, 2016, Mceachnie served Abecassis by delivering the summons and verified complaint to Rose Ruez, a person of suitable age and discretion at Abecassis' place of abode. On April 12, 2016, Mceachnie mailed a copy of the summons and verified complaint in a first class postpaid envelope to Abecassis' residence. On the same day, Mceachnie also mailed a second copy of the summons and verified complaint in a first class postpaid envelope to Abecassis as additional notice. The envelope bore the legend "personal and confidential" and did not indicate that the communication was from an attorney. (plaintiff's exhibit 5) Proof of service was filed on April 12, 2016. Lastly, Michael Robert avers in his affidavit of service that on January 23, 2017, he served the Notice of Motion on Abecassis.

Defendant Abecassis does not oppose.

CPLR 3215 (a) provides that "When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . ." (CPLR 3215 [f]) The standard of proof on an application for judgment by default is not stringent, "amounting only to some firsthand confirmation of the facts". (*Feffer v Malpeso*, 210 A.D.2d 60, 61 [1st Dept 1994])

¹ The sum is comprised of the amounts Undisputed Corp. owes Plaintiff, specifically \$1,170.98 for the month of February 2010 and \$5,908.92 per month for the months of March 2010 through and including September 2010. The sum is also comprised of \$6,086.18 for the months of October 2010 and November 2010. (aff of Elsharkawi at 2)

CPLR 304 (a) provides that “An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter.”

CPLR 304 (c) provides that “filing shall mean the delivery of the . . . summons and complaint . . . to the clerk of the court in the county in which the action . . . is brought or any other person designated by the clerk of the court for that purpose.”

CPLR 308 provides that

“Personal service upon a natural person shall be made by . . . delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing . . .”

CPLR 306-b provides that “Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or good cause shown or in the interest of justice, extend the time for service.”

In *Martinez v Nguyen* (102 AD3d 555, 556 [1st Dept 2013]) the First Department of the Appellate Division held that the Supreme Court “properly

denied plaintiff's motion for a default judgment against [defendant], as plaintiff served [defendant] well beyond the 120-day period set forth in CPLR 306-b. Moreover, plaintiff never moved for an extension of time to serve [defendant]."

Here, Plaintiff commenced this action by summons and verified complaint on September 29, 2015. (plaintiff's exhibit 5) Pursuant to CPLR 306-b, Plaintiff had within 120 days after September 29, 2015 to serve Abecassis with the summons and verified complaint. However Plaintiff served Abecassis in accordance with CPLR 308 (2) by delivering the summons and verified complaint to Rose Ruez on April 1, 2016, mailing 2 copies of the summons and verified complaint to Abecassis' residence on April 12, 2016 and filing proof of service on April 27, 2016. (plaintiff's exhibit 5) Because CPLR 308 (2) provides that service is not complete until 10 days after filing proof of service, service on Abecassis was not complete until May 7, 2017. Therefore Abecassis was served well beyond the 120-day period after September 29, 2015 when this action was commenced. Plaintiff's motion for a default judgment against Abecassis is denied. (see *Martinez v Nguyen* 102 AD3d 555, 556 [1st Dept 2013])

Wherefore, it is hereby

ORDERED and ADJUDGED that Plaintiff 28-34 East 23RD Street's motion for a default judgment pursuant to CPLR 3215 against Defendant Yosef Abecassis in the amount of \$54,705.78 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 19, 2017



EILEEN A. RAKOWER, J.S.C.