

<b>Takacs v ELP Ventures II, LLC</b>
2019 NY Slip Op 31622(U)
June 5, 2019
Supreme Court, New York County
Docket Number: 151094/2019
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

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INDEX NO. 151094/2019

EDWARD W. TAKACS and GIULIANA BERCHICCI,

MOTION DATE 05/28/2019

Plaintiffs,

MOTION SEQ. NO. 001

- v -

ELP VENTURES II, LLC and EDGAR COSTA,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

**NYSCEF Doc Nos. 3-9 were read on this motion for an order directing the entry of a default judgment.**

Motion by Plaintiffs Edward Takacs<sup>1</sup> and Guiliana Berchicci pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiffs and against Defendants ELP Ventures II, LLC and Edgar Costa is denied.

**BACKGROUND**

Plaintiff commenced the instant action on January 31, 2019, by e-filing a one-page summons with notice. (NYSCEF Doc No. 3, at 3-5 [Sperber affirmation], exhibit A [Summons].) The Summons lists ELP Ventures II, LLC ("ELP") and Edgar Costa ("Costa") as Defendants. The Summons sets the venue as New York County, the locus of the transaction giving rise to the action. The Summons states that the nature of the action is for Plaintiff's damages resulting from Defendants' breach of contract in failing to pay rent owed under a lease agreement. The Summons indicates that Plaintiff seeks damages of not less than \$258,750.00, with interest from July 1, 2018, plus the costs of the action.

On February 14, 2019, Plaintiff e-filed an affidavit of service indicating that, on February 1, 2019, Costa was served with process pursuant to CPLR 308 (1). (NYSCEF Doc No. 2; *see also* Sperber affirmation, exhibit B [Affidavit of Service].)

On May 7, 2019, Plaintiff filed the instant motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendants for a sum certain, \$258,750.00, plus interest, and setting the matter down for an inquest as to Plaintiff's reasonable attorney's fees. Plaintiff argues that Defendants have failed to answer or appear and that their time to do so has expired. (Affirmation of Sperber at 3-5.)

<sup>1</sup> Plaintiffs' counsel affirmed in a phone call with the Court on June 4, 2019, that plaintiff Edward W. Takacs has passed away. The Court notes the death on the record and the action now proceeds pursuant to CPLR 1015 (b), with the right sought to be enforced surviving as to surviving plaintiff Giuliana Berchicci (hereinafter "Plaintiff").

Exhibit C to the motion is a Notice of Default, dated March 18, 2019. The Notice of Default states that the “action was commenced on January 31, 2019 and there has been service of the summons and complaint by service pursuant to CPLR §308(2), (*a copy of which is annexed hereto*)” and warns Defendants that as they have failed to answer or appear a default judgment will be sought as to them. (Sperber affirmation, exhibit C, at 1 [Notice of Default].) An affidavit of service annexed to the e-filed Notice of Default indicates that Defendants were served with a copy of the Notice of Default by certified mail at the Unit on April 2, 2019. (*Id.* at 3.)

An affidavit by plaintiff Giuliana Berchicci is annexed to the motion (NYSCEF Doc No. 3, at 6–7 [Affidavit]) along with a lease agreement (Sperber affirmation, exhibit D [Lease]). The Affidavit states that Plaintiff is the owner of 129 West 20th Street, Penthouse AB, New York, New York 10011 (the “Unit”), which was leased to Costa by the annexed Lease, dated April 24, 2018. The Affidavit further states that, pursuant to the lease, Costa agreed to a monthly rent of \$25,000.00 for a twelve-month term. The Affidavit then states that Costa agreed to make an upfront payment of \$75,000.00, representing the rent for the first and last months of the lease term and a security deposit equal to one month of rent. The Affidavit further states that Costa failed to pay ten months of rent, or the sum of \$250,000.00 under the lease, and incurred seven late fees of \$1,250.00 each, or the sum of \$8,750.00, for a total sum owed of \$258,750.00. The affiant argues that Defendants have breached the lease, have been unjustly enriched, and/or have held an account stated with Plaintiff, to the detriment of Plaintiff in the amount of \$258,750.00. The affiant requests a judgment in the amount of \$258,750.00, together with interest, costs, disbursements, and reasonable attorney’s fees pursuant to the lease.

The Lease states that it is for the lease of the Unit with Plaintiff as Landlord and “ELP Ventures II, LLC” as Tenant. (Lease at 1.) The “Address for Notices” for Tenant is listed as “c/o Edgar Costa and Kerry Wellington, 400 High Avenue, Nyack, NY 10960.” Two children, aged 22 and 14, are listed in the Tenant section. In the following “Introductory Terms” section, the Lease date is listed as April 2018 and the Term is listed as 12 months. Spaces for the “beginning” and “ending” of the term are present but are blank. Monthly Rent is listed as \$25,000 and Security is listed as \$25,000. Tenant’s Insurance is listed as \$1–3 million. A space for a “Declaration of Condominium” is blank, followed by the typed word, “(Declarant).” On the next line, the Name of Condominium is typed as The Chelsea Quarter Condominium (the “Condominium”), followed by the typed word “Dated” and a handwritten date of April 24, 2018, in the provided blank, followed by the typed word, “(Condominium).”

After several pages of lease terms, lines for signatures by Landlord and Tenant are present. (*Id.* at 9.) There is a signature on the Landlord signature line that is not legible, and no name is typed. On the Tenant signature lines, there are two signatures. The signature on the first line is illegible. The signature on the second line says Kerry Wellington.

Following the Landlord/Tenant signature lines, a section begins titled, “Absolute and Unconditional Guaranty of Payment and Performance.” (*Id.*) The Date of Guaranty is listed as April 2018. On the following line, the “Guarantor” is typed in as Edgar Costa and Kerry Wellington. The section indicates that the Guarantors unconditionally guarantee Tenant’s payment and performance and the full and timely payment of each and every monetary obligation and performance of each and every non-monetary obligation of the Tenant under the

Lease, including legal fees and expenses. The Guaranty includes a waiver of notice as to any matter or default under the Lease and indicates that, if the Tenant defaults under the Lease, Landlord may require that the Guarantors immediately pay and perform under the Lease even if Landlord has not notified Tenant or demanded payment or performance from Tenant. The Guaranty includes a no-oral modification clause. On the signature lines under the Guaranty, the illegible signature from the first line of the Tenant line of the Lease is present, followed by the signature of Kerry Wellington.

Following the Guaranty is a Rider, dated April 13, 2018, annexed to and forming a part of the Lease. (*Id.* at 10–11.) The Rider is signed by Plaintiff as Landlord. The following line says, “Tenant: ELP Ventures II, LLC.” On the space for a signature, the same illegible signature from the first line of the Tenant section of the Lease appears. It is also the same signature that appears on the Guaranty. Below the Tenant signature line on the Rider is typed, “By: Edgar M. Costa, Title: Member.”

Following the Rider is a further Unit Lease Rider that lists ELP Ventures II, LLC as Tenant and lists the occupants of the Unit as Edgar Costa, Kerry Wellington, and the two children listed on page 1 of the Lease. (*Id.* at 12–14.) The Unit Lease Rider is signed by Plaintiff as Landlord. On the Tenant’s Signature line, the signature associated with Edgar Costa from the Lease, Guaranty, and Rider is present. On the Print Name line immediately below the Tenant’s Signature line is the handwritten name, “Edgar Costa.”

Following the Unit Lease Rider is a Collateral Assignment of Leases and Rents. (*Id.* at 15–16. [Assignment].) The Assignment is between Plaintiff, as Assignor, and the Condominium, as Assignee. The Assignment indicates, in relevant part, that Assignor assigns to Assignee all rents and insurance policies affecting the Unit. The Assignment further indicates that Assignor and Tenant agree that rents, use and occupancy, or other amounts payable under the Lease shall be paid directly to Assignee and that the same shall be credited against rents to be paid by Tenant to Assignor. The Assignment appears to be signed by Plaintiff, as Assignor, and Tenant.

To date, Defendants have not answered or appeared in the action.

### DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a motion for a default judgment pursuant to CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Here, Plaintiff has shown prima facie that Costa was served with process pursuant to CPLR 308 (1). There is no showing that ELP was served with process in this matter, though. As such, as to ELP, there is no showing of default, as there is no showing that ELP's time to answer or appear in the action has begun to run. Further, pursuant to CPLR 306-b, Plaintiff was required to serve ELP within 120 days of commencement of the action. There is no showing on this motion that this has been done.

Pursuant to CPLR 3215 (g) (3), Plaintiff was required to mail Costa an additional copy of the summons. Here, the Notice of Default indicates that an additional copy of the summons and complaint that was served on Defendants pursuant to CPLR 308 (2) was mailed to them at the Unit. The Court finds that the Notice of Default as drafted raises an issue of fact as to whether process in this case, which consists of a summons with notice, not a summons and complaint, and which was served on Costa pursuant to CPLR 308 (1), not CPLR 308 (2), was in fact mailed to Costa as required.

Moreover, as the Lease indicates it was for a twelve-month term that may have begun on April 1, 2018, although it is not clear as the beginning date of the term is not specified in the place provided for on page 1 of the Lease, that term may have ended on March 31, 2019. The affidavit of service annexed to the Notice of Default states that it was mailed to the Unit on April 2, 2019, after the lease term may have ended. Further, the Address for Notices given for Defendants pursuant to the lease is 400 High Avenue, Nyack, New York 10960. There is no indication the mailing was made to this address. As such, based on the foregoing, the Court finds that Plaintiff has failed to show prima facie that Costa was properly noticed pursuant to CPLR 3215 (g) (3).

Even if Plaintiff had shown that it properly effectuated service of process and the CPLR 3215 (g) notice on Defendants as required, Plaintiff has nevertheless failed to submit adequate proof of the facts constituting her claims. While the Court finds that the provided Lease does indicate that Costa is a Guarantor and liable for Tenant's default in payments under the Lease, Plaintiff's affidavit does not address the Assignment, which provides that rent payments would be made directly to the Condominium. As there has not been an affidavit provided by someone with personal knowledge from the Condominium as to whether the payments were in fact made by the Tenant to the Condominium directly, under the facts of this case, the proof of the facts constituting Plaintiff's claims as submitted in the instant motion is inadequate.

**CONCLUSION**

Accordingly, it is ORDERED that the motion is denied.

The foregoing constitutes the decision and order of the Court.

6/5/2019  
DATE

*Robert D. Kalish*  
**HONORABLE ROBERT D. KALISH**  
J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE