

**415 E. 12th St. Hous. Dev. Fund Corp. v Estate of
Burga**

2019 NY Slip Op 32672(U)

September 6, 2019

Supreme Court, New York County

Docket Number: 651626/2019

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 651626/2019

415 EAST 12TH STREET HOUSING DEVELOPMENT
FUND CORPORATION

Plaintiff,

MOTION SEQ. NO. 001

- v -

ESTATE OF JOSE BURGA, BY JOHN A. ESTRADA AS
PRELIMINARY EXECUTOR OF THE ESTATE OF JOSE
BURGA,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14
were read on this motion to/for JUDGMENT - DEFAULT

In this action seeking, inter alia, ejectment and declaratory relief, plaintiff 415 East 12th Street Housing Development Fund Corporation moves, pursuant to CPLR 3215, for a default judgment against defendant Estate of Jose Burga, by John Estrada as Preliminary Executor of the Estate of Jose Burga. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is denied with leave to renew upon proper papers.

FACTUAL AND PROCEDURAL BACKGROUND:

Decedent Jose Burga was a shareholder of plaintiff 415 East 12th Street Housing Development Fund Corporation (“the HDFC”) and resided in apartment 6 at that address pursuant to a proprietary lease. Doc. 7; Doc. 10 at par. 6. Burga died on March 9, 2016 and, by order entered June 30, 2016, the New York County Surrogate’s Court (Mella, J.) appointed John A. Estrada as Preliminary Executor of the Estate of Jose Burga (“the Estate”). Doc. 10 at par. 6.

Article VII, paragraph 7.01 of the proprietary lease entitled the HDFC to certain remedies in the event of a default by a tenant. Doc. 7. On or about January 24, 2019, plaintiff served Estrada with a 10-day default notice to cure on the ground that maintenance and late fee arrears of \$11,248.00 were owed on apartment 6. When the default was not cured after 10 days, the HDFC served Estrada with a notice of termination of the proprietary lease by certified mail on February 19, 2019. Doc. 6. Pursuant to paragraph 7.03 of the proprietary lease, the HDFC was entitled to retake possession of the apartment after Estrada was served with the notice of termination. Doc. 7. Neither Estrada nor anyone on his behalf challenged the termination of the proprietary lease. Doc. 10 at par. 11.

The HDFC thereafter commenced this action by filing a summons and complaint on March 19, 2019. Docs. 1, 2. As a first cause of action, the HDFC demanded a judgment declaring that the proprietary lease was canceled and that Estrada no longer had any interest in apartment 6 or in the building. Doc. 2. As a second cause of action, the HDFC demanded that it was entitled to specific performance by Estrada, i.e., surrendering his shares of the HDFC and the proprietary lease. Doc. 2. As a third cause of action, the HDFC demanded that it was entitled to an order of ejectment compelling Estrada to vacate apartment 6. Doc. 2.

The summons and complaint were served on Estrada by personal service at 8 Marion Place, Maplewood, New Jersey on April 1, 2019. Doc. 8. To date, neither Estrada nor anyone else has appeared on behalf of the Estate. Doc. 11 at pars. 4, 5.

On June 25, 2019, the HDFC filed the instant motion for default against the Estate. Doc. 9. In support of the motion, the HDFC submits the affidavit of Victoria Shaly, president of the HDFC, who sets forth, inter alia, the procedure pursuant to which the notices of default and termination were served (Doc. 10); the attorney affirmation of Jose Luis Torres, who attests,

inter alia, that Estrada has defaulted in answering the complaint (Doc. 11); and the affidavit of service of the motion on Estrada (Doc. 12).¹

LEGAL CONCLUSIONS:

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.” It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. See *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

Here, although the HDFC has established proof of personal service of the summons and complaint on Estrada (Doc. 8), it has failed to make an additional service of the summons and complaint as required by CPLR 3215(g)(3)(i).

The HDFC has also failed to establish the facts constituting the claim. Although it purported to serve a notice of default on Estrada at 415 East 12th Street, Apt. 6, New York, New York (Doc. 5), there is no indication that he resides at that address. Additionally, the HDFC purported to serve the notice of default on Estrada at 8 Marion Place, Maplewood, *New York*, despite the fact that he had been served with the summons and complaint at 8 Marion Place, Maplewood, New Jersey. Further, despite providing certified mail receipts, the HDFC has not provided affidavits of service for the notice of default or the notice of termination. Docs. 5-6.

¹ The affidavit of service reflects that the motion for default was served on Estrada at 400 Tenaflly Road, # 70, Tenaflly, New Jersey 07670. Doc. 12. However, this was an error, since the HDFC’s process server resides at that Tenaflly address. Doc. 8. A corrected affidavit of service filed June 28, 2019 reflects that Estrada was re-served with the motion at 8 Marion Place, Maplewood, New Jersey 07040. Doc. 14.

Finally, although the HDFC purported to serve the motion for default on Estrada at 8 Marion Place, Maplewood, New Jersey, it is unclear from the motion papers whether this was his last-known address even though it is where he had been personally served with the summons and complaint. See CPLR 2103(b)(2), (c).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied, with leave to renew upon proper papers within 45 days, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of the court.

9/6/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
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