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| <b>Moltchanov v Khaitov</b>  |
| 2020 NY Slip Op 30001(U)   |
| January 3, 2020  |
| Supreme Court, New York County   |
| Docket Number: 150008/2019   |
| Judge: Barbara Jaffe   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

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INDEX NO. 150008/2019

GUENADI MOLTCHANOV,  
Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

SERGEY KHAITOV, ESQ. and ANZHELA  
YAKUTILOVA,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23  
were read on this motion for default judgment.

By notice of motion, submitted on default, plaintiff moves for a default judgment against  
defendants.

In his complaint, filed January 1, 2019, plaintiff alleges that defendant Khaitov  
represented him as his lawyer during most of the real estate transactions he had entered into  
between 2004 and 2016. In 2013, Khaitov convinced plaintiff to establish a “real estate trust  
fund.” Khaitov then created a trust for plaintiff under the name of defendant Anzhela Yakutilova,  
as opposed to plaintiff’s actual name, because, according to him, the funds would be less secure  
under plaintiff’s name.

In 2015, when plaintiff asked Khaitov for his money, Khaitov told him that he could not  
“break” the trust fund but could pay plaintiff’s bills and give him small cashier checks. Khaitov  
agreed to use trust funds to pay plaintiff’s maintenance, real estate taxes, electric bills, and  
college tuition for his wife. The payments were made “mostly from the account name ‘Anzhela  
Yakutilova.’”

In April 2017, when plaintiff saw that some of the payments had not been made and confronted Khaitov, Khaitov explained that the checks were lost. In April 2018, the payments stopped altogether and Khaitov told plaintiff that the “money is gone.” Although Khaitov agreed to provide plaintiff with the trust account statements, he never did so and ignored plaintiff’s calls.

Khaitov’s behavior led plaintiff to believe in 2018 that in 2008, when plaintiff sold some of his properties, Khaitov “pocketed” the money. Khaitov told plaintiff that he had placed the money in escrow, but then told plaintiff that he had given it “to the City.” Plaintiff asks that I “research” where the “City” is holding his money and seeks from defendants all statements and receipts for the trust account under the name Anzhela Yakutilova. He demands judgment in the amount of \$514,500. (NYSCEF 2).

In his supporting affidavit, plaintiff contends that he is entitled to a default judgment under CPLR 3215 because he served defendants six times and they have not appeared or answered. (NYSCEF 23).

In support, plaintiff submits an affidavit of service and two certified mail receipts which reflect that on January 14, 2019, “attached papers” were mailed to defendants at 61-35 98 Street Apt 3B, Rego Park, NY 11374. (NYSCEF 5-7). He also submits an affidavit of service in which the affiant states that on February 20, 2019 at 4:25 pm, a copy of the summons and complaint was separately served on each defendant at 61-35 98 Street, Suite 3B, Rego Park, NY 11374, in that the process server rang the doorbell of Suite 3B seven times, and when no one answered, he affixed to the door copies of the summons and complaint contained in two envelopes. He also placed two envelopes, each containing a copy of the summons and complaint in defendants’ mail box. (NYSCEF 8).

Pursuant to CPLR 3215(f), when seeking a default judgment, the movant must file “proof of service of the summons and the complaint.” When serving a natural person, as is the case here, plaintiff is required to comply with CPLR 308(1), which provides that service may be effectuated by delivering the summons to the person to be served. And, as pertinent here, when personal service “cannot be made with due diligence,” the summons may be affixed to the door of the person’s actual place of business and 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 . . . concerns an action against the person to be served . . .” (CPLR 308[4]).

Plaintiff first attempted to serve defendants on January 14, 2019 by mailing them the summons and complaint. Absent previous attempts to serve defendants personally, plaintiff did not thereby effectuate service. His second attempt at service, on February 20, 2019, absent three attempts to effectuate personal service before affixing the summons and complaint to defendants’ door, was also ineffectual. (*See Holbeck v Sosa-Berrios*, 161 AD3d 957 [2d Dept 2018] [plaintiff did not exercise due diligence in attempting service as server resorted to affix-and-mail service after only two attempts to deliver pleadings to defendant on weekdays]; *McGreevy v Simon*, 220 AD2d 713 [2d Dept 1995] [same]).

Pursuant to CPLR 306-b, service of the summons and complaint “shall be made within one hundred twenty days after the commencement of the action or proceeding.” As plaintiff failed to serve defendants within 120 days after the commencement of this action, the complaint is dismissed. (*Diaz v Perez*, 113 AD3d 421, 421 [1st Dept 2014]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment is denied; and it is further  
ORDERED, that the complaint is dismissed, and the Clerk is directed to enter judgment  
accordingly.

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1/3/2020  
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE