

<b>Moltchanov v Khaitov</b>
2021 NY Slip Op 30291(U)
February 2, 2021
Supreme Court, New York County
Docket Number: 150489/2020
Judge: Shawn T. Kelly
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SHAWN TIMOTHY KELLY PART IAS MOTION 57**

*Justice*

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GUENADI MOLTCHANOV,

Plaintiff,

- v -

SERGEY KHAITOV, ANZHELA YAKUTILOVA,

Defendant.

INDEX NO. 150489/2020

MOTION DATE 09/29/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 19, 20 were read on this motion to/for JUDGMENT - DEFAULT

On January 14, 2020, Plaintiff Guenadi Moltchanov filed a complaint against Defendants Sergey Khaitov and Anzhela Yakutilova, alleging that Khaitov had committed breach of contract, conversion, and professional malpractice. Plaintiff alleges that Khaitov acted as his attorney for several years. The complaint alleges that upon the sale of real estate, Khaitov suggested that he could set up a real estate trust for Plaintiff. In 2013, Plaintiff alleges that he gave Khaitov \$502,734.39 to establish the real estate trust. Plaintiff asserts that Khaitov advised him to place the trust in the name of Anzhela Yakutilova.

In 2015, Plaintiff alleges he requested his money back from Khaitov. Khaitov allegedly explained to Plaintiff that he would not be able to give all of the money back as it was placed in an irrevocable trust, however, he would continue to transfer funds to Plaintiff for expenses. Plaintiff alleges that Khaitov returned between \$20,000 and \$40,000. Plaintiff asserts that as of April 2017, the payments from Khaitov stopped. He also alleges that Khaitov gave Plaintiff several excuses as to what had happened to his money including that Plaintiff's money was in an escrow account that could not be touched, that Plaintiff's money had been handed over to the

city, that because of the nature of Plaintiff's trust he is not able to access the funds, and that the money is gone. Plaintiff is requesting \$518,331.18 as he alleges that this is the amount that is owed to him by Khaitov.

On September 22, 2020, an affidavit in opposition to the motion was submitted by Sergey Khaitov alleging that he is a non-party to this action. He alleges that he is not the Sergey Khaitov, Esq. that the allegations have been made against. He further asserts that he takes no issue with the request for relief, but, requests that any order and judgment be issued against Sergey Khaitov, Esq. Photo identification was submitted with the affirmation in opposition.

Plaintiff submitted evidence of his search results in order to effectuate service on Defendants. Plaintiff provided printouts of advanced searches through a search engine containing public records and a search conducted through ACRIS, a website used to locate addresses through the City of New York. Plaintiff further submitted a certificate from the NYC Department of Finance, Office of the City Register, listing Defendants as debtors and a UCC Financing Statement naming both Defendants as owners of the condominium at the address where they were served. Plaintiff's submissions demonstrate that both defendants are located at the same address, where service of the complaint was attempted.

The affidavit of the process server states that she attempted to serve the Complaint on Defendants on six occasions January 20, 2020, at 8:34 am, January 28, 2020, at 6:34 pm, February 21, 2020, at 3:08 pm, February 21, 2020, at 5:01 pm, February 22, 2020<sup>1</sup> at 7:09 am, and February 24, 2020, 8:34pm. The above attempts to serve the complaint were at 61-55 98 Street, Rego Park, NY 11374. Additionally, an additional affirmation/affidavit of service states that the complaint was served at 84-25 118<sup>th</sup> Street, by affixing the Complaint to the door,

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<sup>1</sup> Incorrectly listed as February 22, 2018.

mailing the complaint, and also was served personally on Yakutilova on March 31, 2020, at 8:16 am. Pursuant to Civil Practice Law and Rules Section 308(2) affixing a summons and complaint is only acceptable after attempts of service have been made with “due diligence” at the Defendant's current abode or place of business (*see Bd. of Managers of the Ansonia Condo. v Logan*, 2010 NY Misc LEXIS 3027, \*12, 2010 NY Slip Op 31674(U), 9). The CPLR provides that substituted service, “nail and mail” service, can be made in lieu of personal delivery where, with due diligence, it has been found that in-hand service cannot be effectuated.” Service of the complaint was attempted on six occasions prior to nail and mail service (*see also Holbeck v Sosa-Berrios*, 161 AD3d 957 [2d Dept 2018]).

Plaintiff's Complaint alleges that Defendants owe him \$518,331.18. However, Plaintiff also alleges that he paid Defendant \$170,000 in cash and cashier's check and \$332,734.39 following the sale of one of his properties. These two payments total \$502,734.39. Plaintiff also alleges that he requested his money back from Khaitov and was paid \$1000, \$7000, and \$12,000. Taking the allegations as true Plaintiff would be owed only \$482,734.39.

Pursuant to CPLR §3215(a), a Plaintiff may seek a default judgment against a Defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default (*see* CPLR §3215[f]). Plaintiff has failed to prove that these three criteria have been met. In moving for a default judgment, Plaintiff bears the burden to support the judgment by presenting admissible evidence attesting on personal knowledge or otherwise establishing each of her claims against the defaulting defendants. There is a significant question of fact as to whether Plaintiff established how much money was allegedly owed to him, which demonstrates that the proof on the merits portion of default is not satisfied.

Pursuant to NY CLS CPLR § 4317(b) "Without Consent of the Parties. On motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law." See *Board of Mgrs. o the Cove Club Condominium v Lynn* 2016 N.Y. Misc. LEXIS 2154, \*1, 2016 NY Slip Op 31081(U), 1.


It is hereby,

ORDERED, the motion for default judgment is partially denied.

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

the issue of the amount due to the plaintiff from defendant Sergey Khaitov and defendant Anzhela Yakutilova for unreturned monies as a result of the sale of real estate and under the parties' agreements, through January 22, 2013,

2/2/2021  
DATE

  
SHAWN TIMOTHY KELLY, J.S.C.

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