

**Lu v Xi Chen**

2025 NY Slip Op 33853(U)

October 8, 2025

Supreme Court, New York County

Docket Number: Index No. 654944/2024

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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DAVID LU

Plaintiff,

- v -

XI CHEN,

Defendant.

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INDEX NO. 654944/2024

MOTION DATE 06/09/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

DGW Kramer LLP, New York, NY (Jacob Yiping Chen, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action to recover an unpaid personal loan based upon theories of breach of contract and trespass to chattel, plaintiff DAVID LU (plaintiff) moves pursuant to CPLR § 3215 for leave to enter a default judgment against defendant XI CHEN (defendant), and for an order requiring defendant to transfer 2 Bitcoin to plaintiff. Defendant does not appear or submit opposition.

As explained below, the court dismisses the motion.

When a defendant fails "to appear, plead or proceed to trial of an action reached and called for trial, or when the

court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against [the defendant]" (CPLR § 3215 [a]). Generally, the proponent of a default judgment shall file proof of (1) service of the summons and complaint, of (2) the facts constituting the claim, and of (3) the default and the amount due (see CPLR § 3215 [f]; see also Allstate Ins. Co. v Austin, 48 AD3d 720 [2d Dept 2008]).

"CPLR § 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (Welz v Brown, 228 AD3d 416, 418 [1st Dept 2024]; Joosten v Gale, 129 AD2d 531, 535 [1st Dept 1987])). Though a defaulting defendant is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them . . . if those factual allegations do not state a valid cause of action, the party moving for judgment is not entitled to the requested relief, even on default" (Nationstar Mortgage, LLC v Hilpertshauser, 156 AD3d 1052, 1053 [3d Dept 2017] [internal citations and quotation marks omitted]; see also Zelnik v Bidermann Indus. U.S.A., Inc., 242 AD2d 227, 232 [1st Dept 1997])).

Where, as here, the defendant is a natural person, personal service may be effectuated in a variety of ways, including 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 . . . at his or her actual place of business . . . Proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . ." (CPLR § 308 [2]).

However, "[t]he process server must perform a proper inquiry to determine the defendant's actual place of business, dwelling place, or usual place of abode, which under CPLR § 308 must be correct" (Everbank v Kelly, 203 AD3d 138, 147 [2d Dept 2022]). Courts have held that a proper inquiry consists of inquiring of the person of suitable age and discretion as to whether defendant lives or works at the service address (id.); or by conducting a search of the Department of Motor Vehicle records to determine defendant's address (Fontanez v PV Holding Corp., 182 AD3d 423 [1st Dept 2020]).

Here, the affirmation of service pursuant to CPLR § 308 (2) is defective (see NYSCEF Doc. No. 02, Affirmation of Service). The affirmation of service does not demonstrate that plaintiff's process server performed a proper inquiry of the person served

to determine defendant's actual place of business, dwelling place, or usual place of abode, or that the process server conducted a search of the Department of Motor Vehicle records to verify defendant's address. Therefore, without the requisite support demonstrating that "11463 Taipei Ct, College Point, NY 11356" is defendant's dwelling place or usual place of abode, service of process pursuant to CPLR § 308 (2) is defective.

Further, the Federal Servicemembers Civil Relief Act and New York State Soldiers' and Sailor's Civil Relief Act requires a party seeking a default judgment against an individual defendant to submit proof that the defendant was not in military service at the time of the default (see 50 USC § 3931 [b] [1]; see also Military Law § 309 [1]).

"A proper affidavit of nonmilitary service should include the date and location of the investigation and the facts gleaned from the investigation" (Benabi Realty Mgt. Co. v Van Doorne, 190 Misc2d 37, 38 [Sup Ct NY Cnty 2001]). Documentation provided directly from the Department of Defense Manpower Data Center -- "the official source of data on eligibility for military" -- is sufficient to enable the court to conclude that a respondent is not currently on active military duty, or was at the time of the default (363 Assoc. v Sharhan, 2 Misc3d 928, 930 [Civ Ct NY Cnty 2003]).

Plaintiff's affidavit of service does not include an adequate non-military affidavit. The process server's inquiry of "Jason Doe" as to defendant's military status at the time of service of process does not constitute an investigation into defendant's military status at the time of default (see MB v Precise Mgt., Inc., 2018 WL 2415953, \*1 [Sup Ct NY Cnty 2018] [holding that "a default judgment motion must be accompanied by an investigation into the military status of the defendant and an affidavit detailing the investigation, which cannot be cursory"], citing Unitrin Advantage Ins. Co. v 21st Century Pharm., 158 AD3d 450, 451 [1st Dept 2018]; see also Nedeltcheva v MTE Transp. Corp., 2016 WL 4256556, \*1 [Sup Ct NY Cnty 2016], affd sub nom. Nedeltcheva v MTE Transportation Corp. 157 AD3d 423 [1st Dept 2018]).

Notwithstanding the aforementioned defects, the motion is also denied inasmuch as plaintiff's proof does not establish a prima facie case as to either cause of action alleged in the complaint. To maintain an action for a breach of contract, the plaintiff must show: that (1) a contract exists between the parties; that (2) plaintiff performed in accordance with the contract; that (3) defendants breached their contractual obligations; and that (4) defendants breach resulted in damages (see generally 34-06 73, LLC v Seneca Ins. Co., 39 NY3d 44, 51 [2022] [quotations and citations omitted] [discussing the

standard for a breach of contract in the context of a pleading]).

Plaintiff's submissions do not establish the existence of a contract, plaintiff's performance thereunder, or defendant's breach. Though plaintiff does not submit a copy of any agreement between plaintiff and defendant, plaintiff submits a screenshot of purported messages between plaintiff and defendant, which are in Chinese (see NYSCEF Doc. No. 07, Purported Messages between plaintiff and defendant, with Certificate of Translation attached). However, the messages are missing basic information, including defendant's name and phone number (see id.; see also Doggart v Praeger, 229 NYS3d 311, 323 [Civ Ct NY Cnty 2025] [finding that text messages submitted by defendant "do not qualify as documentary evidence as they are missing basic information"], citing Nosegbe v Charles, 227 AD3d 1400, 1404 [4th Dept 2024]). Similarly, plaintiff's affirmation is silent as to the identity of the individual communicating with plaintiff in said messages (see NYSCEF Doc. No. 06, Affirmation of Merit of Plaintiff).<sup>1</sup> This submission does not establish the existence of a contract between plaintiff and defendant.

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<sup>1</sup> The messages do not contain any contact names -- rather, there is a picture of a dog and a "Supreme" clothing logo where a contact name and phone number would ordinarily be (see NYSCEF Doc. No. 07, Purported Messages between plaintiff and defendant).

Additionally, although plaintiff alleges that he transferred 2 Bitcoin to defendant, plaintiff does not submit any proof of such a transaction (see NYSCEF Doc. No. 08, "Bitcoin Transaction" [with no identifying information as to plaintiff or defendant]). Accordingly, plaintiff's submissions fall far short of establishing a prima facie claim for breach of contract.

For the same reasons, plaintiff's submissions do not establish a prima facie claim for trespass to chattel (see Jackie's Enterprises, Inc. v Belleville, 165 AD3d 1567 [3d Dept 2018] [for a cause of action for trespass to chattel, plaintiff is required to establish that defendant "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [plaintiff's] possession"]).

Accordingly, it is hereby

ORDERED that plaintiff's motion (seq. no. 001), pursuant to CPLR § 3215, for a default judgment, is dismissed without prejudice; it is further

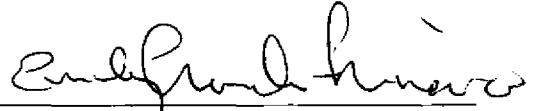
ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendant; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/8/2025

DATE



EMILY MORALES-MINERVA, 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