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| <b>Garcia v Italian Pavilion Pizzeria &amp; Rest., Inc.</b>                                                                                                                                                                    |
| 2025 NY Slip Op 35479(U)                                                                                                                                                                                                       |
| January 14, 2025                                                                                                                                                                                                               |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 55990/2024                                                                                                                                                                                            |
| Judge: David F. Everett                                                                                                                                                                                                        |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X  
Leocadio Garcia and Gustavo Espinoza, and El-Hag &  
Associates P.C.;

**INDEX NO. 55990/2024**

Plaintiffs,

**DECISION/ORDER  
Motion Seq. 1**

-against-

Italian Pavilion Pizzeria & Restaurant, Inc.,  
Franco Adrovic, and Damir Adrovic, individually;

Defendants.

-----X  
**EVERETT, J.**

Upon consideration of the papers filed in the New York State Courts Electronic Filing System (NYSCEF) Doc Nos. 5-19, relative to the motion by plaintiffs Leocadio Garcia, Gustavo Espinoza, and El-Hag & Associates, PC for a default judgment against defendants Italian Pavilion Pizzeria & Restaurant, Inc., Franco Adrovic, and Damir Adrovic, and an assessment of damages, the Court determines as follows:

In the affirmation in support (NYSCEF Doc No. 8), plaintiffs' attorney explains that this is a breach of contract action, which stems from settlement agreements reached in an action in the Southern District of New York (Index # 7:23-cv-03790; NYSCEF Doc No. 9). Plaintiffs' attorney contends that plaintiffs accepted a payment plan from defendants, as memorialized in the settlement agreements; that El-Hag & Associates, PC was to be paid \$19,516.90, Leocadio Garcia was to be paid \$22, 258.99, and Gustavo Espinoza was to be paid \$7,954.11; that on November

25, 2023, defendants defaulted; that on December 20, 2023, defendants were notified regarding the breach, and further emails were sent without response (NYSCEF Doc No. 10); that the total due by defendants to plaintiffs is \$30,483.10, plus interest, attorney's fees and costs.; and that despite the commencement of the action on January 21, 2024, and service on each defendant, defendants have failed to answer or appear.

CPLR 3215 (a) provides: "When a defendant has failed 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 him." In a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default (*Bank of N.Y. Mellon v Van Roten*, 181 AD3d 549, 550 [2d Dept 2020]).

CPLR 3215 (f) requires the applicant for a judgment by default to submit proof "by affidavit made by the party" of the facts constituting the claim, and provides that "[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." (See *DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015].)

CPLR 3215 (g) (3) requires an additional notice of a default judgment application when the defendant is a natural person, who has not appeared, and the action is one for money due under a contractual obligation (CPLR 3215 [g] [3] [i], [ii]).

Uniform Rules for Trial Courts (22 NYCRR) §202.5-bb (b) (3) states that personal service of initiating documents in an action commenced electronically "shall be accompanied by a notice,

in a form approved by the Chief Administrator, advising the recipient that the action is subject to electronic filing pursuant to this section.”

CPLR 2214 provides: “A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard.” If a movant fails to give requisite notice of motion, the Court is deprived of jurisdiction to entertain the motion, which is invalidated (*see Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 124-125 [2d Dept 2015]; *Morabito v Champion Swimming Pool Corp.*, 18 AD2d 706, 707 [2d Dept 1962]).

Service on a corporation may be made via the Secretary of State, pursuant to BCL § 306 (b). In addition, if a corporation is served via this method and defaults by not appearing, CPLR 3215 (g) (4) requires that the plaintiff forward an additional copy of the summons to the corporation by first class mail “at its last known address at least twenty days before the entry of judgment.” The additional service must be accompanied by a notice to the corporation that service is being made pursuant to BCL § 306 (b) (*see NYCTL 1998-2 Trust v Chinese Am. Trading Co., Inc.*, 189 AD3d 1437, 1438 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]). An affidavit attesting to the mailing must be made by the person who performs the mailing, and it must be included in the default application (CPLR 3215 [g] [4]; *TCA Global Credit Master Fund, L.P. v Puresafe Water Sys., Inc.*, 151 AD3d 1098, 1099-1100 [2d Dept 2017]).

Service on an individual may be made pursuant to CPLR 308 (2). In *Everbank v Kelly* (203 AD3d 138, 143 [2d Dept 2022]), the Court explained: “Service of process under CPLR 308 (2) ... requires that the summons be delivered within the state to a person of suitable age and discretion at the defendant's ‘actual place of business, dwelling place or usual place of abode,’ along with a mailing of the summons to the defendant's last known residence or actual place of business.”

Before a default judgment can be entered against a natural person who has otherwise not answered or appeared in an action or proceeding, the party seeking to enter the default judgment must submit an affidavit to the court showing that the defaulting party is neither in active military service nor dependent on anyone else who is (50 USC Appendix § 520 [1]; § 536; Military Law § 303 [1]; § 306) (*see Citibank v McGarvey*, 196 Misc 2d 292, 298 [Civil Ct, Richmond County 2003]).

Here, plaintiffs' attorney affirms that service was made as follows:

20. A Summons and Complaint were duly served upon the Defendant Italian Pavilion Pizzeria & Restaurant, Inc. on January 30, 2024, by CORPORATE SERVICE, by personally delivering 1 true correct copy of the above Summons and Complaint with the date and hour of service endorsed thereon, to the corporation described as the named Defendant at the office of the Secretary of State of the State of New York. (See Exhibit D) [NYSCEF Doc No. 12]

21. A Summons and Complaint were duly served upon Defendant Franco Adrovic on February 1, 2024, at 1:10 PM, by personally delivering 1 true correct copy of the above Summons and Complaint with the date and hour of service endorsed thereon, to someone at the workplace, who identified to be Defendant Franco Adrovic's employee. (See Exhibit E) [NYSCEF Doc No. 13]

22. A Summons and Complaint were duly served upon Defendant Damir Adrovic on February 1, 2024, at 1:10 PM, by personally delivering 1 true correct copy of the above Summons and Complaint with the date and hour of service endorsed thereon, to someone at the workplace, who identified to be Defendant Damir Adrovic's employee. (See Exhibit F) [NYSCEF Doc No. 14]

Plaintiffs submit proof of an additional mailing (NYSCEF Doc No. 15) and affidavits of service of the motion (NYSCEF Doc Nos. 17-19). However, although plaintiffs' attorney, Jordan El-Hag, bears a name similar to the corporate plaintiff, he is not a party to this action; therefore, there is a failure to submit proof "by affidavit made by the party" of the facts constituting the claim. Other deficiencies include that there is no affidavit of mailing of a notice to the corporation that states service is being made pursuant to BCL § 306; that there is no showing that a notice of electronic filing was served on the individual defendants, as the affidavits of service identify the documents served as "Summons and Complaint"; and that there is no affidavit(s) showing that

each individual defaulting party is neither in active military service nor dependent on anyone else who is.

Accordingly, it is,

ORDERED that plaintiffs' unopposed motion for a default judgment against defendants is denied without prejudice to renew on proper papers; and it is further

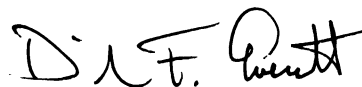
ORDERED that plaintiffs shall serve a copy of this Decision and Order, with notice of entry, on defendants by first class mail within seven days of the filing of this Decision and Order on NYSCEF; and it is further

ORDERED that plaintiffs shall file proof of service of this Decision and Order with notice of entry to NYSCEF within three days of service of the Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
January 14, 2025

ENTER:



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HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF