

Levine v Segal

2026 NY Slip Op 31597(U)

April 15, 2026

Supreme Court, New York County

Docket Number: Index No. 652317/2024

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42M

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RACHEL LEVINE,

Plaintiff,

- v -

EDO SEGAL, AYELET SEGAL

Defendants.

INDEX NO. 652317/2024

MOTION DATE 08/01/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for JUDGMENT - DEFAULT.

APPEARANCES:

Law Offices of Jaime Lathrop, P.C., Brooklyn, NY (Jaime Lathrop, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action, plaintiff RACHEL LEVINE (plaintiff) moves (motion sequence number 01), pursuant to CPLR § 3215, for an order granting it leave to enter a default judgment against defendants EDO SEGAL and AYELET SEGAL (defendants).¹ Defendants do not appear or submit opposition to the motion.

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

¹ Plaintiff does not specify the amount of damages she seeks against defendants, nor does plaintiff request an inquest to determine said amount of damages (see generally New York State Court Electronic Filing System [NYSCEF] Doc. No. 05, notice of motion, and Doc. No. 06, affirmation in support).

court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against [the defendant]" (CPLR § 3215 [a]). To establish entitlement to a default judgment, plaintiff must file (1) proof it served defendant with the summons and complaint, and (2) "proof of the facts constituting the claim, the default, and the amount due . . . by affidavit made by the party" (see CPLR § 3215 [f]; see also Woodson v Mendon Leasing Corp., 100 NY2d 62, 70 [2003] [providing that "an applicant for a default judgment [must] file 'proof by affidavit made by the party of the facts constituting the claim'"]; 231st Riverdale LLC v 7 Star Home Furniture Inc., 198 AD3d 524, 525 [1st Dept 2021]; Feffer v Malpeso, 210 AD2d 60 [1st Dept 1994])).

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 said defendant was not in military service at the time of the default (see 50 USC § 3931 [b] [1] [emphasis added]; 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]).

Here, plaintiff fails to submit an affidavit of non-military service as to either defendant. Instead, plaintiff relies on the affidavits of service, wherein the process server affirms that he "asked the person spoken to whether defendant was in active military service [] in any capacity whatsoever and received a negative reply" (NYSCEF Doc. Nos. 02 and 03, affidavits of service). However, the process server did not actually speak to anyone, rendering the source of this information unclear. In any event, even if the process server had spoken to someone, this would not constitute a proper affidavit of non-military service. Accordingly, the motion (seq. no. 01) must be denied.

Notwithstanding this defect, the affidavits of service pursuant to CPLR § 308 (4) are also defective² (see NYSCEF Doc. No. 45, affirmation of service). CPLR § 308 (4) provides that

² Plaintiff argues that defendants were served in accordance with CPLR § 308 (2). However, defendants were served pursuant to CPLR § 308 (4), given the summons and complaint were not delivered to a person of suitable age of discretion, but were instead affixed to defendants' door and mailed to defendants' last known residence after three failed attempts at service (see NYSCEF Doc. Nos. 02 and 03, affidavits of service).

"where service of process cannot be made with due diligence by personal delivery (CPLR § 308 [1]) or by the delivery and mail alternative (308 § [2]), service can be affected [] by affixing the summons to the door of . . . the actual . . . dwelling place or usual place of abode . . . of the person to be served and by . . . mailing the summons to such person at his or her last known address" (Spath v Zack, 36 AD3d 410, 411 [1st Dept 2007], quoting CPLR § 308 (4) [internal quotation marks omitted, emphasis added]).

"It is the movant's burden to establish that personal jurisdiction has been acquired over the person to be served and, in determining whether the requisite due diligence has been fulfilled, the focus is on the quality of such attempts, and not the quantity" (Lorna Y. v Jeffrey Z., 185 AD3d 1235, 1238 [3d Dept 2020]; Greene Major Holdings, LLC v Trailside at Hunter, LLC, 148 AD3d 1317 [3d Dept 2017] [holding that "what constitutes due diligence is determined on a case-by-case basis"]).

The affidavits of service reflect that plaintiff's process server made three attempts at service, all on weekdays, two of which were made during hours that defendants reasonably could be expected to be either at or in transit to work (see Kader v Kader, 132 AD3d 1376 [4th Dept 2015] [holding that due diligence requirement of CPLR § 308 (4) not satisfied where the process

server attempted to serve defendant three times, all on weekdays during normal business hours]).

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, within fifteen days from the date of this decision and order, plaintiff shall serve a copy of this order, with notice of entry, upon defendants; it is further

ORDERED that plaintiff shall bring a renewed default judgment motion within 90 days from the date of this decision and order; and it is further

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

4/15/2026
DATE

Emily Morales Minerva
EMILY MORALES MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: