

<b>Commissioners of the N.Y. State Ins. Fund v Winegard</b>
2026 NY Slip Op 31903(U)
May 4, 2026
Supreme Court, New York County
Docket Number: Index No. 451698/2024
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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COMMISSIONERS OF THE NEW YORK STATE  
INSURANCE FUND

Plaintiff,

- v -

GEORGE WINEGARD,

Defendant.

INDEX NO. 451698/2024

MOTION DATE 09/23/2025

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, 15

were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

Marschhausen & Fitzpatrick, P.C., Hicksville, NY (Kevin P. Fitzpatrick, Esq. of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action, plaintiff COMMISSIONERS OF THE NEW YORK STATE INSURANCE FUND (plaintiff) moves, pursuant to CPLR § 3215, for an order granting it leave to enter a default judgment against defendant GEORGE WINEGARD (defendant) in the amount of \$9,648.00, together with statutory interest from August 07, 2018, costs, and disbursements. Plaintiff also seeks attorneys' fees in the amount of \$2,122.56.

Defendant does not appear or submit opposition to the motion (sequence number 01).

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]). 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" (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 [1<sup>st</sup> Dept 2021]; Feffer v Malpeso, 210 AD2d 60 [1<sup>st</sup> Dept 1994]).

Here, plaintiff does not demonstrate its entitlement to entry of a default judgment against defendant. CPLR § 308 (4) provides that "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 affirmation of service pursuant to CPLR § 308 (4) is defective (see NYSCEF Doc. No. 04, affirmation of service). The affirmation of service reflects that plaintiff's process server made three attempts at service -- two of which were on the same day, and all three of which made during hours that defendant reasonably could be expected to be either at, or in transit to or from, 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 defendant; 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.

5/4/2026  
DATE

  
EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: