

Ji Ying Tan v Liang

2012 NY Slip Op 32683(U)

October 17, 2012

Sup Ct, Queens County

Docket Number: 13456/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

JI YING TAN, individually and as
shareholder and president of NAGY
SAS WIRELESS GROUP INC., et al.,

Plaintiffs,

-against-

GARY LIANG, et al.,
Defendants.

Index No. 13456/11

Motions
Date November 15, 2011
May 1, 2012

Motion
Cal. Nos. 37 and 21

Motion
Sequence Nos. 1 and 2

After a traverse hearing held on July 31, 2012, plaintiffs' motion for an order pursuant to CPLR 3215(a) to direct the entry of judgment in favor of the plaintiffs and against defendants Gary Liang, Yeechiu Chung Liang, Communication American Wireless Group Inc. (hereinafter collectively referred to as "Liang defendants") and the cross motion by defendants Gary Liang, Yeechiu Chung Liang, Communication American Wireless Group Inc. and Lifetime Technology Inc. (2008-Present) for an order granting dismissal of plaintiffs' Complaint pursuant to CPLR 3211 for lack of jurisdiction or alternatively, setting the matter down for a traverse hearing and the motion by defendant Cathay Bank to dismiss plaintiffs' Complaint pursuant to CPLR 3211(a) on the grounds that: (1) the Court lacks personal jurisdiction of the defendant Cathay Bank as said defendant was never properly served with process and (2) the Complaint fails to state a cause of action against defendant Cathay Bank, are hereby joined solely for purposes of disposition. After careful consideration of all of the testimonial evidence and the exhibits introduced at the hearing and having been afforded the opportunity to evaluate and access the demeanor and credibility of the witnesses who appeared herein, the court decides the motion and cross motion as follows:

PROCEDURAL HISTORY

In an order dated November 21, 2011, the cross motion of the Liang defendants was granted, solely to the extent that a traverse hearing was ordered to determine the propriety of service pursuant to CPLR 308 and to determine whether personal

jurisdiction was properly obtained over the Liang defendants and the remaining issues raised by the moving parties were held in abeyance pending disposition of the traverse hearing.

In an order dated June 27, 2012, and upon the consent of all of the parties on the record on May 29, 2012, defendant, Cathay Bank and the instantly moving parties consented on the record to conducting a traverse hearing to determine the propriety of service pursuant to CPLR 308 and to determine whether personal jurisdiction was properly obtained over all defendants including defendant Cathay Bank and that the remaining issues raised in Cathay Bank's motion shall be held in abeyance and shall be determined upon disposition of the traverse hearing.

DISCUSSION

At the traverse hearing, plaintiffs presented credible evidence in the form of testimony by Ye Shi, who at the time of the alleged services was not a licensed process server. Mr. Shi testified that on June 10, 2011 at defendant Gary Liang's business located on Kissena Blvd., he personally delivered to Gary Liang three copies of the Summons and Complaint, one for the individual defendant Gary Liang, one for corporate defendant Communication American Wireless Group Inc. and one for corporate defendant Lifetime Technology Inc. (2008-Present). In addition, he delivered a copy of the legal papers at a beauty salon "next door". He described Mr. Liang as a male, 5'4", 130-140 lbs., black hair and wearing a blue T-shirt. He said that he did not know Gary Liang personally, but knew him casually as a member of the Flushing business community and recognized him by his face.

On June 10, 2011 he delivered a copy of the legal papers to Cathay Bank at a bank branch located on Main Street. He said at the time of service "a lady come up to [him] identified herself as the person in charge and she accept the paper." He described her physically as being Asian, 40-50 years old, 5'5" and 100-120 lbs.

On June 11, 2011, he attempted to serve unsuccessfully, Yeechiu Chung Liang at an address in the Bronx, and two times at a building located at 147 Barley Avenue. On July 29, 2011, he went to a building he described as "her business location" on Kissena Blvd. where he delivered the papers to an Asian man named Daniel who "identified himself as manager or person in charge in the store at that time". He described the man as Asian, 20-30 years of age, 5'6", 150-180 lbs. and wearing an orange T-shirt.

On cross examination, Mr. Shi admitted that at the time of the alleged services, he was not a licensed process server.

Individual Defendant Gary Liang

Mr. Shi testified that he delivered the summons to Gary Liang personally and that he knew Mr. Liang as a person in the community. Mr. Shi's testimony clearly demonstrated that plaintiffs complied with the service requirements of CPLR 308(1). Defendant Liang's mere denials of receipt of process are insufficient to rebut plaintiffs' evidence (see, *Truscello v. Olympia Const., Inc.* 294 AD2d 350 [2d Dept 2002]). Defendant's bald assertion that he never received the Summons and Complaint is insufficient to dispute the veracity of the process server's testimony and affidavit (see, *Fairmont Funding Ltd. v. Stefansky*, 235 AD2d 213 [1st Dept 1997]). Such a properly executed affidavit of service created a presumption of receipt by defendant (see, *Kihl v. Pfeffer*, 94 NY2d 118 [NY 1999] (stating that a mere denial of receipt is not enough to rebut the presumption)).

The court does not credit the assertions of defendant Gary Liang. The court concludes that plaintiffs properly obtained personal jurisdiction over defendant Gary Liang when he was properly served pursuant to CPLR 308(1). As defendant, Gary Liang failed to present any evidence to rebut plaintiffs' prima facie case, that branch of Gary Liang's motion to dismiss the complaint on the ground that the court lacks jurisdiction over the defendant is denied.

Individual Defendant Yeechiu Chung Liang

Mr. Shi testified that he attempted to serve Ms. Liang by delivering the summons at "her business location" to an individual named Daniel. Plaintiffs have failed to make a prima facie showing that this service was proper and in compliance with any of the requirements of the CPLR. Although it is not clear whether plaintiffs are asserting that plaintiffs attempted to effectuate service pursuant to CPLR 308(2) which section permits service upon a natural person by "leaving it with 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", or pursuant to CPLR 308(4) which section requires a showing of "due diligence", in either case the plaintiffs have failed to make a prima facie showing that the summons was mailed to defendant Yeechiu Chung Liang as required under CPLR 308(2) and 308(4). As plaintiffs have failed to comply with all of the requirements of CPLR 308(2) or 308(4), the court lacks personal jurisdiction over the defendant Yeechiu Chung Liang.

Accordingly, the action is dismissed as against defendant Yeechiu Chung Liang based on plaintiffs' failure to properly effectuate service upon her.

Corporate defendants Communication American Wireless Group, Inc., Lifetime Technology and Cathay Bank

Mr. Shi testified that he served the Summons and Verified Complaint upon corporate defendants Cathay Bank, Communication American Wireless Group, Inc. and Lifetime Technology. Mr. Shi's affidavits of service on defendants Communication American Wireless Group, Inc., Lifetime Technology and Cathay Bank were admitted into evidence without objection. The affidavit of service for defendant Communication American Wireless Group Inc. states in pertinent part:

On June 10, 2011, the undersigned served the within Summons and Complaint upon Defendant, Lifetime Technology Inc., at 41-40 Kissena Blvd., Flushing, New York 11355. The undersigned served upon the aforementioned party through service by personal service: by delivering a true copy of the aforesaid document personally; the undersigned knew said person/corporation so served to be the person/corporation described.

The affidavit of service on defendant Lifetime Technology Inc. states in pertinent part:

On June 10, 2011, the undersigned served the within Summons and Complaint upon Defendant, Communication American Wireless Group Inc. at 41-40 Kissena Blvd., Flushing, New York 11355. The undersigned served upon the aforementioned party through service by personal service: by delivering a true copy of the aforesaid document personally; the undersigned knew said person/corporation so served to be the person/corporation described.

The affidavit of service on defendant Cathay Bank states in pertinent part:

In the afternoon of June 10, 2010,
at around 4:40 pm, I served upon,

by personal delivery, Defendant Cathay Bank located at 40-14/16 Main Street, Flushing, New York 11354, the Summons and Complaint, to an employee working at the Cathay Bank located at 40-14/16 Main Street, Flushing, New York 11354.

The employee of Cathay Bank receiving the papers is a slim and short Asian woman in her 50s sitting in the fifth booth of the open office area of the Cathay Bank.

The Summons and Complaint I delivered to the Asian woman of Cathay Bank was stapled together with a yellow law firm cover sheet.

CPLR 311(a)(1) provides that personal service upon a corporation shall be made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service".

The court determines that plaintiffs failed to establish a prima facie showing that plaintiffs made service in compliance with CPLR 311(1) with respect to the three moving corporate defendants. With respect to corporate defendants Communication American Wireless Group Inc. and Lifetime Technology Inc. (2008-Present), there is no evidence that the process server served anyone authorized by appointment or law to accept service on the corporation's behalf. Indeed, the affidavits of service on these two corporations are devoid of any statement as they do not even state a person to whom the legal papers were delivered. This deficiency was not cured by the testimony of the process server at the hearing.

With respect to corporate defendant Cathay Bank, the process server testified that he delivered the legal papers to an employee employed in one of Cathay Bank's branches. The employee was clearly not an officer, director, managing agent, or cashier of Cathay Bank and plaintiffs submitted no evidence that she was an agent authorized by appointment or law to accept service on Cathay Bank's behalf (*Hoffman v. Petrizzi*, 144 AD2d 437 [2d Dept 1988]). Moreover, while the employee may have agreed to accept the summons and complaint delivered by plaintiffs' process server, there is nothing in the record to show that the process

server made an inquiry to determine the relationship of the employee to Cathay Bank, what duties she performed, or whether she was authorized to accept service of process (*Persaud v. NYC Health & Hospitals Corp.*, 183 AD2d 705 [2d Dept 1992]). Under these circumstances, the court finds that plaintiffs failed to meet their burden of establishing that the defendant Cathay Bank was properly served.

As it has been determined that cross moving defendant Gary Liang was indeed properly served, the court will now address the remainder of plaintiffs' motion.

That branch of plaintiffs' motion to enter a default judgment against defendant, Gary Liang, is granted as to liability only as said defendant failed to appear, submit an Answer, or move with respect to the Complaint herein (see, CPLR 3215). Plaintiffs demonstrated the merits of their claim by submitting a Verified Complaint as part of their motion (see, CPLR 3215[f]; *Henriquez v. Purins*, 245 AD2d 337 [2d Dept 1997]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]).

The parties' remaining contentions are either without merit or academic in light of the court's determination.

Plaintiffs may proceed to a hearing on the assessment of damages (including reasonable attorneys' fees, costs and disbursements). The inquest to determine damages shall take place on Tuesday, January 29, 2013, 2:15 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York. Counsel for plaintiffs is directed to file a note of issue/certificate of readiness on or before December 28, 2012; and counsel for plaintiffs is directed to contact the clerk of Part 6 at (718) 298-1113 on Monday, January 28, 2013 to ascertain the court's availability. In lieu thereof, plaintiffs may submit properly executed affidavits as proof of damages (22 NYCRR 202.46).

Plaintiffs are directed to attach a copy of this order upon filing the note of issue and statement of readiness.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: October 17, 2012

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Howard G. Lane, J.S.C.