Tan v Liang
2013 NY Slip Op 32461(U)
September 24, 2013
Sup Ct, Queens County
Docket Number: 13456/11
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

YI JING 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

Motion
Date November 29, 2012
March 15, 2013

Motion
Cal. Nos. 135 and 99

Motion
Sequence No. 3 and 5

	Papers Numbered
Notice of Motion No. 135 (Seq. #3).....	1-4
Amended Notice of Motion.....	5-6
Cross Motion.....	7-11
Order to Show Cause No. 99 (Seq. #5).....	1-4
Cross Motion.....	5-8
Opposition.....	9-11
Reply.....	12-14

Upon the foregoing papers it is ordered that the branch of defendant, Gary Liang's motion [Motion No. 135, Seq. #3)] to renew/reargue this court's decision dated October 17, 2012, which decision, inter alia, granted plaintiffs' motion for a default judgment on liability against defendant Gary Liang after the holding of a traverse hearing and that branch of defendant Gary Liang's motion for an order pursuant to CPLR 2004 and 3012(d) for leave to file an Answer on the ground that defendant filed a pre-Answer motion to dismiss [Motion No. 135, Seq. #3]; plaintiffs' cross motion for an order pursuant to CPLR 2221(d) to reargue the prior motion [Motion Sequence #2], taking into consideration Mr. Ye Shi's testimony dated May 29, 2012 and defendant Gary Liang's affidavit in cross motion, concluding that plaintiffs have properly conducted legal service on two corporations pursuant to CPLR 311(1), modifying this court's order dated October 17, 2012 which dismissed the Complaint against Communication Wireless Group Inc. and Lifetime Technology Inc (2008-Present), and

entering a default judgment against Communication Wireless Group Inc. and Lifetime Technology Inc (2008-Present); defendant, Gary Liang's order to show cause [Motion Sequence No. 5] for an order staying plaintiffs' inquest hearing pursuant to CPLR 2221, 2004, 3012(d) to vacate the default judgment entered against defendant Gary Liang and granting defendant an opportunity to file an Answer; and plaintiffs' cross motion for an award of attorney's fees and court costs in the amount of $4,795.00 are hereby joined solely for purposes of disposition of the instant motions and are hereby decided as follows:

1. Defendant Gary Liang's motion for reargument and renewal.

In a decision/order dated October 17, 2012, this court held, in relevant part:

> 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.
>
> * * *
>
> 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]).

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (*see*, *Schneider v. Solowey*, 141 AD2d 813; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410). Moving defendant fails to set forth any relevant facts that this Court overlooked or misapprehended, or any controlling principles of law that this Court misapplied. A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor is it designed for litigants to present the same arguments already considered by the court" (*see, Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]).

In the instant case, defendant Gary Liang states that defendant's previous counsel was incompetent and not diligent, and that is the reason for any oversights and argues that defendant should not be blamed for previous counsel's failures. After considering such argument, the court adheres to its prior determination.

Furthermore, defendant Gary Liang's instant argument that he served a cross motion to dismiss for lack of service on April 6, 2012 and so CPLR 3211(f) applies to extend his time to Answer is unavailing. Pursuant to CPLR 3211(f),

> (f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

In the instance case, defendant Gary Liang served his cross motion to dismiss for lack of jurisdiction well after the service of a responsive pleading to the summons was due. As such, the motion by defendant Gary Liang for reargument is denied.

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (*see*, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2d Dept 2000]); or the motion must demonstrate that there has been a change in the law that would change the prior determination. (*Id*).

Renewal is not applicable here because no newly discovered material facts have been submitted by defendant Gary Liang. Defendant Gary Liang argues for renewal on claiming that "the fact that the process server did not know Mr. Liang forms the basis of 'new facts' that Mr. Liang could not have brought prior to the traverse hearing" since current counsel was retained just a few days before the traverse hearing and before previous counsel gave them the entire file. The court finds that the process server, Ye Shi's testimony is not considered "new facts" within the meaning of CPLR 2221(e) and after considering such arguments, the court adheres to its original determination.

2. Defendant Gary Liang's motion to compel acceptance of a late answer.

That branch of defendant Liang's motion for an order pursuant to CPLR 2004 and 3012(d) granting an extension of time for defendants to appear and answer and to compel plaintiff to accept their answer to the Complaint is hereby granted. Pursuant to CPLR 3012(d), "Upon the application of a party, the court may

extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default".

The court finds since plaintiff, Yi Jing Tan and defendant Liang have multiple cases against each other currently pending in the New York State court system, including or not limited to, *Gary Liang, et al. v. Yi Jing Tan, et al.*, Index No. 7424/2008 (Grays, J.); *Lifetime Technology Inc., et al. v. Portables Unlimited, Inc., et al.*, Index No. 700043/2009 (Strauss, J.) (Appellate Division, Second Department affirmed Supreme Court order staying case and compelling arbitration; *Gary Liang, et al. v Yi Jing Tan*, Index No. 20994/2008 (Yablon, J.); *Gary Liang, et al. v. Yi Jing Tan, et al.*, Index No. 3038/2012 (Sampson, J.); *Gary Liang v. Yi Jing Tan*, Index No. 8155/2012 (Hart, J.); and *Lifetime Technology, Inc., et al. v. Yi Jing Tan*, Index No. 12016/12 (Nahman, J.), and defendant has been vigorously prosecuting and defending himself in those cases, in the interests of justice, defendant Liang shall be permitted to serve and file an Answer in the instant case. The court notes that the Summons and Complaint was served upon Mr. Liang on June 12, 2011 and Mr. Liang made a motion to dismiss for lack of service on April 16, 2012. Defendant Liang provided a potentially meritorious defense to plaintiffs' claim via his Proposed Answer which is attached to his cross motion as Exhibit J. Plaintiffs failed to demonstrate how it was prejudiced by the delay. The Appellate Division, Second Department has held that where there is a lack of prejudice to the plaintiff, a meritorious defense, and a 2½ month delay in serving the answer, in light of the public policy of resolving cases on the merits, such a delay in serving the answer should be overlooked (*Kaiser v. Delaney*, 255 AD2d 362 [2d Dept 1998]). The instant court notes that the defendant made a motion to dismiss for lack of service on April 16, 2012 and served the instant motion to serve a late Answer on October 26, 2012 (*see, Mulder v. Rockland Armor & Metal Corp.*, 140 AD2d 315 [2d Dept 1988], stating "[i]n view of the relatively short period of the delay, the absence of any claim of prejudice to the plaintiff, the existence of a possible meritorious defense, the absence of any willfulness on the appellants' part and the public policy in favor of resolving cases on the merits, the Supreme Court should have ... granted the appellants leave to file late answers]").

Accordingly, plaintiffs' motion for a default judgment against defendant Gary Liang is denied and plaintiffs are compelled to accept defendant Gary Liang's Proposed Answer

attached as "Exhibit J" to the instant motion, which is deemed served upon the plaintiffs.

3. Plaintiffs' cross motion for reargument.

That branch of plaintiffs' cross motion for an order pursuant to CPLR 2221(d) to reargue the prior motion (sequence number 2), taking into consideration Mr. Ye Shi's testimony dated May 29, 2012 and defendant Gary Liang's affidavit in cross motion, concluding that plaintiffs have properly conducted legal service on two corporations pursuant to CPLR 311(1), modifying this court's order dated October 17, 2012 which dismissed the Complaint against Communication Wireless Group Inc. and Lifetime Technology Inc (2008-Present), and entering a default judgment against Communication Wireless Group Inc. and Lifetime Technology Inc (2008-Present) is hereby granted as follows:

In a decision/order dated October 17, 2012, this court held, in relevant part:

> 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.

Plaintiffs contend that this court should grant plaintiffs' cross motion to reargue the prior motion pursuant to CPLR 2221(d) and modify the decision and order dated October 17, 2012 because Gary Liang received three copies of the summons and complaint on June 10, 2011 one copy for defendant Gary Liang, one copy for defendant Communication Wireless Group Inc. and one copy for defendant Lifetime Technology Inc. (2008-Present), and Gary Liang has always been the president of Communication Wireless Group Inc. and Lifetime Technology Inc. (2008-Present) and thus he is authorized to accept legal service on behalf of the two properties. Plaintiffs maintain that Gary Liang in his affidavit in support of his cross motion to dismiss admits that he is President of the two corporate entities, Communication Wireless Group Inc. and for defendant Lifetime Technology Inc. (2008-Present).

The court finds plaintiffs' arguments to be meritorious. The court determines that plaintiffs have established a prima facie showing that plaintiffs made service in compliance with CPLR 311(1) with respect to the defendants, Gary Liang, Communication American Wireless Group Inc. and Lifetime Technology Inc. (2008-Present), since the process server testified that he served three different summons to Gary Liang, one for defendant Gary Liang, one for defendant Communication Wireless Group Inc. and one for defendant Lifetime Technology Inc. (2008-Present); and Gary Liang, in his affidavit in support of his cross motion to dismiss admits that he is President of the two corporate entities, Communication Wireless Group Inc. and Lifetime Technology Inc. (2008-Present).

4. Plaintiffs' prior motion for a default judgment against corporate defendants.

As it has been determined that defendants, Communication Wireless Group Inc. and Lifetime Technology Inc. (2008-Present) were indeed properly served, that branch of plaintiffs' prior motion to enter a default judgment against corporate defendants Communication American Wireless Group Inc. and Lifetime Technology Inc. (2008-Present), which branch was previously denied is now granted, as to liability only as said defendants 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]).

Upon proof of filing a copy of this order with the note of issue and statement of readiness and compliance with all the rules of this court, this action shall be placed on the trial calendar for inquest for the assessment of damages (including reasonable attorney's fees, cost and disbursements) at the time of the trial of the matter as to the remaining defendants. *(Vierya v. Briggs & Stratton Corp.*, 184 AD2d 766,767 [2d Dept 1992] [inquest for damages against defaulting defendant to await end of trial against all defendants in interest of judicial economy]).

Additionally, the decision/order of this court dated October 17, 2012 is modified solely to the extent that the paragraph stating:

> 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)

shall be deleted and the following paragraph shall be placed in its stead:

> Upon proof of filing a copy of this order with the note of issue and statement of readiness and compliance with all the rules of this court, this action shall be placed on the trial calendar for inquest for the assessment of damages (including reasonable attorney's fees, cost and disbursements) at the time of the trial of the matter as to the remaining defendants (*Vierya v. Briggs & Stratton Corp.*, 184 AD2d 766,767 [2d Dept 1992] [inquest for damages against defaulting defendant to await end of trial against all

defendants in interest of judicial economy]).

5. Plaintiffs' order to show cause for stay of inquest hearing.

Plaintiffs' order to show cause for an order staying plaintiffs' inquest hearing pursuant to CPLR 2221, 2004, 3012(d) to vacate the default judgment entered against defendant Gary Liang and granting defendant an opportunity to file an Answer is denied as moot, as such inquest was, in essence, stayed by the court until the determination of the renewal/reargument motion which is the subject of the instant decision.

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

6. Plaintiffs' cross motion for sanctions and attorneys' fees.

That branch of plaintiffs' cross motion for an order pursuant to 22 NYCRR 130-1.1 awarding plaintiffs' counsel sanction and attorneys' fees due to the frivolous conduct of defendant, Gary Liang's counsel is denied for the reasons set forth hereinafter.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." At this stage, the court finds that the plaintiffs have not demonstrated that defendant's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have plaintiffs established sufficient cause to warrant sanctions *(see, Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of defendant Gary Liang has not risen to the level of frivolous.

Accordingly, that branch of plaintiffs' cross motion seeking sanctions is denied.

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

This constitutes the decision and order of the court.

Dated: September 24, 2013

.....
Howard G. Lane, J.S.C.