

McIntyre v Chen

2014 NY Slip Op 30320(U)

January 31, 2014

Sup Ct, New York County

Docket Number: 651127/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 651127/2013
MCINTYRE, JAMAAL GARY
vs
CHEN, DAVID
Sequence Number : 001
EXTEND TIME

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/31/14

CK, J.S.C.
CYNTHIA S. KERN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
J. GARY MCINTYRE and DAMON MCINTYRE,

651127/2013

-against-

DECISION/ORDER

DAVID CHEN, MICHAEL GIZA W,
TROY AHWAH and CITRINE LOUNGE LLC (aka
CITRINE LLC, d/b/a STUDIO XXI),

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action against defendants alleging, *inter alia*, fraudulent inducement to enter into a contract, fraudulent misrepresentation, fraud by omission, negligent misrepresentation, breach of contract and unjust enrichment. Plaintiffs now move for an order authorizing a ninety day extension of time to serve the Summons and Verified Complaint on defendants David Chen (“Chen”), Troy Ahwah (“Ahwah”) and Citrine Lounge LLC (“Citrine”). For the reasons set forth below, plaintiffs’ motion is granted.

The relevant facts are as follows. On or about March 28, 2013, plaintiffs commenced the instant action by filing a summons and verified complaint. Thereafter, plaintiffs then attorney

utilized a non-professional process server, David Cepeda ("Cepeda"), an alleged acquaintance known to all parties to attempt service upon defendants. On or about May 29, 2013, Cepeda personally served defendant Michael Gizaw ("Gizaw"). However, as to the remaining defendants, Cepeda allegedly attempted to personally serve Chen and Troy on three separate occasions as said defendants were attending events at various establishments but Chen and Ahwah, allegedly after seeing Cepeda upon leaving such events, retreated back inside the establishments and instructed security not to let Cepeda in. Thus, it is undisputed that personal service was never effectuated on either Chen or Ahwah. However, according to the Affidavit of Cepeda annexed to plaintiffs' moving papers, on or about May 30, 2013, Cepeda mailed the summons and verified complaint to Chen and Ahwah at their addresses listed on the summons. On or about June 27, 2013, Gizaw and Ahwah submitted a joint answer to the underlying action.

In or about August 2013, plaintiffs relieved their attorney of record, Kevin Sten, and retained the law firm of Zimmet Bieber, LLP ("Zimmet") to represent them in this action. After being retained, Zimmet reviewed plaintiffs' former attorney's file and discovered that Cepeda's affidavits of service omitted certain information pertaining to the actual service of process and that proper service was never effectuated on Chen, Anwah or corporate defendant Citrine as Gizaw was only served in his individual capacity. Thus, Zimmet contacted Mr. Robert Elan, attorney of record for Gizaw and Anwah to request that Gizaw and Ahwah accept service and that Gizaw further accept service on behalf of Citrine. Zimmet also inquired whether Chen had retained his services. In response, Mr. Elan allegedly stated that he did not represent Chen at the moment but it was possible that he may in the future. Additionally, by letter dated October 22, 2013, Mr. Elan wrote to Zimmet advising it that his office "has not been given the authority to

accept service of process on behalf of any or all named defendants.”

Pursuant to CPLR § 306-b, service of the summons and complaint must be made within 120 days after the filing of such. However, a court may extend the time in which to effectuate service of process “upon good cause shown or in the interest of justice.” CPLR § 306-b. Good cause requires a threshold showing that the plaintiff made reasonably diligent efforts to make timely service. *Leader v. Maroney*, 97 N.Y.2d 95 (2001). The interest of justice standard, on the other hand, “is intended to be an additional and broader standard to accommodate late service that might be due to mistake, confusion or oversight.” *Wideman v. Barbel Trucking*, 300 A.D.2d 184, 185 (1st Dept 2002) (internal quotation marks and emphasis omitted). Whether to grant an extension is left to the discretion of the court, which may consider “diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” *Leader*, 97 N.Y.2d at 105-106.

In the present action, the court finds that plaintiffs have shown good cause and it is in the interest of justice that plaintiffs’ time to effectuate service be extended. While plaintiffs failed to effectuate proper service on defendants Chen, Ahwah and Citrine within the required time-frame, it is undisputed that the person hired by plaintiffs’ former attorney made several attempts to timely serve said defendants but such attempts were averted by Chen and Ahwah. The court finds that these facts are sufficient to demonstrate that plaintiffs made reasonably diligent efforts to make timely service. Additionally, plaintiffs’ new attorney, upon discovering the lack of proper service, diligently and timely attempted to remedy the error by contacting Mr. Elan and by

making the instant motion. Moreover, defendants have failed to demonstrate any prejudice in granting the extension.

Accordingly, plaintiffs' motion is granted and it is hereby ORDERED that plaintiffs are granted an extension of ninety days from the date of this order to effectuate service of the summons and complaint on defendants David Chen, Troy Ahwah and Citrine Lounge LLC. This constitutes the decision and order of the court.

Dated: 1/31/14

Enter: CR
J.S.C.

CYNTHIA S. KERN
J.S.C.