

Pu v Lifeng Wang

2018 NY Slip Op 30929(U)

May 11, 2018

Supreme Court, New York County

Docket Number: 653757/2016

Judge: Debra A. James

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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**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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RICHARD PU

INDEX NO. 653757/2016

Plaintiff,

MOTION DATE 05/08/2018

- v -

LIFENG WANG, aka ALICE WANG,

MOTION SEQ. NO. 004 005

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 140, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 177, 178

were read on this application to/for

VACATE -

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 179, 180

were read on this application to/for

JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to vacate the default judgment entered on March 23, 2018 (Motion Sequence Number 004) is GRANTED, and the judgment entered on March 23, 2018 is VACATED; and it is further

ORDERED THAT the complaint is dismissed pursuant to CPLR 5015(a)(4); and it is further

ORDERED that the motion of plaintiff for a default judgment (Motion Sequence Number 005) is DENIED; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint, accordingly.

DECISION

By notice of motion dated August 29, 2016 (Motion Sequence No. 001), plaintiff sought "an order pursuant to CPLR 308(5) granting leave to serve defendant Lifeng Wang by mail at the address given by her in Newark, CA", specifically at **34972** Newark Boulevard, Newark, CA (emphasis added).

In his affirmation¹ in support of such motion, plaintiff attached a complaint dated March 10, 2015 and an affidavit of service, sworn on April 14, 2015, of such complaint in Lifeng Wang v Han Su, Index No. 152356/2015 (Supreme Court, New York County). Such complaint states that the residence of Lifeng Wang is **34972** Newark Boulevard, California, CA, and that the residence of Han Su is 75 Wall Street, Unit 29C, New York, New York 10005. The affidavit of service states that the summons and complaint were served on Han Su at her dwelling at 75 Wall Street, Unit 29C, New York, New York 10005.

Plaintiff's motion for leave to use alternative service in the action at bar was granted without opposition. The Order dated December 11, 2017 stated, in pertinent part:

"plaintiff shall effectuate service of process in this action by delivering the summons and complaint and a copy of this order with notice of entry, in an envelope bearing the legend "personal and confidential" and addressed to defendant tat 34972 Newark Boulevard, Newark, California, by regular first class mail, and as proof of service a certificate of mailing in the docket of the Clerk of the County of New York, within twenty (2) days of entry of this order".

By Order dated March 14, 2018, which resolved Motion Sequence Number 002 brought by plaintiff, this court granted plaintiff a judgment of default against defendant.

In her supporting papers on the motion to vacate such default (Motion Sequence Number 004), defendant shows that on plaintiff's motion seeking a default judgment, his supporting affidavits of service, which are appended to his moving papers, each list 34792 Newark Boulevard, as the address where process and the default motion papers were served on defendant, instead of the address where plaintiff sought leave to effectuate service upon defendant and that the court granted, which was **34972** Newark Boulevard.

Plaintiff does not deny the error, and thus, plaintiff did not accomplish "expedient" service that the court permitted pursuant to CPLR 308(5).

However, plaintiff now moves for leave for another default judgment (Motion Sequence Number 005). The basis of his motion is that on September 8, 2017, he caused service to be effectuated on plaintiff, by having his process server deliver

the summons and complaint to defendant's alleged residence at 75 Wall Street, Unit 29C, New York, New York 10005. However, the assertion of plaintiff that defendant resides at 75 Wall Street, Unit 29C, New York, New York 10005, is belied by the supporting papers that he filed in support of his motion for leave to serve defendant by mail at **34972** Newark Boulevard, Newark, CA. In the affidavit of service in such papers, the process server stated that he served one Han Su, at her resided at 75 Wall Street, Unit 29C, New York, New York 10005. In fact, in his memorandum of law in support of his motion for an order granting leave to serve process by mail on the Newark Boulevard address, plaintiff asserted "Plaintiff made concerted efforts to ascertain Defendant's true address, which Plaintiff believes, but cannot be sure is a Fremont, CA address...Plaintiff process server advised Plaintiff that, as the Fremont address, Defendant is avoiding service".

Thus, the evidence that plaintiff placed before the court on his motion for permission to use alternative, i.e. "expedient", service negates his current contention that defendant resides at 75 Wall Street, Unit 29C, New York, New

York 10005. Thus, he has not prima established that he properly served defendant at her residence in accordance with either CPLR § 308(1) or § 308(5) and therefore this court lacks subject matter jurisdiction over the defendant. The default judgment filed on Mach 23, 2018 must be vacated and the complaint dismissed pursuant to CPLR 5015(a)(4).

5/11/2018
DATE


DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

ⁱ CPLR 2106 (a) requires an attorney, who is a party to an action, to submit statements by affidavit, in lieu of an affirmation. As plaintiff pro-se is an attorney, his affirmation violated such rule.