

**Ming Xue Xir v 422 Sunshine Ct., LLC**

2020 NY Slip Op 34446(U)

September 15, 2020

Supreme Court, Kings County

Docket Number: 37578/2002

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 15 day of sept, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN  
JUSTICE

MING XUE XIR,

Plaintiff,

- against -

422 SUNSHINE COURT, LLC., YUXI LIU and XIA CHONG CHEN,

Defendants

Index No.: 37578/2002  
Motion Seq. # 11

DECISION & ORDER

Index No.: 526840/2019  
Motion Seq. # 1

XIAOHONG CHEN,

Plaintiff,

-against-

XIEMING XUE, et. al.

Defendants.

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

|  | <u>PAPERS NUMBERED</u> |
|--|------------------------|
| Notice of Motion, Affidavits, Affirmation and Exhibits | 1                      |
| Memorandum in Support                                  | 2                      |
| Affirmation in Opposition                              | 3                      |
| Memorandum in Opposition                               | 4                      |
| Reply Memorandum                                       | 5                      |
| Verified Petition                                      | 6                      |
| Amended Verified Petition                              | 7                      |

Upon the foregoing papers, Defendant, Xia Hong Chen ("Chen"), moves this Court for an Order pursuant to CPLR § 5015 vacating the judgment entered on January 13, 2010 against Defendants, 422 Sunshine Court, LLC ("LLC"), Yuxi Liu ("Liu") and Chen in the amount of \$681,752.09. In the action entitled XIAOHONG CHEN v XIEMING XUE brought under Index # 526840/2019, Chen moves to vacate a property execution and for an order granting a permanent injunction restraining Xieming Xue ("Xue" a/k/a Ming Xue Xir) from taking any

further action to enforce the judgment entered against her in the action brought under Index # 37578/02<sup>1</sup>.

BACKGROUND

Xue was injured while working at a construction site located at 422 49<sup>th</sup> Street in Brooklyn on May 9, 2002. Plaintiff commenced an action on or about September 17, 2002 pursuant to New York State Labor Law for injuries received while employed at a construction site. The property was owned by the LLC on May 9, 2002 and both the LLC and the prior owner, 422 49<sup>th</sup> Street Realty (“Realty”), were named as Defendants in the original action. Chen and Liu were the principals of the LLC and Realty but only Liu was named as a Defendant. At that time David H. Perlman, Esq. (“Perlman”) appeared on behalf of Liu, Realty and the LLC.

Subsequently, Plaintiff’s counsel moved to amend the complaint and add Chen as a Defendant. The motion was granted and Chen was allegedly served with process sometime in March 2004. Perlman submitted an answer on behalf of Liu, Chen, Realty and the LLC on or about March 23, 2004. After Plaintiff’s successful motion for summary judgment on liability, a jury trial was held to determine damages. On or about November 20, 2006 the jury awarded damages to Plaintiff in the amount of \$ 681,752.09 in total.

A judgment was entered and filed against the LLC, Liu and Chen on or about November 17, 2009. Other named Defendants, including Realty were let out of the case. Sometime thereafter, an execution of a lien was issued on property owned by Chen and delivered to the Sheriff of Kings County on or about July 15, 2019 to satisfy the judgment. On or about December 10, 2019 Chen moved by Order to Show Cause in the action brought under Index #

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<sup>1</sup> All references to the action refer to Index # 37578/2002 unless stated otherwise.

526840/2019 for a preliminary injunction/temporary restraining order, and pursuant to 1)CPLR § 6301 to prevent the Sheriff's sale of the property and 2) CPLR § 5239 for a proceeding against Plaintiff, the judgment creditor, to determine the parties' rights to the property or the debt.

ANALYSIS

Defendant Chen claims that she was never served with process and therefore the Court does not have jurisdiction over her. Further, she claims that the appearance by Perlman made on her behalf was unauthorized. Relying upon the decision in *Skyline Agency v Ambrose Coppotelli*, 117 AD2d 135 (2d Dept 1986), Chen argues that since Perlman did not have authority to represent her, the answer served on her behalf did not constitute her appearance and could not effectively waive her lack of jurisdiction defense. In *Skyline, Id.* the Coppotellis, Dominic and Frank, were brothers and with Alphonse, the father, were equal shareholders in their company. Their company entered into a brokerage agreement with Plaintiff. Thereafter, Plaintiff commenced an action against the company and the Coppotellis alleging that they breached the brokerage agreement. Dominic Coppotelli hired an attorney to represent him, his father, his brother as well as the company itself. Sometime thereafter the Coppotellis' attorney entered into a stipulation of settlement in open court, on behalf of the company and the three shareholders. When the Coppotellis failed to pay the settlement as per the stipulation, Plaintiff's attorney issued an execution, with garnishee, to three individuals who were indebted to Frank Coppotelli, under a mortgage.

Frank Coppotelli then moved for an order vacating the judgment entered against him. He claimed that he was never served with process and that he only became aware of the action and the judgment when an execution was levied upon the mortgage payments due to him,

three years after the action was commenced. Mr. Coppotelli further claimed that his brother Dominic hired the attorney without his knowledge or consent, he was not a party to the brokerage agreement and was never advised of the pendency of the action. After a hearing was held to determine whether service was effectuated upon Frank Coppotelli, the Court vacated the judgment as against him finding proper service was never effectuated. The Second Department disagreed with the lower court's finding that since there was no jurisdiction over Frank Coppotelli the the issue of whether the attorney's representation was authorized had become moot. The Appellate Court held that once a determination was made that no personal jurisdiction had been acquired over Frank Coppotelli, the lower court should have shifted its focus to the question of whether the attorney's appearance on Frank Coppotellis's behalf amounted to a waiver of the right to challenge jurisdiction. *Skyline, supra at 139.*

While a hearing was held to determine whether proper service was made on Frank Coppotelli in the Skyline case, no such hearing is required in the case at bar. Plaintiff served Chen via Nail and Mail service at an address where she had never lived nor worked. Chen made a prima facie showing that she was never served and Plaintiff did not submit any evidence to the contrary or request a hearing to determine if service was properly effectuated on Chen.

However, as the Second Department directed in *Skyline supra*, the Court is required to determine if Perlman's appearance on Chen's behalf served to waive any jurisdictional defense she may have had. The law is clearly established that an appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him/her and therefore confers personal jurisdiction over him/her, unless he/she asserts an objection to

jurisdiction either by way of motion or in an affirmative defense in the answer. ***Countrywide Home Loans Servicing, LP v. Albert, 78 A.D.3d 983, 984 (2d Dept 2010)***. The burden to prove that Perlman did not have authority to make the appearance on Chen's behalf rests with Chen. ***National Loan Investors, L.P. v. Piscitello, 21 AD3d 537, 537 (2d Dept 2005)***.

In the case at bar, Chen states that although she was aware of the lawsuit, she did not expect to be a Defendant in the action but never mentioned why that might be. She and Liu were equal business partners and she must have been aware that Perlman was representing her interests when he filed an answer on behalf of Realty and the LLC. Any claim to the contrary is not credible. Chen further claims that she was unaware of Plaintiff's injuries or the work being performed on property she owned. However, it was she who signed the construction contract with Xue's employer at 422 49<sup>th</sup> Street. Moreover, Liu testified at his deposition that Chen visited the work site regularly<sup>2</sup>.

Chen states in her Affirmation in Support of the motion to vacate the judgment against her that in March 2004 she resided at 463 53<sup>rd</sup> Street in Brooklyn. However, in the Affidavit in Support of Verified Petition, Chen states that in March 2004 she lived at 744 44<sup>th</sup> Street in Brooklyn. Then, in the Amended Verified Petition Chen claimed again that in March 2004 she resided at 463 53<sup>rd</sup> Street and that 744 44<sup>th</sup> Street was a prior address. Chen also submitted proof that mail sent to 744 44<sup>th</sup> Street was properly forwarded to her at 463 53<sup>rd</sup> Street in Brooklyn. Chen also claims that she never lived at 422 49<sup>th</sup> Street in Brooklyn, the site of Xue's injuries. However, 422 49<sup>th</sup> Street was listed as her home address on the business certificate filed with New York State for Realty. Chen also claims that she was unaware that she had been

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<sup>2</sup> Par 26 of Sass affirmation Ex B & L pp.10-11 & 22-23

added as a Defendant in the action until September of 2019. The actual Judgment entered in 2009 was served upon Chen at 744 44<sup>th</sup> Street.

The judgment was properly served in 2010 upon the LLC and Realty, businesses in which Chen was a partner. Chen claims she never knew she was even a Defendant in the case let alone receive notice of the judgment until 2019. Chen never explained why she did not become aware of the lawsuit and judgment in 2010 when it was served upon her business. It isn't credible that as a business partner she would not have become aware at that time.

Further Chen never states where she was residing in 2010; she only claims that she never lived at 422 49<sup>th</sup> Street. However, 422 49<sup>th</sup> Street was listed as her residence in Realty's business certificate filing with New York State. Chen's own submissions contradict the facts regarding her actual residence at any given time. According to Chen, her partner, Liu, did not inform her when the action was amended to add her as a Defendant. This also is not credible. Liu advised her that a lawsuit had been commenced against himself and their businesses. Why wouldn't he tell her that she had been added to the action? Chen did not submit an affidavit by Liu or any other documentation to support her claim that she had no notice of the action or judgment until 2019. While Perlman does corroborate Chen's claim that she did not hire him herself, she failed to establish that Liu, as her business partner, did not have the authority to hire counsel on her behalf. By Chen's own admission she was aware that Liu hired Perlman to represent her interests and appear on behalf of her two businesses, Realty and the LLC.

This Court agrees with Plaintiff and finds that Chen's affirmation and affidavits are not credible and are insufficient to support the requested relief. Therefore, Chen has failed to establish that Perlman did not have authority to represent her and therefore counsel's

appearance on Chen's behalf waived her jurisdictional defense. ***Residential Credit Sols., Inc. v Guzman, 178 AD3d 1109, 1110-11 (2d Dept 2019).***

The parties' remaining contentions are without merit. Accordingly, it is

ORDERED, that Plaintiff's motion to vacate the judgment entered against her (motion sequence # 11, Index # 37578/2002) is denied in its entirety, and it is further

ORDERED, that Plaintiff's motion for a permanent restraining order to prevent execution of the lien is denied in its entirety (motion sequence #1, Index # 526840/2019); and it is further

ORDERED, that Plaintiff's motion for a hearing to determine the rights of the debtor and creditor in the property is also denied in its entirety (motion sequence #1, Index # 526840/2019).

ENTER



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LOREN BAILY-SCHIFFMAN, JSC