

Liang Rui Pang v Henan Huimian, Inc.

2021 NY Slip Op 32591(U)

December 7, 2021

Supreme Court, New York County

Docket Number: Index No. 653827/2020

Judge: W. Franc Perry

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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. WILLIAM PERRY PART 23

Justice

-----X
LIANG RUI PANG, INDEX NO. 653827/2020
Plaintiff, MOTION DATE 05/26/2021
MOTION SEQ. NO. 001, 002

- v -

HENAN HUIMIAN, INC., YANMING MA **DECISION + ORDER ON MOTION**
Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 29, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 76

were read on this motion to/for ATTORNEY - FEES

Plaintiff Liang Rui Pang brings this purported class action against his former employer, Henan Huimian, Inc., a restaurant, and its owner, Yanming Ma, alleging that the Defendants violated multiple provisions of the New York Labor Law. In motion sequence 001, Plaintiff moves for default judgment, while Defendants cross-move to dismiss the complaint for defective service, or, in the alternative, for an extension of time to appear and answer. In motion sequence 002, Plaintiff moves for attorneys' fees and costs, while Defendants cross-move for sanctions.

Background

Henan Huimian is a Chinese restaurant located in Queens. (NYSCEF Doc No. 1, Complaint, at ¶ 6.) Plaintiff alleges that he was employed by Defendants as a miscellaneous worker, performing various tasks such as cleaning, cooking, and organization, from February 1, 2015 to November 30, 2015. (*Id.* at ¶¶ 23-24.) Plaintiff alleges that his regular work schedule

consisted of five 11-hour days and two 12-hour days, for a total of 79 hours per week, for which he was compensated biweekly at a rate of \$1500.00, with no overtime pay. (*Id.* at ¶¶ 25-33.)

Plaintiff commenced this action on August 14, 2020, setting forth the following claims under the Labor Law for: 1) overtime pay; 2) spread of time pay; 3) failure to provide meal periods; 4) failure to keep records; 5) failure to provide time of hire wage notice; and 6) failure to provide wage statements.

On April 16, 2021, Plaintiff moved for the entry of a default judgment in the amount of \$133,320.73, submitting a damages spreadsheet and an “affidavit of accounting” by John Troy, Plaintiff’s counsel, in support. (NYSCEF Doc No. 13, Troy Declaration Ms001, at ¶ 19; NYSCEF Doc No. 23, Pl.’s Memo; NYSCEF Doc No. 20, Spreadsheet; NYSCEF Doc No. 21, Aff. of Accounting.) Further, Plaintiff requests \$17,079.40 in attorneys’ fees and costs. (Troy Declaration Ms001 at ¶ 19; NYSCEF Doc No. 17, Attorney Invoice.)

Although the \$17,079.40 in attorneys’ fees and costs is sought in motion sequence 001, Plaintiff also filed motion sequence 002, for identical relief: attorneys’ fees and costs in the amount of \$17,079.40. (NYSCEF Doc No. 24, Notice of Ms002; NYSCEF Doc No. 25, Troy Declaration Ms002, at 20; *compare* NYSCEF Doc No. 26 *with* Attorney Invoice.)

Defendants filed their answer on May 28, 2021, setting forth one counter-claim for punitive damages in the amount of \$500,000.00 for Plaintiff’s frivolous lawsuit. (NYSCEF Doc No. 30, Answer, at ¶¶ 28-36.) Defendants allege that Plaintiff was never employed as a “miscellaneous worker,” but was actually a 50% owner of Henan Huimian, along with Defendant Ma, for the relevant period of February 1, 2015 through November 29, 2015. (*Id.* at ¶¶ 7-27.) Defendants further allege that Plaintiff failed to adequately manage the business and wanted to sell his 50%

stake to Defendant Ma, a transaction which was completed on November 29, 2015, with financing from Ma's cousin, Jianhai Liang. (*Id.*)

Defendants further filed their opposition to the motions, together with a cross-motion to 1) dismiss the complaint for defective service; 2) to extend time to answer and compel the acceptance of the already-filed answer; 3) to extend the time to appear and oppose Plaintiff's motion for fees and to deny the motion for default judgment and the motion for fees; and 4) to impose sanctions on Plaintiff. (NYSCEF Doc No. 33, Cross-Motion, at 10-11.)¹

Discussion

On a motion for leave to enter a default judgment, "the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.]" (CPLR 3215 [f]; *see also SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Service

Plaintiff alleges that service was proper upon both Defendants, and, in support, submits two affidavits of service indicating that on August 14, 2020, the process server personally served Defendant Ma at Henan Huimian. (NYSCEF Doc No. 9, Ma AOS.) Plaintiff alleges that service

¹ Defendants have filed the exact same set of documents in response to motion sequences 001 and 002. (*Compare* NYSCEF Doc Nos. 32-48 [ms001 response documents] *with* NYSCEF Doc Nos. 49-65 [ms002 response documents].) For the sake of clarity, the court will refer to the first set of documents only.

thus was proper upon Henan Huimian, pursuant to Business Corporation Law § 306, because Ma is the registered agent of Henan Huimian. (NYSCEF Doc No. 8, Henan AOS; Troy Declaration Ms001 at 3.) However, in his memorandum of law, Plaintiff suggests that service upon both Ma and Henan Huimian was properly effectuated pursuant to CPLR 308[2], by serving Ma, a “person of suitable age and discretion.” (Pl.’s Memo at 7.) Both affidavits of service contain a photograph of an individual wearing a chef’s hat looking at an envelope, who Plaintiff alleges is Defendant Ma. (Ma AOS at 2; Henan AOS at 2.)

Defendants allege that the complaint must be dismissed for defective service because the service “did not contain any name and address on the face of the [USPS] envelope and did not tell Defendant Yanming Ma the content of the documents inside the envelopes.” (Cross-Motion at ¶ 10.) Further, Defendants allege that Ma “did not take the USPS priority mail envelopes” “[o]ut of the precaution due to the COVID-19 pandemic,” and refused service, instructing the process server to take the envelope away, although it was ultimately thrown into the garbage by an employee to “prevent the transmission of the coronavirus.” (*Id.* at ¶¶ 15-17.) Defendants also allege that Plaintiff’s counsel and process server violated federal law by using a USPS envelope while they are not employees thereof, citing to a USPS webpage titled “How Do I Use or Reuse Boxes Properly?” in support. (*Id.* at ¶¶ 11-14.)

Preliminarily, Defendants’ cross-motion to dismiss the complaint for defective service is denied as it is utterly without basis in law. Defendants fail to identify any legal authority in support of their argument that service was improper (*Scarano v Scarano*, 63 AD3d 716, 716 [2d Dept 2009] [“a process server’s affidavit of service constitutes prima facie evidence of proper service”]), and, in fact, Ma’s affidavit entirely corroborates the account of the process server. (NYSCEF Doc No. 46, Ma Affidavit.) His mere refusal of service does not entitle the Defendants to dismissal.

To the extent that Defendants cross-motion is based on Plaintiff's use of a USPS envelope, such relief is denied.

Accordingly, the court finds that service upon Defendant Ma was proper, pursuant to CPLR 308[1].

To the extent that Plaintiff alleges that service upon Henan Huimian was proper via service upon Defendant Ma, pursuant to CPLR 308[2], Plaintiff is incorrect. CPLR 308[2] "is applicable only to actions against natural persons and is inapplicable to actions against corporations[.]" (*Perez v Garcia*, 8 Misc3d 1002[A], at *2 [Sup Ct, Bronx County, 2005], citing *Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984].) Additionally, to the extent that Plaintiff alleges that service upon Henan Huimian was proper pursuant to BCL § 306[a], Plaintiff is again incorrect. That provision provides that service may be made upon a corporation by serving its registered agent. However, Plaintiff's own submissions show that Defendant Ma is not a registered agent for Henan Huimian, but is its chief executive officer. (NYSCEF Doc No. 22.)

Personal service, however, may be made upon a corporation 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." (CPLR 311 [a][1].) Thus, the court finds that service upon Henan Huimian was proper, as Defendant Ma, the CEO thereof, was personally served.

However, Plaintiff fails to demonstrate compliance with CPLR 3215[g][3][i], which requires that a plaintiff moving for a default judgment against a natural person based upon nonpayment of a contractual obligation submit an affidavit of mailing indicating that a separate copy of the summons was sent by first-class mail to the individual defendant at his place of residence. (*Rodriguez v Indus. Finishing Products, Inc.*, 2019 WL 1771254, at *2 [Sup Ct, Kings

County 2019] [denying motion for default judgment in case for overtime wages for failure to comply with additional notice requirement of CPLR 3215].) The court notes that Plaintiff, in his opposition to the cross-motion, alleges for the first time that he sent a second copy of the summons to Defendants (albeit in an erroneous attempt to demonstrate compliance with CPLR 308[2] as discussed above), Plaintiff's allegation is insufficient. First, the exhibit submitted in support is not an affidavit, as explicitly required by the statute. Secondly, the "proof" is an undated picture of an unnamed, unseen individual holding an envelope bearing the address of Henan Huimian above the entry slot of a US mailbox. (NYSCEF Doc No. 70.) There is no indication that the envelope was ever sent, nor that it was sent via first-class mail. Finally, the address listed is not the individual Defendant's place of residence. Thus, the court finds that the "proof" of the additional mailing as required by CPLR 3215[g] is insufficient for the entry of default judgment against either Defendant, and Plaintiff's motion sequence 001 is denied. As such, there is no basis for attorneys' fees, and motion sequence 002 is denied.

The court grants the balance of Defendants' cross-motion to compel Plaintiff's acceptance of the concededly-late answer. Plaintiff waived his objection by failing to reject the answer and serving a reply to the counter-claim and allegations contained therein. (NYSCEF Doc No. 31; *Liberty Mut. Ins. Co. v Cooper*, 2019 WL 9077471, at *5 [Sup Ct, NY County 2019] [granting motion to compel acceptance of late answer where plaintiff failed to reject and filed reply to counterclaims].) Further, Plaintiff fails to demonstrate prejudice as a result of the delay. Thus, it is hereby

ORDERED that Plaintiff's motion sequence 001 for default judgment is denied; and it is further

ORDERED that Plaintiff's motion sequence 002 for attorneys' fees and costs is denied; and it is further

ORDERED that Defendants' cross-motion is granted only to the extent that Plaintiff is compelled to accept the answer of the Defendants.

12/7/21
DATE


WILLIAM PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE