

Big Yuk Chiu v Louzon
2022 NY Slip Op 32941(U)
August 31, 2022
Supreme Court, New York County
Docket Number: Index No. 154442/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

BIG YUK CHIU

Plaintiff,

- v -

CLAUDE LOUZON,

Defendant.

-----X

INDEX NO. 154442/2022

MOTION DATE 08/30/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

The motion by defendant to dismiss is denied and the cross-motion by plaintiff is granted to the extent that he may serve defendant via publication as described below.

Background

In this action to recover based on a guaranty, defendant moves to dismiss on the ground that he was never served. He claims that the affidavit of service, which asserts that defendant was served via “nail and mail” at an address on Prince Street in Manhattan, is not sufficient because he does not live there. Defendant claims in his affidavit that “Instead, I reside in Paris, France and have so resided there for many years” (NYSCEF Doc. No. 7, ¶ 5). But defendant does not say exactly where he lives in Paris.

In opposition and in support of his cross-motion, plaintiff asks for an extension of time to serve defendant, that he be permitted to serve defendant via his counsel or, in the alternative, for leave to serve defendant some other way. He emphasizes that the deed for a separate property (located on Thompson Street in Manhattan) lists the Prince Street residence as defendant’s

residence. Apparently, plaintiff tried to serve defendant at various addresses throughout Manhattan.

In reply, defendant insists that the affidavit of service is facially defective. He also claims that plaintiff's cross-motion is premature and that, in any event, plaintiff failed to establish the requisite due diligence for "nail and mail" service.

In reply to his cross-motion, plaintiff complains that defendant concealed his tax returns and demands that he be permitted to serve defendant through some alternative means.

Discussion

As an initial matter, defendant established that service was not properly effectuated through his affidavit in support of the motion and his non-resident tax returns. There is no reason to hold a traverse hearing to further explore this issue. Defendant swore he does not live in Manhattan and attached a document showing he lives in Paris (although his address is redacted).

"CPLR 308(5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4), which provide for service by personal delivery, delivery and mail, and affixing and mailing, respectively, are impracticable. The impracticability standard does not require the applicant to satisfy the more stringent standard of due diligence under CPLR 308(4) nor make an actual showing that service has been attempted pursuant to CPLR 308(1), (2), and (4). Once the impracticability standard is satisfied, due process requires that the method of service be 'reasonably calculated, under all the circumstances, to apprise' the defendant of the action" (*Jean v Csencsits*, 171 AD3d 1149, 1149-50, 99 NYS3d 348 [2d Dept 2019] [internal quotations and citations omitted]).

Here, plaintiff demonstrated that he identified a probable address for defendant—the Prince Street address. The deed for the Thompson Street property (another place where plaintiff tried to serve defendant) states that defendant lives at the Prince Street address (NYSCEF Doc. No. 16). And while defendant asserts that he lives in Paris, he redacted his address in Paris in the tax returns he submitted in connection with this record (NYSCEF Doc. No. 20). In reply, plaintiff pointed out that Google searches for defendant’s residence reveals only the Prince Street address and nothing in Paris.

That, of course, leaves plaintiff in a tough predicament, one that is obviously impracticable. He must now try to find where defendant lives in Paris and then spend the resources necessary to serve him via the Hague Convention. The Court declines to play along with defendant’s game of “Catch Me If You Can.” Defendant clearly knows about this case- having already learned about it due to plaintiff’s efforts- and so an alternative means of service is appropriate.

The Court declines to allow service by serving the attorney who brought the motion as plaintiff requests. If courts appointed the attorney as the defendant’s agent for service of process, then there would be no need for traverse hearings or any real attempts to properly serve defendants; no defendant could ever win a jurisdictional challenge if judges issued opinions saying, in effect, that “service was bad but just email the attorney defendant hired to challenge service to make it good.” Of course, it would also disincentivize parties from seeking counsel altogether.

Plaintiff did not provide an email address for defendant. That leaves publication as a means to serve. Therefore, plaintiffs may effectuate service via publication (*Fid. Nat. Tit. Ins. Co. v Smith*, 2015 N.Y. Slip Op. 32497[U] [Sup Ct, New York County 2015] [permitting service

by publication in a fraud and negligent misrepresentation case]). Undoubtedly, service by publication is a method of notice that is least calculated to notify a defendant about the case. However, posting notices in publications based in Manhattan (both of which have an online presence) about a case concerning a breach of a guaranty for a property located in Manhattan is sufficient under these circumstances.

After all, plaintiff alleges that defendant signed a guaranty in connection with a store *in Manhattan* and defendant now owes plaintiff nearly \$700,000. The Court finds there is no reason to make plaintiff hunt all over the world when plaintiff already showed that he followed the document trail in front of him and that defendant is fully aware of this action. Now defendant is also fully aware of the publications in which notice of this lawsuit will be published.

Accordingly, it is hereby


ORDERED that the motion by defendant to dismiss is denied and the cross-motion by plaintiff is granted to the extent that plaintiff may serve defendant by publication pursuant to CPLR 316, meaning that the summons, together with a brief statement of the action, the relief sought and the sum of money sought by plaintiff shall be posted in the *Irish Echo*, 309 Fifth Ave, New York, New York 10016 and the *New York Amsterdam News*, 2340 Frederick Douglass Boulevard, New York, New York 10027; and it is further

ORDERED that pursuant to CPLR 316, this service shall be made in each publication once each week for four consecutive weeks; and it is further

ORDERED that the first publication must be made within 30 days of the date of this order; and it is further

ORDERED that once service is completed, defendant shall answer or otherwise respond pursuant to the CPLR.

Remote Conference: November 2, 2022 at 11:30 a.m. By October 26, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial discovery or 3) letters explaining why no discovery agreement could be reached. The Court will then assess whether a conference is necessary. If nothing is uploaded by October 26, 2022, the Court will adjourn the conference.

<p style="text-align: center; margin: 0;">8/31/2022</p> <p style="text-align: center; margin: 0;">DATE</p>	<div style="text-align: center;">  ARLENE P. BLUTH, J.S.C. </div>															
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