

324-6 E 13 LLC v Bank
2007 NY Slip Op 31160(U)
May 3, 2007
Supreme Court, New York County
Docket Number: 0118486/2006
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PART 52

PRESENT
Index Number : 118486/2006

— 324-6 E 13 LLC

vs
BANK, CATHAY

Sequence Number : 002

REN

EX NO.

118486/2006

FILED DATE

3/7/07

FILED SEQ. NO.

002

FILED CAL. NO.

123

Renewal turnover

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

petition is decided in accordance with the annexed decision, order & judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: _____

5/3/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

ALL PAPERS MUST BE FILED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
324-6 E 13 LLC,

Petitioner/Judgment-Creditor,

-against-

CATHAY BANK,

Respondent/Garnishee,

YI SHI LIU,

Respondent/Judgment-Debtor

Index Number 118486/2006

Submission Date 3/7/07

Mot. Seq. No. 002

Cal. No. 123

**DECISION, ORDER
AND JUDGMENT**

Papers considered in review of this petition for a turn:

Papers	Numbered
Amended Notice of Motion.....	<u>1</u>
Affidavit of Service.....	<u>2</u>

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or interested parties must appear in person at the County Clerk's Office (1100m 1100m).

PAUL GEORGE FEINMAN, J.¹:

Petitioner-judgment creditor, 324-6 E 13 LLC, moves pursuant to CPLR 2221 to renew its application for an order directing the respondent, Cathay Bank, to allow a Marshal or a designated Sheriff of the City of New York, County of New York, to force open safe deposit box No. 3184 in the presence of a bank officer and to inventory the contents and permit the Marshal or Sheriff to take into possession any saleable items or cash. The application is premised upon the ground that the respondent-garnishee Cathay Bank, is the lessor of the safe deposit box to the respondent-judgment debtor, Yi Shi Liu, the contents of which are believed to contain funds sufficient to satisfy all or part of a judgment held by the petitioner. Petitioner also seeks attorney's fees incurred as a result of this proceeding. For the reasons stated below, the motion is

¹ The court acknowledges the assistance of law student intern Mark Radi in the drafting of this decision and order.

granted as to the turnover request and denied as to the award of attorney's fees.

PROCEDURAL BACKGROUND

Petitioner was awarded a judgment in a landlord-tenant matter in the amount of \$ 87,337 against judgment-debtor Liu by decision and judgment dated October 3, 2006 (*see* Amended Notice of Motion Ex. A). In attempting to enforce the judgment, petitioner sought to gain the contents of a safe deposit box registered to Liu located at Cathay Bank. The Bank has not granted permission to petitioner's request to open and turn over the contents of the box.

Petitioner commenced this special proceeding by notice of petition and petition dated December 18, 2006 seeking a judgment from the court directing Cathay Bank to force open the safe deposit box, inventory the contents, and turn over to the Marshal any saleable items or cash. By decision and order of this court dated January 30, 2007, the petition was denied without prejudice to renewal, based upon petitioner's failure to establish that it had fully complied with the service requirements of CPLR 308. Specifically, the court directed that petitioner submit more complete affidavits of service which reflect the basis of the process server's knowledge regarding Liu's actual place of business, a statement establishing that the statutory requirements of CPLR 308(2) had been met, and proof of service of the January 30, 2007 decision and order in addition to proof of service of any renewal motion.

By amended motion dated February 21, 2007, petitioner renews its application. As part of its application, it submits an affirmation by its attorney, Ranakdevi Chudasama, Esq., who states that he participated in the underlying summary proceeding and trial in Housing Court trial, and that petitioner presented evidence of various restaurants where Mr. Liu worked or had an ownership interest, and that Liu testified concerning his employment at certain of those

restaurants (Am. Not. of Mot., Chudasama Aff. ¶ 16). Petitioner also submits evidence to establish Liu's connections with several of those properties (Am. Not. of Mot. Ex. A, H, C, G, I)

According to the affidavit of the process server, Ron Schwartz, he served Liu on December 19, 2006, by serving the cashier at Riverdale Noodle, which was Liu's actual place of business, and a restaurant owned by Liu, according to an individual at the restaurant (Am. Mot. Schwartz Aff. ¶ 3). He mailed copies of the pleadings addressed to Liu at Riverdale Noodle, by first class mail, with a certificate of mailing, in a postpaid envelope bearing the legend "personal and confidential" without any indication that the communication was from an attorney (Am. Mot. Schwartz Aff. ¶ 5). In addition, he served Liu by serving the cashiers at Fresco Tortillas II and New Fres'co Tortillas Inc., the former a restaurant owned by Liu, as stated by his niece, the cashier, and the latter a restaurant on which Liu serves as the Chief Executive Officer, according to the New York State Department of State's website (Am. Mot. Schwartz Aff. ¶¶ 6, 9, 10). He mailed copies of the pleadings to Liu at these two restaurants in the same manner as he had at Riverdale Noodle (Am. Mot. Schwartz Aff. ¶¶ 8, 12). The Schwartz Affidavit identified the cashiers as persons of suitable age and discretion.

Petitioner also submits documentary evidence in support of its claims. Exhibit "E" is a copy of Yi Shi Liu's 2004 Federal Income Tax Return, which states that Yi Shi Liu is a partner in Riverdale Noodle Shop & Grill LLC (*see* Amended Notice of Motion, Ex. G). Exhibit "C" is a copy of Liu's 2004 Federal Income Tax Return, which states that Yi Shi Liu is the proprietor of New Fresco Tortilla II, with an address of 561-563 West 235th Street, Riverdale, New York, 10463 (*see* Amended Notice of Motion, Ex. G). Exhibit "I" is a copy of the listing in the NYS DOS, which indicates Liu is the Chairman or Chief Executive Officer of New Fres'co Tortilla's

Inc., located at 63 Reade Street, New York, New York, 10007. Additionally, according to petitioner, during the summary housing proceeding, Yi Shi Liu testified that he worked at this location.

Petitioner also submits affidavits of service establishing that the Amended Notice of Motion and the January 30, 2007 Decision and Order with Notice of Entry were served upon respondent at his actual places of business (*see* Amended Notice of Motion, Ex. J, K; Affidavits of Service of Andreee Boothe of February 21, 2007, and February 22, 2007, respectively).

LEGAL ANALYSIS

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e]). The granting of a motion to renew is discretionary. Here, petitioner’s unopposed motion to renew is based upon the submission of additional facts regarding the basis of the process server’s knowledge of Yi Shi Liu’s actual place of business as defined by CPLR 308(6), which were not presented to the Court in connection with the initial petition, although the petition was itself unopposed. For this reason, petitioner’s amended motion to renew is granted.

CPLR 308(2) provides that

“[p]ersonal service upon a natural person shall be made . . . by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served . . . proof of service shall identify

such person of suitable age and discretion and state the date, time and place of service”

CPLR 308(6) defines “actual place of business” as “any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.” Petitioner’s affidavits and attorney affirmation establish that the summonses were mailed by first class mail to Yi Shi Liu’s “actual place of business,” as defined by CPLR 308(6), in envelopes bearing the legend “personal and confidential” and did not indicate on the outside that the communications were from an attorney or concerned any actions against him. Petitioner has therefore established that all requirements of proper service pursuant to CPLR 308(2) have been met.

Accordingly, because petitioner has presented new facts that establish that it properly served respondent-judgment debtor Liu, its petition to allow a Marshal or a designated Sheriff of the City of New York, County of New York, to force open safe deposit box no. 3184 located at Cathay Bank in the presence of a bank officer and to inventory the contents and permit the Marshal or Sheriff to take into possession any saleable items or cash, in order to satisfy the judgment owed by Liu to petitioner, is granted. Petitioner, however, has made no showing of its entitlement to attorney fees pursuant to New York law and therefore this aspect of the petition is denied. It is

ORDERED that the petition is granted to the extent indicated and otherwise denied; and it is further

ORDERED and ADJUDGED that the respondent Cathay Bank is directed, upon receipt of a certified copy of this order and judgment, to allow a Marshal or designated Sheriff of the City of New York, County of New York, to force open safe deposit box no. 3184 in the presence of a bank officer and to inventory the contents and to allow said Marshal or designated Sheriff to

take into possession any saleable items or cash, to the maximum amount of \$ 87,337 so as to satisfy the judgment issued on October 3, 2006 against Yi Shi Liu; and it is further

ADJUDGED that upon such turn-over of any saleable items and cash funds, the respondent Cathay Bank shall be discharged of all liability on this safety deposit box to the extent of payment or turn-over is made.

This constitutes the decision, order, and judgment of the court.

Dated: May 3, 2007
New York, New York

Law George C. Sinna
J.S.C.



UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).