[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____ **J.S.C.** _____ **PART** 10

Index Number : 113969/2009

ALEXANDER, JOYCE

VS

TOA CONSTRUCTION CO., INC.

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. 113969/09

MOTION DATE _____

MOTION SEQ. NO. 002

for _____

_____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

FILED

SEP 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: SEP 13 2011

_____, J.S.C.
HON. JUDITH J. GISCHE
J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

JOYCE ALEXANDER

Plaintiff,

-against-

TOA CONSTRUCTION CO., INC.; YUK NAM KIM a/k/a RIKUO YAMAGATA; MASAKO YAMAGATA; KY DEVELOPMENT AND MANAGEMENT LLC and JOHN DOES 1-5 (said names being fictitious, it being the intention of plaintiff to designate any and all entities or individuals who exercised control over the subject property herein),

Defendants.

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DECISION/ORDER
Index No.: 113969/09
Seq. No: 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m [3215] [sep back]	1
Pltf's MTH affirm, exhs [sep back]	2
Pltf's memo of law [sep back]	3
Def's Opp w/ ACT affirm, exhs	4
Pltf's Reply w/ MTH affirm, exhs	5

Hon. Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action arising from an alleged trip and fall. Plaintiff Joyce Alexander ("Alexander" or "Plaintiff") now moves for the entry of a default judgment pursuant to CPLR § 3215 against defendants Yuk Nam Kim a/k/a Rikuo Yamagata ("Kim") and Masako Yamagata ("Yamagata") (collectively referred to as "Defendants") or alternatively, for this Court to devise a method of service upon defendants, pursuant to

CPLR § 308(5). Defendants oppose and claim that Plaintiff failed to serve them properly, and that they did not comply with the provisions of the Hague Convention, as ordered in a previous Stipulation.

Underlying Facts and Arguments Presented

This action was commenced on October 5, 2009 by the filing of the Summons and Complaint. Plaintiff alleged that she sustained severe injuries as a result of a trip and fall on the sidewalk in front of a building located at 400-406 West 57th Street in New York, New York, which was owned and maintained by the defendants. After three attempts at service on December 30, 2009, January 2, 2010 and January 5, 2010, Plaintiff claims that defendants Kim and Yamagata were served at their residence, 43 West 61st Street, Apt. 10F, New York, New York ("Premises") on January 5, 2010, by substituted service to "John Doe the Desk Clerk at the address." On the same day, January 2, 2010, a copy of the Summons of Complaint was mailed to each defendant at the Premises. Plaintiff subsequently moved for a Default Judgment on May 20, 2010, claiming that Defendants failed to Answer. Defendants filed a Cross-Motion to Dismiss the Complaint.

In the Cross-Motion, Defendants claimed that service upon Kim and Yamagata would only be proper if effected in Japan, where they allegedly reside, and made pursuant to the terms of the Hague Convention as it applies to Japan. Without waiving Plaintiff's arguments that service at the Premises was proper, Plaintiff agreed to withdraw her motion and effectuate service upon Defendants in Japan. Plaintiff claims that she spent over a year and thousands of dollars in attempting to effectuate service upon Defendants in Japan, only to be informed that Kim has been in a hospital for approximately one year. Notwithstanding, Plaintiff maintains that on December 5, 2010 defendant Kim was served

at 12, 2 Bancho, Chiyoda-ku, in Tokyo, Japan, by substituted service upon a person of suitable age and discretion. Despite the international process server's multiple attempts to personally serve defendant Yamagata, and although no one answered at the residence, plaintiff maintains that defendant Yamagata was properly served when it mailed a true copy of the Summons and Complaint, in a securely sealed, postpaid wrapper with the words personal and confidential written on it, bearing no indication that it was from an attorney or concerned actions against the person to be served. The mailing was made on February 14, 2011. Plaintiff claims that she also mailed the same to defendant Kim.

Based on the foregoing, Plaintiff maintains that the time for Defendants Kim and Yamagata to answer with respect to the Complaint has expired, and that she is entitled to a default judgment against them. In the alternative, Plaintiff submits to this Court that further attempts at service pursuant to CPLR § 308(1), (2) and (4) are impracticable and asks that the Court direct an alternative method of service of process upon defendants pursuant to CPLR § 308(5).

In opposing the instant Motion for Default Judgment, defendants Kim and Yamagata take issue with what they maintain are confusing and misleading claims on the one hand, and a failure to comply with the Stipulation between the parties, dated October 20, 2010, on the other hand. In that stipulation, the parties agreed that the Plaintiff would attempt to serve the Defendants in Japan pursuant to the Hague Convention, and not by substituted service in the United States. Specifically, the defendants point out that on December 8, 2010, the clerk of the Tokyo Civil Court invalidated the substituted service upon Kim which was through a relative and employee at TOA construction in Japan. Furthermore, Defendant takes issue that Plaintiff did not attempt to serve Kim at the

hospital, where he was residing. Additionally, Defendants allege that pursuant to the December 20, 2010 certificate of service, the service upon Yamagata was not completed.

In her reply affirmation, Plaintiff refutes Defendants assertions and maintains that a default judgment should be granted, or in the alternative requests that the court suggest an alternative form of service.

Discussion

[a] The Court lacks personal jurisdiction over the defendants Kim and Yamagata.

The Court does not have personal jurisdiction over defendants Kim and Yamagata because the Plaintiff has failed to properly serve process on the defendants Kim and Yamagata in this matter. Service pursuant to CPLR 308(2) is effected by, *inter alia*, "delivering the summons within the state to a person of suitable age and discretion at the *actual place of business, dwelling place or usual place of abode* of the person to be served . . . " (emphasis added). Furthermore, the Court of Appeals, in applying the analogous provision in CPLR 308(4), made clear that the dwelling place contemplated by the statute is one at which the defendant is actually residing at the time of delivery. See Feinstein v. Bergner, 48 N.Y.2d 234 (1979). Service at the actual residence enhances the likelihood of defendant's actual receipt of process. Delivery at the "last known residence," in contrast, will not meet this goal if defendant is not in actual residence. See Cuomo v. Cuomo, 144 A.D.2d 331 (2d Dept 1988). The Premises in New York cannot be accepted as the proper "dwelling place or usual place of abode" because Plaintiff has not established that it was the actual residence at the time of delivery.

Furthermore, the parties hereto stipulated, in an Order dated October 21, 2010, that:

(4) The time in which plaintiff is required to serve Defendants Yuk Nam Kim

a/k/a Rikuo Yamagata and Masako Yamagata with the Summons and Complaint is hereby equitably tolled to May 1, 2011 pursuant to C.P.L.R. 306(b) to give Plaintiff the opportunity to retain an international process server to effectuate service of process of these Defendants in Japan. Plaintiff intends to serve Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata in Japan under the provisions of the Hague Convention and not attempt service of the Summons and Complaint by substituted service in the United States unless authorized by the terms of the Hague Convention as it applies to Japan; and

(5) If Plaintiff fails to serve Defendants Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata with the Summons and Complaint by May 1, 2011, Plaintiff may seek a further extension of time from the Court based on Plaintiff's diligent efforts and other good cause shown."

The Plaintiff's attempts at service of process pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Convention") failed, due to a number of factors, including the invalidation of process by the Tokyo Courts. The invalidation was due, in part, to a lack of information regarding the addresses of the Defendants in Japan. It has long been held that "notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court." Feinstein v. Bergner, 48 N.Y.2d 234 (1979), CSC Holdings, Inc. v. Fung, 349 F.Supp.2d 613, 616 (E.D.N.Y. 2004). Since the Court does not have personal jurisdiction over the Defendants Kim and Yamagata, there is no basis for the court to grant a default judgment. Therefore, the motion for a default judgment is denied.

[b] Alternative service due to impracticality (CPLR § 308[5]).

CPLR § 308(5) provides that "personal service upon a natural person shall be made...in such a manner as the court, upon motion without notice, directs, if service is *impracticable* under paragraphs one, two and four..." (emphasis added). A showing of impracticability under 308(5) does not require proof of actual prior attempts to serve a party

under the methods outlined pursuant to Subdivisions (1), (2) or (4) of CPLR 308. See Tremont Federal Savings & Loan Assoc., v. Ndanusa, 144 A.D.2d 660, *app. denied* 73 N.Y.2d 918. In this case, the evidence demonstrates that plaintiff had information regarding the defendant's last known residence, which is not equivalent to the actual dwelling place or usual place of abode, which would allow for service pursuant to Subdivisions (2) or (4) of CPLR 308. See Feinstein v. Bergner, 48 N.Y.2d 234. Further, plaintiff's efforts to obtain information regarding the defendants' current residence and place of abode through ordinary means have proven ineffectual. This sufficiently demonstrates that the methods of service provided under CPLR § 308 (1), (2) and (4) would be "impracticable". See Franklin v. Winard, 189 A.D.2d 717 (1st Dept 1993).

Ren Yamagata, the son of defendants Kim and Yamagata, offered sworn affidavits on more than one occasion on behalf of his parents (as well as another defendant, TOA Construction) in this action. Mr. Yamagata has asserted that he played an integral role when his parents visited the United States. He further states that his parents are located in Japan. Clearly Mr. Yamagata acts as defendant's agent in this country for many purposes. Although he does not express authorization to accept service, he almost certainly has information about where this parent live in Japan. Given these unique circumstances, Plaintiff may issue a non-party subpoena to depose Ren Yamagata to obtain the addresses of the current residences of the defendants Kim and Yamagata, so that Plaintiffs may properly serve the defendants in Japan, in accordance with the terms of the Hague Convention.

[c] Plaintiff is granted extra time to serve process due to good cause and a showing of diligence (CPLR § 306-b).

The Court grants Plaintiff an extension of time to effect process upon defendants Kim and Yamagata. CPLR § 306-b provides that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or *upon good cause shown* or *in the interest of justice*, extend the time for service" (emphasis added). The "good cause" standard requires a showing of due diligence regarding service of the complaint. Slate v. Schiavone Const. Co., 10 A.D.3d 1 (1st Dept 2004). The "interest of justice" standard allows the court to consider diligence as "simply one of many relevant factors" Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95 (2001). Moreover, the court has discretion "to accommodate late service that might be due to mistake, confusion or oversight." Id., at 104-105.

The Court of Appeals has clarified that "good cause" and the "interests of justice" under CPLR § 306-b are separate standards. Id., at 104. In determining whether either standard warrants extension of the 120-day period for service, "[t]he statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative." Id. at 106. Arbeeny v. Kennedy Exec. Search, Inc., 31 Misc.3d 494, 500-02 [Sup. Ct. New York 2011]. Here, Plaintiff has made a showing of diligent efforts to serve the Defendants Kim and Yamagata. Kulpa v. Jackson, 3 Misc.3d 227 (Sup. Ct. Oneida 2004) (Plaintiff had good cause for extension of time in which to serve process pursuant to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, given difficulties of serving defendants in other countries.) Plaintiff first attempted to serve the defendants via substituted service but failed because the Premises were not their usual residence or place of abode pursuant to CPLR 308(2). Plaintiff then attempted to effect service in Japan, pursuant to the Hague

Convention, but that attempt was invalidated by the Tokyo Courts. Having shown "good cause," this court grants Plaintiff an extension of 120 days to serve the Defendants at their current residences, in accord with the Hague Convention, using the alternative method as provided in section [b].

Conclusion

Plaintiff's motion for a default judgment is denied. Plaintiff is given leave to serve a non-party subpoena on Ren Yamagata, ordering him to appear for a deposition for the purpose of obtaining the addresses of the current residences of the defendants Kim and Yamagata. The time for Plaintiff to serve process upon defendants Kim and Yamagata pursuant to the Hague convention is extended 120 day from the date of this order.

In accordance herewith, it is hereby:

ORDERED that Plaintiff Joyce Alexander's motion for a default judgment is denied at this time; and it is further

ORDERED that Plaintiff may serve a non-party subpoena on Ren Yamagata ordering him to appear for a deposition for the purpose of obtaining the addresses of the current residences of the defendants Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata; and it is further

ORDERED that the time for Plaintiff to serve process upon defendants Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata pursuant to the Hague convention is extended 120 day from the date of this order; and it is further

ORDERED that a control date is set for **February 2, 2012 at 9:30 am, part 10, room 232, 60 Centre Street;** and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
September 13, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.