

Li-Shan Wang v TIAA-CREFF Life Ins. Co.

2012 NY Slip Op 33026(U)

December 14, 2012

Supreme Court, New York County

Docket Number: 106689/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Index Number : 106689/2009
WANG, LI-SHAN
vs.
TIAA-CREFF LIFE INSURANCE
SEQUENCE NUMBER : 004
FIX METHOD OF SERVICE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 20 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 14, 2012

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
LI-SHAN WANG,

Plaintiff,

INDEX NO. 106689/09

-against-

TIAA-CREFF LIFE INSURANCE COMPANY aka
TEACHERS INSURANCE AND ANNUITY
ASSOCIATION, MICHELLE XU aka YUAN
MENAGER-XU aka MICHELLE YUAN-XU,
KAYA NEFTCI and KAAN NEFTCI, INFANTS, BY
THEIR MOTHER AND NATURAL GUARDIAN,
MICHELLE XU, MERVE NEFTCI, EMRE NEFTCI
and GUL NEFTCI,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
DEC 20 2012
NEW YORK
COUNTY CLERK'S OFFICE

In this action involving a dispute over the rightful beneficiary of a life insurance policy, plaintiff moves for an order pursuant to CPLR 308(5) authorizing service process on defendant Michelle Xu and her infant children by email. Defendant TIAA-Creff Life Insurance Co. ("TIAA") opposes the motion.

Defendant TIAA previously moved for an order dismissing the complaint for failure to join necessary parties. On April 23, 2012, this court issued a decision and order determining that Michelle Xu a/k/a Yuan Menage a/k/a Michelle Yuan Xu, Kaya Neftci, Kaan Neftci, Merve Neftci, Emre Neftci and Gul Neftci are necessary parties, and directing plaintiff to serve such parties within 60 days of service of a copy of the decision and order with notice of entry. The decision and order further provided that if plaintiff was unable to serve any of the necessary

parties, she should move, within 75 days, to be excused from such joinder under CPLR 1001(b), and such motion should include affidavits explaining plaintiff's efforts to serve the necessary parties and why such service could not be made. By a further order dated July 26, 2012, plaintiff's time to serve Ms. Xu and the time to move to be excused from such service were both extended.

Plaintiff is now moving pursuant to CPLR 308(5) for alternate service on Ms. Xu and her infant children by email. In support of the motion, plaintiff's counsel submits an affirmation that they timely served defendant Ful Neftci outside London, defendants Merve and Emre Neftci in Switzerland through the Hague Service Convention, but they did not succeed in serving Michele Xu. Plaintiff's counsel states that they were not able to service Michele Xu or her infant children under the Hague Convention – the papers were returned by the service agent from the Swiss government agency, with the advice that Ms. Xu no longer lived at the address they had for her in St. Sulpice Switzerland, from the Federal Court action, and that she had moved to an address in Shanghai, China. Plaintiff's counsel explains that they confirmed that the Shanghai address is “incomplete” and asked their service agent if it could obtain a full address from the Swiss government agency that provided the incomplete address; they were informed that the agency has no obligation to do so and it would not do so.

Under the circumstances, plaintiff is requesting leave to serve defendants Michelle Xu and her infant children by email to a specific email address, with copies of the amended summons and complaint by certified mail to her former New York attorney, Jonathan Warner, her brother in California, her Swiss attorney, and by regular mail to Ms. Xu at her last known

residence address. Plaintiff's counsel states that the email address for Ms. Xu is from plaintiff Ms. Wang, who "believe it to be a good address as she and Ms. Xu used to email each other." The attorney states that he attempted to contact Ms. Xu using the email address, but she did not respond; his email, however, was not returned as "undeliverable." The attorney also states that the brother's address was "often used by this insurer and by Ms. Xu to correspond concerning policy matters." He submits a copy of Ms. Xu's request to Transfer Ownership, sent to TIAA in January 2009, which provides her brother's address in Temple City, CA.

Plaintiff's counsel asserts that despite their best efforts they cannot locate Michelle Xu to serve her under CPLR 308(1), (2), (3) or (4), and that service by email with copies to two attorneys, and to her brother and to her last known address, "will likely apprise her of this action, of which she is already apprised – by virtue of her successful motion last year to dismiss the action on jurisdictional grounds."

Defendant TIAA opposes the motion, arguing that plaintiff has not made the necessary showing that service should be permitted by email because no attempts have been made to serve Ms. Xu in China, where she is believed to be residing. Defendant also argues that plaintiff has not made an evidentiary showing that the cost of pursuing Ms. Xu in China is prohibitive or that plaintiff will be unable to locate Ms. Xu or accomplish service. Defendant argues that the incomplete address in China from a document from the Swiss government, simply shows that service in Switzerland is impracticable, and does not show that plaintiff "fulfilled her obligation to locate Ms. Xu and serve her abroad." Defendant argues that the court has already determined that these parties are necessary, and that it will "suffer extreme prejudice by the absence of Ms. Xu and her minor children either as parties or witnesses."

In reply, plaintiff argues that the standard for service under CPLR 308(5) is “not exhaustion of attempts at service, but impracticability, and it is beyond me that counsel would lay the blame for the current situation with plaintiff, when it is the insurer who chose to ignore plaintiff’s claim when it still had the money and then, for reasons unknown, filed an interpleader action when it thought it had stopped payment of its checks to Ms. Xu and then didn’t realize for a year and a half it had not stopped the checks. Under the circumstances of this case it is most telling that insurer does not simply join in our application for alternative service.” Plaintiff argues that if they knew where Ms. Xu was in China, they would have to serve her under the Hague Convention, but neither her residence nor business address is known. Plaintiff’s counsel states that he told defendant’s counsel that his service agent advised that they could try to locate Ms. Xu in Shanghai at the cost of about \$1,000, with no prediction or guarantee of success. Plaintiff’s counsel argues that given Shanghai’s population of 23 million, and the fact that they have already spent \$1,875 to serve Emre and Merve, and to attempt to serve Ms. Xu, all in Switzerland, and spent \$1,400 to serve Gul outside London, “I thought it would be too much to ask plaintiff to spend an additional \$1000 for such an uncertain result.”

The court is authorized to permit expedient service under CPLR 308(5), where a plaintiff demonstrates that it is “impracticable” to serve a defendant under existing statutory methods. With respect to service on a natural person, a plaintiff need only establish that service cannot be made under CPLR 308(1), (2) and (4).¹ See Dobkin v. Chapman, 21 NY2d 490, 500 (1968); .

¹ Those methods are personal delivery, delivery on a person of suitable age and discretion and mailing, or “nail and mail” service if either of the first two methods cannot be made after “due diligence.”

Significantly, a showing of impracticability does not require plaintiff to establish actual prior attempts by each and every statutory method of service, or require proof of due diligence. See Contimortgage Corp v. Isler, 48 AD3d 732, 734 (2nd Dept 2008); Franklin v. Winard, 189 AD2d 717 (1st Dept 1993); Saulo v. Noumi, 119 AD2d 657 (2nd Dept 1986). For example, service on an individual has been held to be impracticable, where a plaintiff shows that efforts to locate a defendant, or to obtain information as to a defendant's address "through ordinary means," have failed. Franklin v Winard, *supra* at 717; accord Morgan Guaranty Trust Co v. Hauser, 183 AD2d 683 (1st Dept 1992); LTD Trading Enterprises v. Vignatelli, 176 AD2d 571 (1st Dept 1991). Gibson v Salvatore, 102 A.D.2d 861 (2nd Dept 1984); Snyder v. Alternate Energy, Inc., 19 Misc3d 954 (Civ Ct, NY Co, 2008).

Specifically, as to email service, the Appellate Division First Department holds that "there is nothing necessarily improper about the use of email service." Alfred E. Mann Living Trust v. Etirc Aviation S.a.r.l., 78 AD3d 137, 142 (1st Dept 2010). "Both New York courts and federal courts have, upon application by plaintiffs, authorized e-mail service of process as an appropriate alternative method when the statutory methods have proven ineffective," and "[s]ervice by email on foreign defendants covered by the Hague Convention has also been approved upon a proper showing." *Id* at 141-142 (citing Snyder v. Alternate Energy, Inc., *supra*; Popular Enterprises, LLC v. Webcom Media Group, Inc., 225 FRD 560 [ED Tenn 2004]; MPS IP Services Corp v. Modis Communications, Inc., 2006 WL 1049924 [US Dist Ct, MD Fla]).

Applying the foregoing principles, the court finds that plaintiff has adequately demonstrated that service on Michelle Xu is impracticable within the meaning of CPLR 308(5).

As detailed above, plaintiff's submissions show that diligent, albeit unsuccessful, efforts were made to serve Ms. Xu at her last known address in Switzerland, and to obtain information about her current address from the Swiss authorities who confirmed that she no longer resides in Switzerland and provided only an incomplete address in Shanghai, China. The record further establishes that at considerable expense, plaintiff employed an international service company which was unable to serve Ms. Xu in Switzerland, but succeeded in serving two other defendants in Switzerland and another defendant outside London. See LTD Trading Enterprises v. Vignatelli, supra.

Considering the facts and circumstances presented, the court concludes that service pursuant to CPLR 308(5) is warranted, and plaintiff is authorized to serve defendants Michelle Xu and her infant children by email to the specified email address, with copies of the amended summons and complaint by certified mail to her former New York attorney, Jonathan Warner, her brother in California, her Swiss attorney, and by regular mail to Ms. Xu at her last known residence address. In view of this conclusion, plaintiff's time to complete such service shall be extended 30 days from the date of this decision and order.

Accordingly, it is

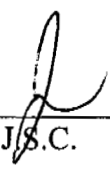
ORDERED that plaintiff's motion is granted and plaintiff is authorized to serve defendants Michelle Xu and her infant children by email to the specified email address, with copies of the amended summons and complaint by certified mail to her former New York attorney, Jonathan Warner, her brother in California, her Swiss attorney, and by regular mail to Ms. Xu at her last known residence address; and it is further

ORDERED that the time for plaintiff to serve process on defendant Michelle Xu and her infant children in accordance with the foregoing paragraph, including the certified mailings, is extended 30 days from the date of this decision and order; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for January 31, 2013 at 9:30 am.

DATED: December 14, 2012

ENTER:



J.S.C.

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DEC 20 2012
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