

Alexander v Tao Constr. Co., Inc.

2013 NY Slip Op 31074(U)

May 6, 2013

Supreme Court, New York County

Docket Number: 113969/09

Judge: Kathryn E. Freed

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SCANNED ON 5/17/2013

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Justice

PART 5

Index Number : 113969/2009
ALEXANDER, JOYCE
vs.
TOA CONSTRUCTION CO., INC.
SEQUENCE NUMBER : 004
DEFAULT JUDGMENT *CAL: #3*

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAY 17 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-6-13
MAY 06 2013


HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
JOYCE ALEXANDER,

Plaintiff,

DECISION /ORDER
Index No. 113969/09
Seq. No. 004

-against-

TAO 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).

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Defendants.

FILED
MAY 17 2013
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. KATHRYN E. FREED:

In this personal injury action, plaintiff moves pursuant to CPLR§ 3215 (a) for a default judgment in her favor or, alternatively, for an order pursuant to CPLR §306-b and§ 308 (5) extending the time for service and devising an alternative method of service of the summons and complaint upon defendants Yuk Nam Kim a/k/a Rikuo Yamagata (Kim) and Masako Yamagata (Masako) (collectively defendants). Plaintiff also requests costs to defray the expenses associated with her failed attempts to serve process on defendants.

Factual and procedural history:

Plaintiff commenced the instant action in October 2009, alleging that she was injured as a result of a slip and fall on the sidewalk in front of a building located at 400-406 West 57th Street in Manhattan which was owned by the defendants. Plaintiff claims that, on January 5, 2010, defendants were served by substituted service at their residence located at 43 West 61st Street in New York by

delivering the summons and complaint to a person of suitable age and discretion and mailing copies of the summons and complaint to each defendant at the New York residence.

Defendants failed to answer or otherwise move against the complaint in a timely fashion and plaintiff moved for a default judgment based on their failure to respond. Defendants cross-moved to dismiss the complaint claiming that service on them would only be proper if effected, pursuant to the Hague Convention, in Japan, where defendants allegedly reside.

Thereafter, the parties entered into a stipulation whereby they agreed to withdraw the motion and cross-motion. Defendant TOA Construction Co., Inc. agreed to accept service of process and answer the complaint and the parties also agreed:

“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 will 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;”

(Hensley aff, exhibit I)

Plaintiff claims that she spent over a year and thousands of dollars attempting to effectuate service upon defendants in Japan, only to be informed that Kim had been hospitalized for approximately one year. Nevertheless, Alexander attempted to serve Kim at his residence at 12, 2 Bancho, Chiyoda-ku, in Tokyo upon a person of suitable age and discretion followed by a mailing. Masako was allegedly served at the same address by mail.

When defendants failed to answer the complaint, Alexander once again moved for a default judgment on the complaint, or, alternatively, she asked the court to devise an alternative method of service. Defendants opposed the motion on the ground that on December 8, 2010, the clerk of the Tokyo Civil Court invalidated the substituted service on Kim. Thus, they argued that the service on Masako was not completed.

In a decision dated September 13, 2011, Justice Judith Gische held that Alexander's service upon the defendants in New York was invalid because plaintiff did not establish that the apartment on 61st Street was the defendants actual residence at the time the summons and complaint was delivered. Moreover, Justice Gische held that, "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." (Hensley aff, exhibit N)

The court denied plaintiff's request for a default judgment because it did not have jurisdiction over defendants. However, it granted the branch of the motion that sought an extension of time to effect service and it directed plaintiff to serve defendants "at their current residences in accord with the Hague Convention, using the alternative method as provided in section [b]" (*id.*). The court also ordered defendants to produce their son, Ren Yamagata (Ren), for a deposition to conclusively determine where his parents reside in Japan, so that they could be properly served in that country (*id.*).

Ren appeared for a deposition on November 23, 2011. According to his testimony, Kim resides at Takatsuki Byouin Hospital, Tokyo-to Haoji-Shi Mishita-Cho, 178-4, Room Higashi 2 and Masako resides at 2 Bancho 12, Chiyoda-ku, Tokyo Japan 102-0084 (Hensley aff, exhibit Y, p 26;

p 35-36).¹ He also testified that he held power of attorney to receive documents on his parents' behalf (Hensley aff, exhibit Y, p 63 and exhibit Z)

Thereafter, plaintiff attempted to serve process on Kim and Masako by delivering the summons and complaint to Ren in New York and by attempting to serve the defendants at the above designated addresses in Japan according to Article 10 (b) of the Hague Convention (Hensley Aff, exhibits AA and BB).²

On March 26, 2012, plaintiff was advised that attempted service on Masako in Japan was unsuccessful because, contrary to Ren's testimony, Masako "has been repeatedly hospitalized due to dementia. And now the addressee does not live at the given address." On April 27, 2012, Alexander was advised that attempted service on Kim, in the hospital in Japan, was unsuccessful because the data related to the place of service was not clear (Hensley aff, exhibits EE and FF).

Parties positions:

In support of the motion for a default judgment, plaintiff argues that she effected proper service upon the defendants in New York either through service on a person of suitable age and discretion in 2010 at their "residence" on 61st Street in New York or through service, in November

¹ Ren Yamagata also testified that Masako lives at the above address but that she might be found at her daughter's house a block away (Hensley aff, exhibit Y, p 36). However, there is no evidence that Masako resides at her daughter's house.

² Article 10 (b) of the Hague Convention states:

" [p]rovided the State of destination does not object, the present convention shall not interfere with – b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of the judicial documents directly through the judicial officers, officials or other competent persons of the State of destination".

2011, on Ren Yamagata in New York, as defendants' alleged agent for service of process in this matter. In addition, plaintiff contends that she is entitled to a default judgment because the service on defendants in Japan pursuant to the Hague Convention, was proper in both 2010 and 2012.

Alternatively, plaintiff takes the position that if a default judgment is not entered, then good cause exists for the extension of time to effect service of process because she has exercised due diligence in attempting service and defendants have acted to evade service of process. Moreover, she argues that the interests of justice will be served because, if the matter was dismissed for lack of service, the applicable statute of limitations may bar her personal injury claims. Additionally, plaintiff asks the Court to devise an alternative method of service because service pursuant to the Hague Convention has proven to be impractical.

In opposition to the branch of the motion that seeks a default judgment, defendants contend that this court has not acquired jurisdiction over them. First, they claim that the law of the case bars plaintiff's assertion that the Court acquired jurisdiction over them via the 2010 substituted service in New York or the first attempt to serve them, in Japan, pursuant to the Hague Convention. Moreover, they argue that the attempted service on Ren Yamagata in New York was ineffective because he had not been an appointed agent for service of process in this matter and because the Court ordered plaintiff to serve them in Japan, in accordance with Article 10 (b) of the Hague Convention. Finally, it is their position that the second attempt to serve them in Japan pursuant to the Hague Convention failed because neither of them received the summons or complaint.

Defendants also claim that plaintiff's request for a new method of service is barred by law of the case; that she has failed to show that service pursuant to the Hague Convention is impractical; or that she has been diligent in her attempts to serve the defendants. In addition, they argue that the

motion to extend time for service must be denied because the previous extension expired more than a month before plaintiff made the current application.

Conclusions of law:

A. That branch of the motion that seeks a default judgment against defendants is denied because this Court does not have jurisdiction over those defendants (*see e.g. Martinez v Nguyen*, 102 A.D.3d 555, 555-556 [1st Dept 2013]). Although plaintiff has attempted to serve process on many occasions, both in New York and Japan, service has never been perfected.

Defendants correctly argue that law of the case bars plaintiff's reliance on the substituted service on them at their New York apartment (Hensley aff, exhibit N ["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"]) and the first purported service on them in Japan (*id.* ["attempts at service of process pursuant to the Hague Convention . . . failed, due to a number of factors . . . "]) to establish jurisdiction.

Moreover, the service on Ren failed to confer jurisdiction because there is no evidence that defendants specifically designated him as their agent for service of process in accordance with CPLR§ 318. CPLR§ 318 provides, in pertinent part that, "a person may be designated by a natural person . . . as an agent for service in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon." In the case at bar, plaintiff's reliance on the powers of attorney which give Ren the power over "all matters pertaining to the sale of real property and improvements located at 400-406 West 57th Street, New York, NY . . . including executing any and all agreements, undertakings, documents instruments or certificates and taking all actions necessary to effectuate the Sale" is without merit because those powers of attorney, by their terms,

limit Ren's authority to matters pertaining to the sale of the property (Hensley aff, exhibit Z; Bednarczyk v. Kiese, 188 A.D.2d 794, 795 [3d Dept 1992] [person designated as agent for defendant pursuant to power of attorney was not agent for service of process under New York law where there was no conformity with CPLR§ 318]).

Moreover, although Ren testified that his parents orally told him that he could communicate, on their behalf, with the attorney regarding this lawsuit (Stabbert aff, exhibit A, p 59), he did not state, or produce a writing indicating, that he had been appointed defendants' agent to accept service of process on their behalf in this matter (Wichlenski v. Wichlenski, 67 A.D.2d 944, 947 [2d Dept 1979] ["the designation must be in writing, must have the consent of the agent endorsed thereon, and must be filed in the office of the County Clerk"]).

In addition, the service upon Ren does not qualify as substituted service pursuant to CPLR §308 (2) because, as stated above, the defendants did not have a usual place of abode in New York.

Finally, the documents demonstrate that, although plaintiff attempted service on defendants, in Japan, pursuant to the Hague Convention in December 2011, that service was not perfected because the addresses supplied by Ren were insufficient (Hensley aff, exhibits EE and FF).

B. Plaintiff's request pursuant to CPLR§306-b to extend the time for service is granted because she has shown good cause and diligence in her prior attempts to serve the defendants with process.

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”³. In Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 103-104 [2001]), the Court of Appeals found that the statute grants courts two separate standards by which to measure an application for an extension of time to serve – “good cause” and “interest of justice”. “A ‘good cause’ extension requires a showing of reasonable diligence in attempting to effect service upon a defendant” (Henneberry v. Borstein, 91 A.D.3d 493, 496 [1st Dept 2012]). In Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 31-32 [2d Dept 2009] [internal citations omitted]) the court stated that, “good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control.” In Kulpa v Jackson, 3 Misc.3d. 227, 235-236 [Sup Ct, Oneida County 2004]), a case cited in Bumpus, the court noted that difficulties with service abroad through the Hague Convention would qualify for a “good cause” extension (*see also Henneberry*, 91 AD3d at 496).

However, even if this case did not qualify for an extension for “good cause”, it would qualify for an extension in the “interest of justice”. Under the interest of justice standard, a court “may consider [plaintiff’s] diligence, or lack thereof, along with any other relevant factor . . . , including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to the defendant” (*see Leader*, 97 NY2d 105-106).

In this case, plaintiff’s attempts to serve defendants have been unsuccessful. However, she has sufficiently demonstrated due diligence in attempting service abroad, by relying on information

³ CLPR 306-b is applicable where service, timely made within the 120-day period, is found to be defective (Earle v Valente, 302 AD2d 353, 354 [2d Dept 2003])

obtained from defendants' son and attempting service through the Hague Convention protocol. Moreover, while the action was timely commenced by proper filing, plaintiff's claim against these defendants would be extinguished without an extension since the statute of limitations will have expired. Furthermore, although the first 120-day extension granted by the court had expired approximately one month before plaintiff made this application, the one month delay is de minimus, particularly in light of the fact that the defendants have failed to show any prejudice (Leader, 97 N.Y.2d at 107).

C. Plaintiff's request that the court direct an alternative method of service is granted. CPLR §308 (5) vests a court with the discretion to direct an alternative method of service of process, "if service is impracticable under paragraphs, one, two and four of this section."

In this case, plaintiff has shown that service is impractical pursuant to sections one, two and four of CPLR § 308 as the evidence establishes that defendants do not have an actual dwelling place or usual place of abode in New York. Moreover, the attempts to serve pursuant to the Hague Convention have been fruitless due to circumstances beyond plaintiff's control.

Defendants' argument that service pursuant to the Hague Convention is mandatory is without merit. The United States Supreme Court has held that although the Hague Convention "preempts inconsistent methods of service prescribed by state law in all cases to which it applies" (Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 [1988]), it has also made clear that, the Hague Convention is not mandatory "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause" (*id.* at 707 ["the Due Process Clause does not require as official transmittal of documents abroad every time there is service on a foreign national."]).

The inquiry then turns to whether service on defendants' attorney in the underlying litigation, the Law Office of Alan C. Tractman, will comply with New York law and is consistent with due process.

CPLR§308 (5) provides for alternative service. The statute states that if service upon a natural person is impractical under sections one, two and four, service on the individual may be made in any manner the court directs. Here, the evidence demonstrates that service under CPLR§ 308 (1) (2) and (4) was impractical, as was service pursuant to the Hague Convention. Under the circumstances, where "invention" of a method of service is necessary, it is reasonable to expect that service on counsel providing a defense for Kim and Masako in the underlying action, would provide them with "notice reasonably calculated, under all the circumstances, to apprise the [defendants] of the pendency of the action and afford them an opportunity to present their objections" (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 [1950]; *see also* Dobkin v. Chapman, 21 N.Y.2d 490, 501-502 [1968]; Invar Intl. Inc. v. Zorlu Enerji Elektrik Üretim Anonim Şirketi, 86 A.D.3d 404, 405 [1st Dept 2011]; Yamamoto v. Yamamoto, 43 A.D.3d 372, 373 [1st Dept 2007] [service of process on New York attorney for defendant residing in Japan only denied because there had been no showing that service pursuant to Hague Convention was impractical]).

Plaintiff's request for costs to defray the cost of effectuating service in Japan is denied. Here, there is no evidence to establish that her inability to perfect service in Japan was deliberately caused by defendants.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff Joyce Alexander's motion is granted to the extent that the time for her to serve process upon defendants' Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata

is extended 45 days from the date of service of this order with notice of entry; and it is further

ORDERED that service of process upon defendants Yuk Nam Kim a/k/a Rikuo Yamagata and Masako Yamagata, by personal service upon defendants' counsel, Mr. Alan Trachtman, Esq. by plaintiff shall be deemed good and sufficient service; and it is further

ORDERED the motion is otherwise denied; and it is further

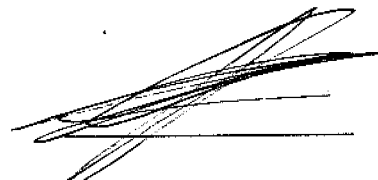
ORDERED that plaintiff shall serve a copy of this order on defendants and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: May 6, 2013

ENTER:

MAY 06 2013



Hon. Kathryn E. Freed

^{JSC}
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
MAY 17 2013
NEW YORK
COUNTY CLERK'S OFFICE