

Wong v Liu & Shields, LLP

2015 NY Slip Op 31122(U)

June 5, 2015

Supreme Court, Kings County

Docket Number: 504446/2014

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

PATRICK WONG and LING CHEN,

Plaintiffs,

DECISION / ORDER

-against-

**Index No. 504446/14
Motion Seq. No. 2**

**LIU & SHIELDS, LLP, CAROLYN SHIELDS and
YING LIU,**

Defendants.

FILED
KINGS COUNTY CLERK
2015 JUN 29 AM 8:39

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss the complaint.

Papers	Numbered
Notice of Motion, Affidavit, Memorandum and Exhibits Annexed ...	<u>1-8</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>9-15</u>
Reply Affirmation.....	<u>16</u>
Other: _____	_____

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendants, a law firm which operates as a limited liability partnership (LLP), and the firm's partners, as individuals, move pre-answer to dismiss plaintiffs' complaint pursuant to CPLR § 3211, claiming 1) the first and second causes of action are time barred [CPLR § 3211(a)(5)], 2) the complaint and each and every fact alleged fail to state a cause of action [CPLR § 3211(a)(7)] and 3) the court does not have jurisdiction over the individual defendants [CPLR § 3211(a)(8)]. Plaintiffs oppose the motion. For the reasons stated herein, the motion is granted as to the individual defendants and denied as to the defendant Liu & Shields, LLP.

The court must first note that, though defendants fail to acknowledge it in their papers, they made virtually the same motion previously, and it was denied after argument on November 13, 2014. The decision on the prior motion states "The branch of the motion to dismiss for improper service on the individual defendants is denied as moot with leave to renew, as a second service was made on July 31, 2014, after the motion was filed and [the new] affidavits of service were timely filed."

The decision went on to deny the balance of the motion, without leave to renew, because of movants' failure to annex a copy of the complaint, and because of the insufficiency of the motion as regarded the other claims, as it failed to make out a prima facie case for dismissal. Specifically, the only affidavit by a party in support of the motion was solely addressed to the issue of improper service. The affirmation of defendant Carolyn Shields could not be considered as an attorney may not affirm if she is a party defendant.

JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

As noted, the court granted movants leave to renew on the issue of whether the plaintiff properly served the individual defendants. In their motion, each of the individual defendants takes issue with the manner of the second attempt at service upon them of the summons and complaint¹, which they aver does not comply with the requirements of CPLR § 308. They are correct.

The notarized affidavits of service of Harold Howell, a licensed process server, state that each defendant was served with the summons and verified complaint on July 31, 2014 at 41-60 Main Street-Suite 208-A, Flushing, New York by delivering a true copy of the

¹Service upon the defendant LLP was through the Secretary of State and is not contested herein.

papers to a suitable age person, a male unwilling to give his name but duly authorized to accept service on behalf of the defendant. The affidavits also aver that the premises is each defendant's "actual place of business-dwelling house-usual place of abode-within the state."

Each affidavit goes on to aver that the process server also enclosed a copy of the papers in a post-paid sealed wrapper properly addressed to defendant *at defendant's last known residence* at 41-60 Main Street-Suite 208-A, Flushing, New York and deposited said wrapper in a post office official depository under the exclusive care and custody of the United States Postal Service within New York State. This constitutes service under CPLR § 308(2).

Neither individual defendant objects to the delivery of the summons and complaint to a person of suitable age and discretion. Both individual defendants object to the mailing.

The defendants assert that the process server did not indicate when the summons and complaint were mailed. This is not accurate. The affidavits of service on both defendants indicate the mailing was done the same day as the in-hand service. This is sufficient.

Both defendants also object that they never received the mailing. Certainly, defendants are correct in arguing that an affidavit of service asserting a mailing is not by itself conclusive once there has been a sworn denial of receipt. See, *Empire National Bank v Judal Construction*, 61 AD2d 789 [2nd Dept 1978]; *Dime Savings Bank v Steinman*, 206 AD2d 404 [2nd Dept 1994]. But the denial is not by itself conclusive either.

However, there is a more important reason why the service is defective. The public internet attorney registration database of the Unified Court System indicates that both individual defendants have their *business address* at the firm of Liu & Shields LLP, located

at 41-60 Main Street-Suite 208-A, Flushing, New York. The New York State Department of State (DOS) Division of Corporations Entity Information indicates Liu & Shields' principal office is located at 41-60 Main Street-Suite 208-A, Flushing, New York, as is their DOS address for service of process. Plaintiff's affidavit of service on defendant Liu & Shields LLP indicates it was served by service upon the Department of State, which means it was ultimately sent to 41-60 Main Street-Suite 208-A, Flushing, New York. Plaintiff's own complaint indicates that defendant Liu & Shields LLP does business at 41-60 Main Street-Suite 208-A, Flushing, New York.

A search of the website of the New York City Department of Buildings indicates that the certificate of occupancy for 41-60 Main Street-Suite 208-A, Flushing, New York is "commercial," not "residential."

As such, the court must conclude that the individual defendants were served at their place of business, and not at their residence as is indicated in the affidavit of service.

CPLR § 308 (2), states in relevant part:

"by 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 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 . . ."
[emphasis added]

The affidavits of service in the instant matter do not indicate that the envelopes mailed to the individual defendants at their place of business were labeled "personal and confidential", nor do they indicate that they did not bear any indication that they came from a lawyer or concern a law suit. In fact, the affidavits do not even indicate that the envelopes

were sent to the individual defendants at their place of business.

Since the plaintiff failed to comply with the prescribed statutory conditions, personal jurisdiction over the individual defendants was not acquired, and the complaint must be dismissed as against them. See, *Mastropierro v Bennett*, 233 AD2d 483 [2nd Dept 1996]; *Pesner v Fried*, 166 AD2d 512 [2nd Dept 1990]; *Broomes-Simon v Klebanow*, 160 AD2d 973 [2nd Dept 1990].

STATUTE OF LIMITATIONS AND FAILURE TO STATE A CAUSE OF ACTION

The branches of the motion addressed to defendant's claims regarding the statute of limitations and the alleged failure to state a cause of action are procedurally defective, as they violate the "one motion" rule of CPLR 3211(e) which provides that "[a]t any time before service of the responsive pleading is required, a party may move [to dismiss] on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted". The rule precludes successive motions in these circumstances. See, e.g. *Ramos v City of New York*, 51 AD3d 753, 754 [2nd Dept 2008].

As the court did not grant defendants leave to renew on these branches of their prior motion, movants' are now limited to moving for leave to renew. CPLR § 2221, the primary statute governing motions affecting a prior order, or to wait until they can move for summary judgment.

The instant motion does not seek leave to reargue, is not based upon any matter of fact or law allegedly overlooked by the court, and was not brought within thirty days of the prior decision. It thus fails to meet the statutory requirement for a motion to reargue.

As regards a motion for leave to renew, CPLR § 2221 states, in relevant part:

e) A motion for leave to renew:

- * 6]
1. shall be identified specifically as such;
 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The instant motion does not identify itself specifically as a motion to renew, is not based upon new facts that would change the prior determination or demonstrate there has been a change in the law, and does not contain any justification for the failure to present those facts on the prior motion. It thus fails meet every statutory requirement for a motion to renew.

Therefore, the branches of the motion which seek to dismiss the complaint as time barred or on the grounds that it fails to state a cause of action must be denied.

CONCLUSION

The motion to dismiss is granted as to the individual defendants for failing to effectuate proper service, without prejudice, and denied as to the Liu & Shields, LLP defendant.

This shall constitute the Decision and Order of the Court.

Dated: June 5, 2015

ENTER :



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

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