

Wong, Wong, & Assoc., P.C. v Zhang Ya

2019 NY Slip Op 31692(U)

June 10, 2019

Supreme Court, New York County

Docket Number: 655307/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 655307/2018

WONG, WONG, & ASSOCIATES, P.C.,

Plaintiff,

01/28/2019,
02/11/2019,
03/08/2019

MOTION DATE

- v -

MOTION SEQ. NO. 001 002 003

ZHANG YA, CEFC CHINA ENERGY COMPANY LIMITED, CHINA
ENERGY FUND COMMITTEE

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11
were read on this motion to/for ALTERNATE SERVICE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16,
17, 18, 19
were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 20, 21, 22, 23, 24,
25, 26, 27, 28, 29, 30
were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover an unpaid balance due for legal services, the plaintiff law firm, Wong, Wong, & Associates, P.C., moves pursuant to CPLR 308(5) for leave to serve the amended complaint upon the defendant Zhang Ya (Zhang) through an electronic communication program called WeChat (SEQ 001), pursuant to CPLR 306(b) to extend its time to serve the defendant CEFC China Energy Company Limited (CEFC) (SEQ 002), and pursuant to CPLR 3215 for leave to enter a default judgment as against the defendant China Energy Fund Committee (China Energy) (SEQ 003). No opposition is submitted. The motions for leave to serve Zhang by alternative means and to extend time to serve CEFC are granted, and the motion for leave to enter a default judgment as against China Energy is denied without prejudice to renewal upon proper papers.

"It is well established that CPLR 308(5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR 308 (1), (2) and (4) are 'impracticable.'" Home Fed. Sav. Bank v Versace, 252 AD2d 480, 480 (2nd Dept. 1998), quoting CPLR 308 [5]; see State St. Bank & Trust Co. v. Coakley, 16 AD3d 403, 403 (2nd Dept. 2005). "Although the impracticability standard 'is not capable of easy definition' [Markoff v South Nassau Community Hosp., 91 AD2d 1064, 1065, affd 61 NY2d 283], it does not require the applicant to satisfy the more stringent standard of 'due diligence' under CPLR 308(4), or to make a showing that 'actual prior attempts to serve a party under each and

every method provided in the statute have been undertaken.” Astrologo v Serra, 240 AD2d 606, 606 (2nd Dept. 1997), quoting Kelly v Lewis, 220 AD2d 485, 485 (2nd Dept. 1995). Due process requires only that the method approved by the court be reasonably calculated to apprise the defendant of a pending lawsuit. See Harkness v Doe, 261 AD2d 846 (4th Dept. 1999); see also Henderson-Jones v City of New York, 87 AD3d 498, 506 (1st Dept. 2011).

The plaintiff avers that it attempted to serve defendant Zhang at her last known address in Manhattan, but was not able to do so because Zhang no longer resides there. The plaintiff’s process server attempted to perform a postal search to locate Zhang, but was unsuccessful. The plaintiff, which was retained by Zhang in connection with an underlying criminal action, states that its last communications with Zhang took place just before Zhang left the country for China. Zhang did not tell the plaintiff that she was not returning to the United States, or that she was not retaining her Manhattan apartment.

The plaintiff previously communicated with Zhang through a program called WeChat, an electronic communication application popular throughout Asia. The plaintiff avers that while Zhang was in China and still a client of the plaintiff, the plaintiff’s managing partner communicated with Zhang numerous times through WeChat. The plaintiff also served Zhang with a fee arbitration form through WeChat. The plaintiff now seeks leave to electronically serve Zhang with the amended complaint through WeChat.

While service of process by private messaging application is not directly authorized by either the CPLR or the Hague Convention, the plaintiff has pled facts indicating that Zhang cannot be served according to traditional methods and would be likely to receive the summons and complaint through WeChat message. Accordingly, the plaintiff’s motion for leave to serve Zhang by alternative means is granted to the extent that the plaintiff shall serve the summons and complaint upon Zhang via the electronic communication program called WeChat, using the contact last utilized by Zhang to communicate with the plaintiff, within 30 days of the date of this order.

CPLR 306-b permits the court to extend the time for service “upon good cause shown or in the interest of justice.” “[W]hile ‘good cause’ requires a showing of reasonable diligence, ‘the interest of justice’ standard has a broader scope, which can encompass late service due to ‘mistake, confusion or oversight, so long as there is no prejudice to the defendant.” Baumann & Sons Buses, Inc. v Ossining Union Free School Dist., 121 AD3d 1110 (1st Dept. 2014) *citing* Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 (2001); see Nicodene v Byblos Restaurant, Inc., 98 AD3d 445 (1st Dept. 2012); Henneberry v Borstein, 91 AD3d 493 (1st Dept. 2012). Furthermore, CPLR 2004 provides that “the court may extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and upon good cause shown.”

Here, the plaintiff has alleged that it made a prior, ineffective attempt to serve the defendant CEFC in China. The instant motion was made within the 120-day period provided by CPLR 306-b. The plaintiff has thus shown good cause. Further, there is no apparent prejudice

to CEFC in granting the motion. Therefore, the plaintiff's motion to extend its time to serve CEFC is granted to the extent that the time for service is extended for 90 days.

As to the plaintiff's motion for leave to enter a default judgment against the defendant China Energy, CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477, 478 (1st Dept 2013); Beltre v Babu, 32 AD3d 722, 723 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiff fails to meet that burden.

As to the facts constituting the underlying claims here, the plaintiff submits, *inter alia*, the unverified summons and complaint and an unnotarized affirmation of its managing member. An unverified complaint is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, *supra*, at 723; see Martinez v Reiner, *supra*, 478; Joosten v Gale, *supra*, at 535. Similarly, the affirmation of the plaintiff's managing member is unnotarized, and is thus without evidentiary value.

Further, "[a]lthough an attorney is authorized to submit an affirmation in lieu of an affidavit in most situations (CPLR 2106), 'even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action.'" LaRusso v Katz, 30 AD3d 240 243 (1st Dept. 2006), quoting Slavenburg Corp. v Opus Apparel, 53 NY2d 799, 801 n (1981). Thus, "[a]n attorney who is an active litigant on his [or her] own behalf cannot subscribe to an affirmation for the entry of a judgment." Schutzer v Suss-Kolyer, 57 AD2d 613, 613-614 (2nd Dept. 1977). While any declarant may employ a notarized affirmation in lieu of an affidavit if he or she has religious objections to swearing an oath (see Slavenburg Corp. v Opus Apparel, *supra*), the affirmation of the plaintiff's managing member was unnotarized, and there is no indication that he affirmed rather than swore to the contents of his statement on religious grounds.

In light of the foregoing, the plaintiff has not submitted proof of the facts constituting its claims and thus is not entitled to judgment on default at this juncture, even assuming, without deciding, that service was properly made upon China Energy.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 308(5) (SEQ 001) seeking to serve the defendant Zhang Ya by alternative means is granted and the plaintiff shall serve the summons and complaint upon Zhang Ya via the electronic communication program called WeChat, using the contact last utilized by Zhang Ya to communicate with the plaintiff, within 30 days of the date of this order, and such service shall be deemed good and effective service; and it is further,

ORDERED that the plaintiff's motion pursuant to CPLR 306-b (SEQ 002) seeking an extension of time to serve the summons and complaint upon the defendant CEFC China Energy Company Limited is granted to the extent that service shall be made within 90 days of the date of this order; and it is further,

ORDERED that the plaintiff's motion pursuant to CPLR 3215 (SEQ 003) for leave to enter a default judgment against the defendant China Energy Fund Committee is denied without prejudice to renewal upon proper papers.

This constitutes the Decision and Order of the Court.

6/10/2019
DATE

NMB
NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| SEQ 001 | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| SEQ 002 | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| SEQ 003 | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |