

Cao v Qiao Yun lu

2020 NY Slip Op 31420(U)

May 11, 2020

Supreme Court, New York County

Docket Number: 653507/2019

Judge: Barbara Jaffe

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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. BARBARA JAFFE **PART** **IAS MOTION 12EFM**

Justice

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JEFF CAO,

Plaintiff,

- v -

INDEX NO. 653507/2019

MOTION DATE _____

MOTION SEQ. NO. 001

QIAO YUN LU, WEN QING CHAU, LOU WAN,
MING YUNG LEE,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17-23, 28-34 were read on this motion to dismiss.

By notice of motion, defendant Qiao Yun Lu moves pursuant to CPLR 3211(a)(8) and 3012(b) for an order dismissing the complaint, or in the alternative, additional time to serve a responsive pleading. Plaintiff opposes and, without notice of cross motion, cross-moves pursuant to CPLR 3012(d) for an order compelling Lu to accept plaintiff’s verified complaint.

By summons with notice dated June 16, 2019, plaintiff commenced this action, by alleging, among other things, unlawful wage practices in violation of the Labor Law. (NYSCEF 20). An affidavit of service dated September 2019 reflects, as pertinent here, that in August 2019, a domestic corporation was served the summons with notice by personally serving a copy on “Qiao Yun Lu, et al.” (NYSCEF 21).

On September 27, 2019, Lu’s counsel filed a notice of appearance and demanded a complaint from plaintiff. (NYSCEF 22). On November 13, 2019, plaintiff filed his verified complaint. (NYSCEF 23).

On December 13, 2019, plaintiff filed an amended affidavit of service dated December 11, 2019, reflecting that Lu had been personally served on August 31, 2019. (NYSCEF 32).

Lu contends that the court lacks personal jurisdiction over her, as plaintiff's affidavit of service is defective. She observes that the affidavit erroneously reflects that a corporation, and not Lu, an individual, was served, and she contends that the affidavit is improperly notarized. Moreover, she alleges that the complaint was not timely served, as it was served over 20 days from Lu's demand for a complaint. (NYSCEF 18).

In opposition, plaintiff denies that dismissal is warranted, arguing that a defective affidavit of service does not deprive the court of personal jurisdiction. Rather, plaintiff contends, the dispositive issue is whether Lu was served, and here, Lu offers no evidence of improper or untimely service. Plaintiff also maintains that the summons was properly and timely served, and to the extent that typographical errors appear in the affidavit of service, an amended affidavit was filed that reflects proper service.

Plaintiff asks that Lu should be compelled to accept the verified complaint, as the delay in filing was brief and necessary to verify the complaint. In any event, Lu suffers no prejudice with the late filing, he argues. The complaint is meritorious, plaintiff maintains, as demonstrated by the verified complaint in which he alleges Lu's unlawful conduct. (NYSCEF 28).

While a plaintiff is required to complete service of process on a defendant within 120 days of commencing an action (CPLR 306-b), he or she is not required to demonstrate proof of compliance with that provision unless the issue is raised by a motion. (*See Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345, 345 [2d Dept 2006] ["CPLR 306-b provides that a court may only dismiss a complaint for failure to effect timely service of process 'upon motion,' not on its own initiative"]).

Pursuant to CPLR 3211(a)(8), a party may move to dismiss an action on the ground that the court lacks personal jurisdiction over it. To defeat such a motion, the plaintiff must demonstrate, *prima facie*, that the court has jurisdiction. (*Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]). The submission of an affidavit of service satisfies plaintiff's *prima facie* burden. (*Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]).

While it is undisputed that plaintiff's initial affidavit of service is defective and insufficient to demonstrate jurisdiction over Lu, "the failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004." (*Khan v Hernandez*, 122 AD3d 802, 803 [2d Dept 2014]). The affidavit submitted by plaintiff in opposition reflects that Lu was served within 120 days of commencement, and in reply, Lu offers nothing to the contrary. Thus, the court has personal jurisdiction over Lu.

Where the summons is served without the complaint, a defendant may serve a written demand for one, and service thereof must then be made within 20 days after service of the demand. (CPLR 3012[b]). Here, plaintiff filed the complaint 47 days after Lu's demand for the complaint. Thus, to defeat Lu's motion, plaintiff must "demonstrate a reasonable excuse for the delay and a meritorious claim." (*McKenzie v Jack D. Weiler Hosp.*, 171 AD3d 615, 615 [1st Dept 2019], quoting *Stevens v Stevens*, 165 AD2d 780, 781 [1st Dept 1990]).

In *Marcello v Flecher*, the plaintiff maintained that his 41-day delay in complying with the defendant's demand for a complaint was due to his need to review medical records before submitting an affidavit of merit in support of his claim, as required by statute. (150 AD3d 1457, 1458 [3d Dept 2017]). The Court rejected the proffered excuse, observing that the plaintiff had

previously filed a certificate of merit, and thus, there was nothing preventing him from timely serving the complaint. (*Id.* at 1458-59).

Here, there is no requirement that plaintiff’s complaint be verified to advance an unlawful wage practices claim, and thus, as in *Marcello*, time taken to verify it does not constitute a reasonable excuse for failing to serve the complaint timely. That defendant is not prejudiced by plaintiff’s untimeliness is immaterial. (*See Bittinger v Erie Ins. Co.*, 169 AD3d 1359, 1360 [4th Dept 2019], quoting *Verre v Rosas*, 47 NY2d 795, 796 [1979] [“The absence of any reasonable excuse for plaintiffs’ delay is determinative; there is no requisite that prejudice be shown before a motion to dismiss is granted in a case of this nature”]).

As the complaint is dismissed, the merit of plaintiff’s causes of action is not addressed. In addition, even if plaintiff’s cross motion were considered, notwithstanding her failure to file a notice of cross motion (*see Myung Chun v N. Am. Mortg. Co.*, 285 AD2d 42, 45 [1st Dept 2001] [absent a notice of cross motion, the court is “virtually without jurisdiction to grant the relief” sought]), it is denied as moot.

Accordingly, it is hereby

ORDERED, that defendant Qiao Yun Lu’s motion to dismiss is granted pursuant to CPLR 3012(b) to the extent that plaintiff’s claims against her are severed and dismissed, and the clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

5/11/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE