

Xiao Bing Wang v Da Yu Manhattan LLC

2022 NY Slip Op 32439(U)

July 21, 2022

Supreme Court, New York County

Docket Number: Index No. 651886/2020

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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XIAO BING WANG,

Plaintiff,

- v -

DA YU MAHATTAN LLC, d/b/a Da Yu Hot Pot, YU
ZHANG, HAI JIN ZHAO, LILI SHEN,

Defendants.

INDEX NO. 651886/2020

MOTION DATE 05/13/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16

were read on this motion to/for EXTEND - TIME

In motion sequence 001, plaintiff Xiao Bing Wang, moves, pursuant to CPLR 306-b, for an order granting his motion to extend time to serve the summons and complaint upon defendant Hai Jin Zhao.

Plaintiff filed a complaint on May 25, 2020, against defendants Da Yu Manhattan LLC d/b/a Da Yu Hot Pot, Yu Zhang, Hai Jun Zhao and Lili Shen. Plaintiff alleges that he was employed from October 15, 2019 to March 8, 2020 by defendants to work as a chef for Da Yu Manhattan LLC d/b/a Da Yu Hot Pot located at 81 Bowery, in New York, New York. Plaintiff brings this action individually and as class representative on behalf of all other former non-exempt employees who have been, or were employed, by the defendants for up to the last three years through the entry of a judgment in this case, and who were not compensated at their promised hourly rate and for one and a half times their promised rate for all hours worked in excess of 40 hours per week.

Plaintiff's complaint alleges that the "[i]ndividual Defendants are officers, directors, managers and/or majority shareholders or owners of the corporate defendant and being among the ten largest shareholders and/or LLC members, are individually responsible for unpaid wages under the New York Business Corporation Law and Limited Liability Company Law."

NYSCEF DOC. NO. 1, ¶ 10. He alleges causes of action for violations of the Fair Labor Standards Act for unpaid wages and failing to pay overtime. Plaintiff also alleges violations of New York's Labor Law for unpaid wages, failing to pay overtime, failing to provide meal periods, failing to keep records, failing to provide time of hire wage notices, and failing to provide wage statements.

The New York State court electronic filing system ("NYSCEF") indicates that on September 22, 2020, plaintiff filed a "Notice of Motion to Extend Time to Serve Individual Defendant Hai Jun Zhao." The Notice of Motion was "corrected" according to NYSCEF, and a "Notice of Motion to Extend Time to Serve" dated January 6, 2021 was uploaded that included a submission date of January 20, 2021. On January 19, 2022, plaintiff filed a document entitled "AFFIRMATION IN SUPPORT OF PLAINTIFFS' MOTION TO EXTEND TIME TO SERVE DEFENDANTS PURSUANT TO NY CLS CPLR § 306-b."

Plaintiff maintains that although defendants Da Yu Manhattan LLC d/b/a Da Yu Hot Pot, Yu Zhang and Lili Shen were served in 2020 with the summons and complaint, they have not answered. Plaintiff further maintains that the defendants' restaurant is closed due to the pandemic. Plaintiff contends that because several of the defendants have not appeared in this case, counsel is trying to locate the last known address of the individual defendant Hai Jin Zhao to serve him in-person. Plaintiff's complaint alleges that Hai Jin Zhao is "the Owner/ Operator of DA YU MANHATTAN LLC d/b/a Da Yu Hot Pot, (1) had the power to hire and fire

employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employee records at DA YU MANHATTAN LLC d/b/a Da Yu Hot Pot.” *Id.* ¶ 13. Plaintiff maintains that the Notice of Motion was filed before the passing of the 120-day deadline as set forth in CPLR 306-b.

CPLR 306-b entitled “Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause” provides:

“[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If 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.”

“Good cause and interest of justice are two separate and independent statutory standards. To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service.”

Wachovia Bank, N. A. v Greenberg, 190 AD3d 1007, 1008 (2d Dept 2021) (internal quotations and citations omitted); *see also Zegelstein v Faust*, 179 AD3d 541, 542 (1st Dept 2020).

The Court of Appeals has held:

“[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, 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 defendant.”

Leader v Maroney Ponzini, & Spencer, 97 NY2d 95, 105-106 (2001).

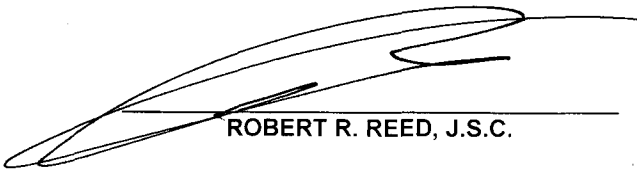
Here, upon review of the motion and documents in NYSCEF, it is unclear to the court, why plaintiff's affirmation in support of his motion was not filed until January 19, 2022, when the original Notice of Motion was filed on September 22, 2020, and the corrected "Notice of Motion" dated January 6, 2021 was uploaded with a submission date of January 20, 2021, a full year before plaintiff's Affirmation in Support was filed. In any event, the Affirmation in Support fails to detail what attempts were made to serve defendant Hai Jin Zhao during the 120-day period after the commencement of the action as discussed in CPLR 306-b, and it is unclear why more time to serve this defendant became necessary.

Therefore, it is

ORDERED that plaintiff Xiao Bing Wang's motion to extend time to serve the summons and complaint upon defendant Hai Jin Zhao is denied without prejudice; and it is further

ORDERED that plaintiff is to refile such motion within 30 days and detail the attempts made to locate defendant Hai Jin Zhao within the statutory time frame.

7/21/22
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: