

Xiao Bing Wang v Da Yu Manhattan LLC
2022 NY Slip Op 34404(U)
December 23, 2022
Supreme Court, New York County
Docket Number: Index No. 651886/2020
Judge: Robert R. Reed
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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, YU ZHANG, HAI JIN ZHAO, LILI
 SHEN

Defendant.
 -----X

INDEX NO. 651886/2020

MOTION DATE 09/12/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20
 were read on this motion to EXTEND - TIME

In this employment action for unpaid wages, plaintiff moves, pursuant to CPLR 306-b,
 for an order granting him an extension in which to serve the summons with notice upon
 individual defendant Hai Jin Zhao. The motion is unopposed.

Background

Plaintiff commenced the instant action on May 25, 2020, against defendants Da Yu
 Manhattan LLC d/b/a Da Yu Hot Pot, Yu Zhang, Hai Jin Zhao, and Lili Shen by filing of a
 summons and complaint (NYSCEF doc. no. 1). Plaintiff served defendants Da Yu Manhattan
 LLC d/b/a Da Yu Hot Pot, Lili Shen and Yu Zhang (NYSCEF Doc. Nos. 8-10), but was
 unsuccessful in serving defendant Hai Jin Zhao.

On September 22, 2020, plaintiff filed a motion for an extension of time in which to serve
 defendant Hai Jin Zhao (NYSCEF Doc. Nos. 11 to 16). The motion was then "corrected" on
 January 19, 2022 (NYSCEF Doc. Nos 14 to 16). Thereafter on July 22, 2022, the court issued its
 decision and order wherein the motion was denied without prejudice, finding the affirmation in

support “fail[ed] 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 [was] necessary” (decision and order dated July 21, 2022 at 4, NYSCEF Doc. No. 17).

Plaintiff filed the instant motion on August 22, 2022, renewing his request for an extension of time to serve Hai Jin Zhao. Plaintiff affirms that he waited 30 days after mailing a waiver of service to Zhao, and then after hearing no response, attempted service at Zhao’s place of business (John Troy affirmation, ¶¶ 7-8, 17, NYSCEF Doc. No. 19). After this court’s July 2022 decision, plaintiff began a “diligent search” for Zhao’s residential address (*id.* at ¶ 18).

Discussion

CPLR 306-b provides that service of process must be made “within one hundred twenty days after the commencement of the action.” 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” (*Matter of Baumann & Sons Buses, Inc. v Ossining Union Free Sch. Dist.*, 121 AD3d 1110, 1113 [1st Dept 2014], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; see also *Nicodene v Byblos Restaurant, Inc.*, 98 AD3d 445 [1st Dept 2012]; *Henneberry v Borstein*, 91 AD3d 493 [1st Dept 2012]). Whether to grant “an extension of time for service [pursuant to CPLR 306-b] is a matter within the court’s discretion” (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 101).

Here, plaintiff originally requested additional time to serve Zhao in September 2020, but did not provide explanation as to the attempts that were made to locate defendant Zhao during

that time. Plaintiff alleges that he attempted service on defendant at his business address but was, “unable to do so.” Even after the court requested further explanation as to the attempts that were made to locate him, plaintiff failed to provide any specifics.

Plaintiff alleges that an extension of time will not prejudice defendant, as the remaining defendants that have been served are in default. Plaintiff’s submission, however, fails to establish good cause for an extension of time to serve Zhao.

This court is not persuaded that plaintiff made timely, diligent efforts to serve defendant Zhao. Nonetheless, the statute of limitations has not yet expired, and plaintiff has apparently located defendant Zhao in California (*cf. Cronan v Peters*, 2019 NY Slip Op 33215[U], **6 [Sup Ct, NY County 2019]).

In the interest of justice, the court will permit an extension of time in which to serve defendant Zhao (*Moundrakis v Dellis*, 96 AD3d 1026, 1027 [2d Dept 2012]; *see Bumpus v New York City Tr. Auth.*, 66 AD3d 26 [2d Dept 2009] [holding that plaintiff failed to satisfy good cause requirement for extension, but that extension was warranted in the interests of justice]).

Accordingly, it is hereby

ORDERED that the motion by plaintiff Xiao Bing Wang to extend time in which to serve the summons with notice upon defendant Hai Jin Zhao, pursuant to CPLR 306-b (motion seq. no. 002), is granted in the interest of justice; and it is further

ORDERED that service shall be made upon defendant Zhao within 60 days of the date of this order; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

12/23/2022
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: