

MW Gestion v Cellenkos Inc.

2023 NY Slip Op 34290(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 653598/2023

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MW GESTION, DERIVATIVELY ON BEHALF OF
NOMINAL DEFENDANT GLOBAL CORD BLOOD
CORPORATION, MW OPTIMUM, and DERIVATIVELY
ON BEHALF OF NOMINAL DEFENDANT GLOBAL CORD
BLOOD CORPORATION,

Plaintiffs,

- v -

CELLENKOS INC., GOLDEN MEDITECH HOLDINGS
LIMITED, TING TINA ZHENG, ALBERT CHEN, YUEN
KAM, MARK DA-JIAN CHEN, JENNIFER J. WENG, KEN
LU, JACK CHOW, JACKY CHENG, GOLDEN MEDITECH
STEM CELLS (BVI) COMPANY LIMITED, GM PRECISION
MEDICINE (BVI) LIMITED, GOLDEN MEDITECH (BVI)
COMPANY LIMITED, EASTON CAPITAL CORP., and
REDWOOD VALUATION PARTNERS

Defendants.

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INDEX NO. 653598/2023

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for ALTERNATE SERVICE.

In motion sequence number 001, plaintiffs move to serve the summons and complaint by alternative methods upon defendants Ting Tina Zheng, Albert Chen, Yuen Kam, Ken Lu, Jack Chow, and Jacky Cheng (together, alternative service defendants), as well as defendant Mark Da-Jian Chen (Mark Chen),¹ pursuant to CPLR 308 (5).

Additionally, plaintiffs move to extend time to serve the summons and complaint upon

¹ Plaintiffs assert that they properly served Mark Chen but seek to serve him by alternative methods of service because his counsel indicated that Mark Chen would contest the service made upon him. Indeed, Mark Chen subsequently filed a motion to dismiss asserting, *inter alia*, lack of personal jurisdiction due to plaintiffs' failure to serve him. (NYSCEF Doc. No. [NYSCEF] 97, MTD memo at 22-23 [NYSCEF pagination].)

these defendants past the remaining period under CPLR 306-b, which expired on November 22, 2023.²

“Pursuant to CPLR 308, personal service upon a natural person may be made, *inter alia*, by delivering the summons to the person to be served (*see id.* § 308[1]); by delivering the summons 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 mailing the same (*see id.* § 308[2]); where service under CPLR 308(1) and (2) cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place, or usual place of abode of the person to be served and by mailing the same (*see id.* § 308[4]); or in such manner as the court, upon motion without notice, directs, if service is impracticable under CPLR 308 (1), (2), and (4) (*see id.* § 308[5]).” (*MTGLQ Invs., L.P. v Mayers*, 209 AD3d 1009, 1010-11 [2d Dept 2022].)

A party seeking an order directing expedient service pursuant to CPLR 308 (5) “must make some showing that the other prescribed methods of service could not be made” or “would have been unduly burdensome.” (*JPMorgan Chase Bank v Kothary*, 178 AD3d 791, 794 [2d Dept 2019] [internal quotation marks and citations omitted]; *see also Cooper-Fry v Kolket*, 245 AD2d 846, 847 [3d Dept 1997] [“a court is without power to direct expedient service pursuant to CPLR 308 (5) absent a showing by the moving party that service under CPLR 308 (1), (2) or (4) is impracticable” (citation omitted)]; *Richards v Hedman Resources Ltd.*, 204 AD3d 1407, 1409 [4th Dept 2022] [same].)

² Motion sequence number 001 was filed on October 11, 2023, and was returnable on November 13, 2023. (NYSCEF 21, Notice of Motion at 1 [mot. seq. no. 001].) Plaintiffs fail to explain why they failed to move by OSC under these exigent circumstances.

Here, plaintiffs fail to show that service upon alternative service defendants pursuant to CPLR 308 (1), (2) or (4) is impracticable. Indeed, plaintiffs' counsel Michael Grunfeld avers on September 1, 2023, plaintiffs commenced service upon the alternate service defendants through the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 6638 [1965]) (Hague Convention) in Hong Kong. (NYSCEF 22, Grunfeld aff ¶¶ 19, 21.) Plaintiffs' bare assertion that there is no telling whether and when service through the Hague Convention will be completed is woefully insufficient to show that service pursuant CPLR 308 (1), (2) or (4) cannot be made or would be unduly burdensome. (*JPMorgan Chase Bank*, 178 AD3d at 794; *see Joseph II. v Luisa JJ.*, 201 AD3d 43, 48-49 [3d Dept 2021] [movant failed to show impracticability of service through Hague Convention as he failed to submit proof demonstrating actual effort to effectuate service upon defendant's residence in Italy].)

Similarly, plaintiffs fail to show that service upon Mark Chen pursuant to CPLR 308 (1), (2) or (4) is impracticable. In sum, plaintiffs' efforts to serve Mark Chen have been limited to investigating his residential address and leaving the summons and complaint with his wife, defendant Jennifer Weng, at a dwelling house in New York on August 3, 2023. (NYSCEF 22, Grunfeld aff ¶¶ 13-17; NYSCEF 10, aff of service.) Plaintiffs' attempted service on Mark Chen undermine plaintiffs' argument that service pursuant CPLR 308 (1), (2) or (4) cannot be made or would be unduly burdensome. (*JPMorgan Chase Bank*, 178 AD3d at 794.) Indeed, plaintiffs' position is that they did properly serve Mark Chen by leaving the summons and complaint at what they believed

to be his dwelling house.³ (See NYSCEF 33, Memo at 11, 16 [Mark Chen was served through Weng] [NYSCEF pagination]; NYSCEF 10, aff of service.) Moreover, the record indicates that plaintiffs have several other addresses of Mark Chen, but they fail to demonstrate any effort to serve him at those addresses. (NYSCEF 30, Service list in bankruptcy action.)

Finally, plaintiffs assert that Mark Chen and alternative service defendants have evaded service which would satisfy CPLR 308 (1), (2) or (4) as impracticable service. However, mere refusal of the attorneys for Mark Chen and certain other defendants to accept service is not evidence of evading service. (NYSCEF 32, email from David Hill dated October 10, 2023 at 4:43 pm; email from Christopher Cogburn dated October 10, 2023 at 9:31 pm.)

Plaintiffs' motion to extend time to serve alternative service defendants is granted, given plaintiffs' prompt efforts to investigate these defendants' residential addresses and serve them through the Hague Convention. (CPLR 306-b; *see Bumpus v NY City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept 2009] ["good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (citation omitted)]; *Kulpa v Jackson*, 3 Misc 3d 227, 235-36, 773 NYS2d 235 [Sup Ct, Oneida County 2004] [extending time to serve due to difficulties associated with service through Hague Convention].) Further, plaintiffs' motion to extend time to serve Mark Chen is granted, given plaintiffs' prompt efforts to serve him

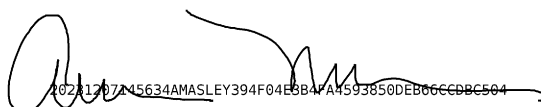
³ In his opposition affirmation, Mark Chen avers that he has not lived in New York since 2005 and has resided in Xiamen, China since 2021. (NYSCEF 134, Chen aff ¶ 3.) At this time, the court takes no position on the issue of whether the New York address is Mark Chen's residence.

at the dwelling house in New York and Mark Chen’s subsequent affirmation to the effect that he had no residence in New York. (CPLR 306-b; see *Bumpus*, 66 AD3d at 32; *Kulpa*, 3 Misc 3d at 235-36 [extending time to serve should plaintiff wish to attempt service again to obviate any possible objection].)

Accordingly, it is

ORDERED that the motion is denied, in part, without prejudice and with opportunity to renew, in that plaintiffs MW Gestion and MW Optimum are not authorized to serve the summons and complaint by alternative methods of service upon defendants Ting Tina Zheng, Albert Chen, Yuen Kam, Ken Lu, Jack Chow, Jacky Cheng, and Mark Da-Jian Chen; and it is further

ORDERED that the motion is granted, in part, to the extent that plaintiffs MW Gestion and MW Optimum’s time to serve defendants Ting Tina Zheng, Albert Chen, Yuen Kam, Ken Lu, Jack Chow, Jacky Cheng, and Mark Da-Jian Chen with the summons and complaint is extended until March 8, 2024.



12/7/2023
DATE

ANDREA MASLEY, J.S.C.

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