

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(ECF)

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YONGWEI ZHANG, :  
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 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 HOW HO CHENG, NEW YORK THAI GRILL :  
 INC. (D/B/A NEW YORK THAI GRILL & :  
 SUISHI BAR), :  
 Defendants. :  
----- :

10 Civ. 8560 (JCF)  
  
MEMORANDUM  
AND ORDER

JAMES C. FRANCIS IV  
UNITED STATES MAGISTRATE JUDGE

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The plaintiff, Yongwei Zhang, brings this action against the defendants, New York Thai Grill Inc. (the "Thai Grill") and How Ho Cheng, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The parties previously consented to my exercising plenary jurisdiction over the case in accordance with 28 U.S.C. § 636(c). The defendants now move pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure to dismiss the claims against them on the grounds of improper service. In connection with that motion, an evidentiary hearing was held on October 4, 2011. For the reasons that follow, the defendants' motion is granted.

Background

The plaintiff's process server, Joshua Navarrette, attempted service upon the defendants at the Thai Grill on November 18, 2010.

(Tr. at 9-10, 12, 15).<sup>1</sup> Upon his arrival, Mr. Navarrette asked to speak with either Mr. Cheng or a manager. (Tr. at 21-22). Mr. Navarrette was informed that Mr. Cheng was not there but that he could wait and speak with someone. (Tr. at 22). A woman approached Mr. Navarrette from the back of the restaurant and introduced herself as Sharon Chan.<sup>2</sup> (Tr. at 12-13). Mr. Navarrette then served Ms. Chan, on behalf of both defendants, with the Summons and Complaint. (Tr. at 16). (Pl. Exhs. 2, 3).<sup>3</sup>

The plaintiff maintains that service was based on the information contained in the New York Department of State's Entity Information Database (the "Database"). (Tr. at 10-11). The Database lists Mr. Cheng as the Chairman or C.E.O. of the Thai Grill and as the person to receive process on behalf of the corporation if service is made through the New York Department of State. (New York Department of State, Division of Corporations, Entity Identification (Pl. Exh. 1)). However, the information contained in the Database is not current. In fact, Mr. Cheng sold

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<sup>1</sup> "Tr." refers to the transcript of the evidentiary hearing.

<sup>2</sup> "Sharon Chan" is the spelling used on the Affidavits of Service. (Affidavit of Service upon New York Thai Grill dated Nov. 30, 2010 (Pl. Exh. 2); Affidavit of Service upon How Ho Cheng dated Dec. 2, 2010 (Pl. Exh. 3)). The Transcript of the hearing refers her as "Sharon Chen". (Tr. at 31).

<sup>3</sup> Unless otherwise indicated, exhibit numbers and letters refer to evidence submitted at the hearing.

all of his interest in the Thai Grill in 2004 and has had no dealings with the Thai Grill since that time. (Stock Transfer Agreement of New York Thai Grill Inc. dated Nov. 24, 2004, ("Def. Exh. A")).

The Thai Grill is actually owned by Him Sum Chang.<sup>4</sup> (Tr. at 29). Ms. Chang has never heard of Sharon Chan or employed her at the Thai Grill. (Chang Aff., ¶ 10). Ms. Chang also testified that due to the Thai Grill's small size it does not have a manager on staff. (Tr. at 33).

### Discussion

#### A. Service of Process

Due process of law requires notice to "apprise interested parties of the pendency of an action and [to] afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). "When a defendant moves to dismiss under Rule 12(b)(5), the plaintiff bears the burden of proving adequate service." Burda Media, Inc. v. Viertel, 417 F.3d 292,298-99 (2d Cir. 1992); Preston v. New York, 223 F. Supp. 2d 452, 466 (S.D.N.Y. 2002). Compliance

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<sup>4</sup> At the hearing Ms. Chang spelled her name as "Him Sum Chang". (Tr. at 28). However, in Ms. Chang's Affidavit her name is spelled "Hin Sum Cheng". (Reply Affidavit of Hin Sum Cheng dated May 17, 2011 ("Chang Aff.")). This opinion will refer to her as Him Sum Chang or Ms. Chang.

with the service requirements prescribed in the Federal Rules of Civil Procedure is mandatory before a defendant is subject to the court's jurisdiction. See Buggs v. Ehrnschwender, 968 F.2d 1544, 1548 (2d Cir. 1992) ("Actual notice of the lawsuit alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with the proscribed conditions of service.") (internal citations omitted).

B. Service on How Ho Cheng

Service of the summons and complaint on an individual is governed by Rule 4(e), which provides that service may be effected by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following: (A) delivering a copy of the summons and of the complaint to individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). The plaintiff has not served Mr. Cheng personally, has not left a copy of the summons and the complaint at Mr. Cheng's dwelling or usual place of abode, and has not delivered a copy to an agent authorized by appointment or law to receive process. Therefore, the only way the court can have jurisdiction

over Mr. Cheng is if service was made pursuant to New York law. New York law, in turn, allows non-personal service, upon an individual, by:

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or other usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other.

N.Y. Civ. Prac. Law & Rules ("CPLR") § 308(2).

"The service provisions of CPLR 308(2) have been construed strictly." Anon Realty Assoc., L.P. v. Simmons Stanley, LTD., 153 Misc. 2d 954, 956, 583 N.Y.S.2d 778, 780 (N.Y. Sup Ct. 1992); See also Raschel v. Rish, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 22, 24 (N.Y. 1986) ("When the requirements of service have not been met, it is irrelevant that defendant may have actually received the documents").

The plaintiff attempted to serve Mr. Cheng at his actual place of business. (Pl. Exh. 3). "[I]n order for a place to be a person's 'actual place of business,' that person must be shown to regularly transact business at that place." Anon Realty Associates, 153 Misc. 2d at 957, 583 N.Y.S.2d at 780. Service at

a defendant's last known place of business is ineffective if the defendant can offer credible evidence that the defendant is no longer working there. See Leab v. Streit, 584 F. Supp. 748 (S.D.N.Y. 1984) (holding that service was inadequate because the defendant clearly demonstrated that he no longer worked at the place of business on the date of service); see also Cho v. Song, 166 Misc. 2d 129, 631 N.Y.S.2d 484 (N.Y. Sup. Ct. 1995) (holding that a doctor's office at a health center was not his actual place of business because the doctor was on sabbatical in Korea at the time of service).

Mr. Cheng has demonstrated that at the time of service he had already sold his interest in the Thai Grill and was living in Michigan. (Def. Exh. A; Tr. at 32). Further, Mr. Cheng has had no business interactions with the Thai Grill since 2004. The plaintiff's only evidence that the Thai Grill was Mr. Cheng's actual place of business is the Database listing Mr. Cheng as the Chairman or C.E.O. (Pl. Exh. 1). However, the preface to the Entity Information Database clearly states that the "information's completeness or accuracy cannot be guaranteed." Search the Corporation & Business Entity Database, New York State Department of State, Division of Corporations, State Records & UCC, [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html) (last visited Dec. 19, 2011). Therefore, the plaintiff's reliance on the

Database alone is insufficient to prove that the Thai Grill was Mr. Cheng's actual place of business. See Balendran v. North Shore Medical Group, P.C., 251 A.D.2d 522, 523-524, 674 N.Y.S.2d 724, 725 (2d Dep't 1998 ) (holding that listing of defendant's business address in Medical Directory of the Society of The State of New York failed to establish address as defendant's actual place of business because the directory's preface indicated that information had not been verified). Accordingly, the plaintiff's complaint against Mr. Cheng is dismissed.

C. Service on Thai Grill

Service of process upon a domestic corporation is governed by Rule 4(h)(1) and Rule 4(e)(1) of the Federal Rules of Civil Procedure, which state that service may be completed by:

following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made;

or

delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and -- if the agent is one authorized by statute and the statute so requires -- by also mailing a copy of each to the defendant;

Fed. R. Civ. P. 4(e)(1), 4(h)(1)(B). In New York, service on a corporation is governed by Section 311(a)(1) of the CPLR, which states that service shall be made:

Upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorised by appointment or by law to receive service.[Or on the secretary of state as an agent] pursuant to section three hundred six . . . of the business corporation law.

CPLR § 311(a)(1); see also N.Y. Bus. Corp. Law § 306(b)(1).

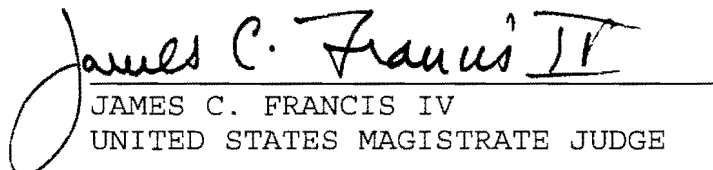
The Plaintiff did not serve the Secretary of State. Nor has the plaintiff shown that service was made to an officer or director of the Thai Grill. Ms. Chang, the sole owner and officer of the Thai Grill, was never personally served. (Tr. at 31, 34). The plaintiff did not serve a cashier or assistant cashier. Even if Sharon Chan, or whomever Mr. Navarrette personally served, operated the cash register or was a waitress, service would still be improper. See Oustecky v. Farmingdale Lanes, Inc., 246 N.Y.S.2d 979, 41 Misc. 2d 979 (Nassau Cnty. Sup. Ct. 1964) (holding that under Section 311(a)(1) cashier is financial official within the ranks of the managerial hierarchy, not check-out clerk at counter of retail store). Ms. Chang testified that she employs no managers and the plaintiff has offered no credible proof to the contrary. (Tr. at 33). The person served by Mr. Navarrette was either not an employee of the Thai Grill at all or was a non-managerial employee. In either event, that person was not an individual authorized to receive personal service on behalf of the Thai Grill.



Conclusion

For the reasons set forth above, the defendants' motion to dismiss (Docket no. 11) is granted. The Clerk of Court shall enter judgment accordingly and close this case.

SO ORDERED.

  
JAMES C. FRANCIS IV  
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York  
December 19, 2011

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