

Walker v Simmsparris
2020 NY Slip Op 33328(U)
September 15, 2020
Supreme Court, Kings County
Docket Number: 506589/2018
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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OSBOURNE WALKER,

Plaintiff,

-against-

MICHELE SIMMSPARRIS,
ET AL.

Defendant.
-----X

Decision and Order

Index No. 506589/2018

Submitted: 8/18/20

Mot. Seq.: 2, 3, 4

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Defendant Michele SimmsParris' Motion to Reject Referee Report	1
Plaintiff's Opposition and Cross-Motion to Confirm Referee Report and for Default Judgment	2
Defendant Michele SimmParris' Opposition & Reply to Plaintiff's Cross-Motion	3
Defendant Michele SimmParris' Cross-Motion to Dismiss, for Summary Judgment and Other Relief	4
Plaintiff's Opposition to Defendant Michele SimmParris' Cross-Motion to Dismiss, for Summary Judgment and Other Relief	5
Defendant Michele SimmParris' Reply to Defendant Michele SimmParris' Cross-Motion to Dismiss, for Summary Judgment and Other Relief	6

MONTELIONE, RICHARD J., J.

In this action for unauthorized practice of law, tortious interference, intentional infliction of emotional distress, fraudulent inducement, fraud on the court, conversion and unjust enrichment, defendant Michele SimmsParris moves to reject the report of the referee pursuant to CPLR 4403, CPLR 4320(b) and 22 NYCRR 202.44 (motion sequence 2) and plaintiff Osbourne

Walker cross-moves to confirm the report of the referee (motion sequence 3). Defendant Michele SimmsParris also moves, erroneously, as a cross-motion, for dismissal of the complaint pursuant to CPLR 3211(a), 3211(a)(7), 3211(a)(8) or alternatively, for summary judgment pursuant to CPLR 3212 (motion sequence 4). Plaintiff previously filed a motion for default judgment in which the Honorable Lawrence Knipel by Order dated December 6, 2018, referred the matter for a traverse hearing. Special Referee Miriam Sunshine held the traverse hearing on April 9, 2019 and filed a referee report on July 16, 2019 recommending that the traverse be overruled and find that proper service was effectuated upon defendants Michele Simmsparris and Kwesi Simmsparis.

As an initial matter, the timeliness of the parties' respective motions to reject or confirm the referee's report based upon CPLR 4403, which specifies that such motion shall be made within 15 days after the filing of the report, is a moot argument. The Court in *Breland v. Motor Vehicle Acc. Indemnification Corp.*, expressly stated that regardless of whether the parties move or do not move within 15 days to confirm or reject the referee's report, the court is still free to determine the merits of the referee's report and the legislative intent in limiting the parties to 15 days in which to move to confirm or reject the referee's report was to "create a period in which the parties may move before the court acts of its own volition so that they might have the opportunity 'of pointing out in what respects, if any, the referee's report or his conduct of the proceedings is erroneous' (internal citation omitted)" (*Breland v. Motor Vehicle Acc. Indemnification Corp.*, 24 A.D.2d 881, 264 N.Y.S.2d 584 [2d Dep't 1965]). As such, while the report of the referee was filed on July 16, 2019 and the hearing was concluded on April 9, 2019, neither party is precluded from such motion simply because the motions were filed outside of the 15 day timeframe.

Turning to defendant SimmsParris' motion to reject the referee report and plaintiff Walker's cross-motion to confirm the referee report, it is well established that "[t]he report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility (internal citations omitted)" *Thomas v. Thomas*, 21 A.D.3d 949, 800 N.Y.S.2d 768 [2d Dep't. 2005], *lv. to app. den.*, 6 N.Y.3d 704, 811 N.Y.S.2d 336 [2006]; *see also U.S. Bank Nat'l Ass'n v. Kaur*, 177 A.D.3d 1016, 113 N.Y.S.3d 169 [2d Dep't 2019]. "A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor (internal citation omitted)" *Last Time Beverage Corp. v. F & V Distribution Co., LLC*, 98 A.D.3d 947, 951 N.Y.S.2d 77 [2d Dep't 2012]; *see also Galasso, Langione & Botter, LLP v. Galasso*, 89 A.D.3d 897, 933 N.Y.S.2d 73 [2d Dep't 2011]). Although a referee's report shall technically be filed within 30 days of its submission pursuant to CPLR 4320(b), a late filing is not a reason to bar its consideration by the court (*Capili v. Ilagan*, 26 A.D.3d 354, 810 N.Y.S.2d 480 [2d Dep't 2006]). Similarly, where no substantial right of the parties has been or will be prejudiced, the court may accept defects in a referee report that are mere irregularities (*see Martin v Castaneda*, 73 A.D.3d 712 [2d Dep't 2010]).

Defendant SimmsParris argues, *inter alia*, that the referee's report's finding that service was properly effectuated against defendants Michele and Kwesi SimmsParris should be rejected as the referee's report was filed in excess of 30 days of its submission after the conclusion of the hearing and that the referee's report was filed without a copy of the transcript of the hearing. Defendant argues alternatively, the referee's finding should likewise be rejected as the process server did not comply with the "due diligence" requirement of CPLR 308(4) as the process

server's affidavits of service did not describe the efforts she made to ascertain the defendant's whereabouts, dwelling place or place of abode. Further, defendant argues that the referee's report states that mailing of the summons and complaint took place four months after the alleged date of service and as such, service failed to meet the requirements of CPLR 308(4). Defendant also argues that the testimony indicates that the process server did not establish that the place where she purportedly effectuated service was the defendant's actual dwelling place, usual place of abode or actual place of business. Therefore, defendant argues that the referee's report should be rejected as the record did not support her findings.

Plaintiff argues, *inter alia*, that the referee's report should be confirmed despite its late filing because the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility. Further, plaintiff argues that defendant has not been prejudiced by the referee not including a copy of the transcript in her report because defendant had access to the transcript of the traverse hearing before the report was filed. As to defendant's contentions of the lack of due diligence on the part of the process server, plaintiff contends that the testimony of the process server indicates that due diligence was satisfied and the referee's report indicating the mailing to be in August when the record as well as the affidavit of service reflects the mailing to be in April should be disregarded as a typographical error.

In the instant case, defendant's reliance upon *Murphy v Murphy*, 144 A.D.2d 904 (4th Dep't 1988), is misplaced as in that matter, the referee's report did not include the transcript of the traverse hearing because a stenographer was not present. The technical and procedural reasons defendant proffers for rejecting the referee's report are without merit as defendant has not demonstrated any substantial right that is prejudiced by the court considering the referee's report with the transcript as annexed in plaintiff's cross-motion and it is clear that defendant had

a copy of the transcribed hearing as evidenced by her reference thereto (*see Martin v Castaneda*, 73 A.D.3d 712 [2d Dep't 2010]).

As to defendant's alternative arguments for the rejection of the referee's report, the court upon review, finds that the referee "clearly defined the issues and resolved matters of credibility" and the record supports her findings (*U.S. Bank Nat'l Ass'n v. Kaur*, 177 A.D.3d 1016, 113 N.Y.S.3d 169 [2d Dep't 2019]). Defendant reliance upon *Estate of Waterman v Jones*, 46 A.D.3d 63 (2d Dep't 2007), is misplaced as in that case, there was no hearing that took place to ascertain proper service. Moreover, the due diligence requirement may be satisfied through the testimony of the process server, not solely what is stated on the face of the affidavit of service (*see Nationstar Mortg., LLC v. Dekom*, 161 A.D.3d 995, 996, 78 N.Y.S.3d 148, 150 [2018], *leave to appeal dismissed in part, denied in part*, 35 N.Y.3d 957, 147 N.E.3d 1158 [2020]). In this case, the process server testified regarding her process of contemporaneously taking notes with each attempted service¹, that she visited the address several times², that she inquired of the neighbors³, that she observed vehicles parked in the driveway and that she observed mail was retrieved from the mailbox⁴. Evidence was proffered that at defendant's last known places of businesses, that the properties were vacant, that she attempted to ascertain from neighbors whether they were familiar with defendant's names, if they knew that this was their address or they moved somewhere and if there was a forwarding address with no success⁵. Taken together, the record supports the referee's finding that service pursuant to CPLR 308(4) was properly effectuated as against the defendants (*see Nationstar Mortg., LLC v. Dekom*, 161

¹ Pla. Cross-Motion, Exhibit M, Pgs. 15-16.

² Pla. Cross-Motion, Exhibit M, Pgs. 19-21.

³ Pla. Cross-Motion, Exhibit M, Pg. 29.

⁴ (Pla. Cross-Motion, Exhibit M, Pgs. 21-22.

⁵ Pla. Cross-Motion, Exhibit M, Pg. 35.

A.D.3d 995, 78 N.Y.S.3d 148 [2d Dep't 2018], *leave to appeal dismissed in part, denied in part*, 35 N.Y.3d 957, 147 N.E.3d 1158 [2020]; *see e.g. Taron Partners, LLC v. McCormick*, 173 A.D.3d 927, 103 N.Y.S.3d 485 [2d Dep't 2019]).

Lastly, as to the referee's report which states that verification from a neighbor of defendants' residence and a mailing of the legal documents occurred in August, it is evident that it is a typographical error as the transcript and the affidavits of service indicate the same to have occurred in April, rather than August. Defendant's lone argument that the referee's report states that the mailing occurred in August rather than April when the record reflects otherwise and that therefore, service was not timely effectuated in accordance with CPLR 308(4), is without merit and is rejected.

Therefore, defendant Michele SimmParris' motion to reject the referee's report is denied. Plaintiff's motion to confirm the referee's report is granted and the court adopts the referee's finding that service was properly effectuated against defendants Michele SimmParris and Kwesi SimmParris. That portion of plaintiff's motion for default judgment is denied without prejudice to renew as plaintiff lacks an affidavit of merit or a complaint that is verified by someone with personal knowledge (*see* CPLR 3215[f]; *Hazim v. Winter*, 234 A.D.2d 422, 651 N.Y.S.2d 149 [2d Dep't.1996]).

Defendant Michele SimmParris' motion to dismiss or alternatively, for summary judgment, is denied as academic as defendant is in default in answering.

This constitutes the decision and order of the court.

Dated: SEP 15 2020


Richard J. Montelione, A.J.S.C.

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KINGS COUNTY CLERK
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