

Haberman v Simon

2003 NY Slip Op 30171(U)

December 18, 2003

Supreme Court, New York County

Docket Number: 100605/98

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: WALTER B. TORRES
Justice

PART 15

0100605/1998

HABERMAN, JACOB
vs
SIMON, DAVID

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

SEQ 7

CONFIRM/REJECT REFEREE REPORT

SCANNED
JAN 02 2004

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 12/18/03

Wf

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOI ONCASE IS RESPECTFULLY REFERRED TO
JUS ICE

WALTER B. TORRES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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JACOB HABERMAN,

Plaintiff,

-against-

Index No. 100605/98

DAVID SIMON, JEFFREY SIMON, ROGER KAISER,
JEFFREY H. KUNKEN, JONATHAN SCHNAPP, and
JANE and/or JOHN DOE 1-3,

Defendants.

-----x

WALTER B. TOLUB, J.:

Plaintiff Jacob Haberman moves for an order pursuant to CPLR 4403 confirming a special referee's report and recommendation that service of process be found to have been properly effectuated on defendants David Simon and Jeffrey Simon. David Simon and Jeffrey Simon cross-move for an order rejecting the report and directing that a new traverse hearing be held.

By decision and order dated March 11, 2003, this court stayed the previous motion by David Simon and Jeffrey Simon to vacate a default judgment entered against them and directed that a traverse hearing be held on the issue of whether service of process had been properly effectuated. The court also directed that the hearing be held before a special referee to hear and report with recommendations. In the affidavit of service, the process server attests that, on January 22, 1998, he served David Simon by in-hand delivery of the summons to him at apartment 4W

in the building located at 315 Central Park West in Manhattan (see CPLR 308[1]¹) and served Jeffrey Simon by delivery of the summons to David Simon, a person of suitable age and discretion, and by mailing the summons to Jeffrey Simon at the Central Park West address (see CPLR 308[2]²). David Simon denied that he was present at that address on the date of service and contended that the physical description of the person served set forth in the affidavit of service does not match his physical characteristics. In the prior order, the court found that David Simon had raised issues of fact regarding whether personal service had been effectuated on him and on Jeffrey Simon.

The traverse hearing was held before special referee Marilyn B. Dershowitz. During the hearing, Juan Delgado, a licensed process server employed by Gotham Process Service, and David Simon testified under oath. In her report dated June 12, 2003, the referee summarized the testimony given by each individual, rendered credibility determinations with regard to that testimony and concluded that the credible evidence demonstrated that service had been properly effectuated on David Simon and on

¹Section 308(1) of the CPLR provides in relevant part that "service upon a natural person shall be made * * * by delivering the summons within the state to the person to be served."

²Section 308(2) of the CPLR provides in relevant part that service upon a natural person shall also be made "by delivering the summons within the state 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 summons to the person to be served at his or her last known residence * * *, such delivery and mailing to be effected within twenty days of each other."

Jeffrey Simon.

Haberman now seeks to confirm the referee's report and recommendation that service be found properly effectuated.

In opposition, David Simon and Jeffrey Simon contend that the report should be rejected and a new hearing held on the ground that the referee's findings of fact and conclusions are not supported by the weight of credible evidence adduced at the hearing.

The report of a special referee will be confirmed "whenever the findings contained therein are substantially supported by the record * * * and the referee has clearly defined the issues and resolved matters of credibility," (Kaplan v Einiv, 209 AD2d 248, 251 [1st Dept 1994] [citations omitted]; Nager v Panadis, 238 AD2d 135 [1st Dept 1997]). As the finder of fact, the special referee is empowered to resolve matters of credibility (Kardanis v Velis, 90 AD2d 727 [1st Dept 1982]). Here, the referee clearly sets forth in the report the issues and her credibility determinations. In addition, a detailed review of the hearing transcript reveals that the referee's findings are substantiated by the record.

First, David Simon and Jeffrey Simon contend that Mr. Delgado's testimony was not credible because more than five years had elapsed between the service on January 22, 1998, and the date of the hearing, because service was accomplished in less than 30

seconds and because Mr. Delgado has worked continually as a process server since the date of service, serving between 10 and 20 individuals a day.

After summarizing Mr. Delgado's testimony, the referee concluded that, "All in all the testimony of Mr. Delgado was consistent and credible," (referee report at 2). Regarding Mr. Delgado's presence at the building, the referee noted that Mr. Delgado testified in detail as to the physical condition and appearance of the building lobby, the elevator and the apartment vestibule and that he had served another individual at the same building many times. The referee concluded that, "I have no doubt that, as [Mr. Delgado] documented in his Affidavit of Service, on January 22, 1998 he went to 315 Central Park West, saw an individual in the lobby whom he assumed was a doorman, asked the individual if Mr. Simon was at home in 4W, was told he was and then went up to the apartment," (referee report at 2). The referee also noted that Mr. Delgado's "uncontroverted description makes it clear that he was at the premises," (referee report at 2). Regarding the handing of the papers to David Simon, the referee noted that Mr. Delgado's testimony was "unwavering and consistent," (referee report at 2). Thus, Mr. Delgado's testimony, accepted as credible by the referee, demonstrates that the passage of time had not dulled his memory of handing the summons to David Simon at the Central Park West

address.

David Simon and Jeffrey Simon next contend that David Simor could not have been the individual served because the description of the individual indicated on the affidavit of service by Mr. Delgado does not match David Simon's actual age or appearance. In his testimony and affidavit of service, Mr. Delgado described David Simon as a black-haired, 35-year-old white male standing 5 $\frac{1}{2}$ -feet tall and weighing 150 pounds. David Simon testified that, on the date of service, he was 27 years old, had brown hair, was 5 feet, 10 inches tall, and weighed approximately 185 to 190 pounds. In the report, the referee noted the differences and concluded, "Of course these discrepancies while perhaps correctly noted [by David Simon], do not vitiate that the observations of Mr. Delgado could well have resulted in the descriptions on the Affidavit [of Service]. Mr. Simon gives the appearance of a young white male who is somewhat short and stocky, not inconsistent with the description offered by Mr. Delgado," (referee report at 2). The referee also noted that, during examination by cross movants' counsel regarding the handing of the summons and complaint to David Simon, Mr. Delgado's testimony was "unwavering and consisrent," (referee report at 2). Thus, the referee's conclusions are properly based on her own observations and assessments of the evidence adduced at the hearing.

David Simon and Jeffrey Simon also contend that David Simon's testimony conclusively demonstrates that David Simon could not have been the individual Mr. Delgado served because he was rarely physically present in apartment 4W from September 1997, when he began staying at his girlfriend's apartment, through May 1998, when he removed his belongings from apartment 4W. They also contend that, on the date of service, David Simon was in Toledo, Ohio, visiting his parents.

In the report, the referee summarized David Simon's testimony regarding his physical presence at the apartment and noted that he also testified that, although he no longer resided at the apartment after September 1997, he went there regularly at night to check on it and on his belongings. The referee noted that this testimony was given in "a rather waffling manner" and was "quite incredib[le]," (referee report at 3). With regard to David Simon's testimony about his trip to Ohio, the referee correctly concluded that it was self-serving and unsupported by any other evidence. Once again, the referee's conclusions are correctly based on her own observations and assessments of the reliability of the testimony evidence adduced at the hearing.

In addition to these credibility determinations, the referee's finding that David Simon was indeed the individual served is also supported by Mr. Delgado's testimony that, on the date of service, a man opened the door of apartment 4W when Mr.

Delgado knocked on it, answered, "yes," when he asked whether he was Mr. Simon and whether he was David Simon and accepted each summons as he handed it to him (traverse hearing tr at 20[li 3-10]).

Last, David Simon and Jeffrey Simon contend that the referee improperly found that service had been properly effectuated on Jeffrey Simon because, during the hearing, Haberman failed to establish that the process server actually mailed the summons and complaint in compliance with Gotham Process Service's usual procedure.

The hearing transcript includes Mr. Delgado's clear testimony that, on the date of service and through the present, Gotham clerical workers routinely prepared the necessary documents and envelopes required for a mailing to complete service of process. Mr. Delgado also testified that, during that same period, it was the process server's responsibility to verify that the address on the envelope matched the information on the documents inside and to mail the filled envelopes within 24 hours after service at a location. This testimony established the existence of an office procedure followed in the regular course of business regarding the addressing and mailing of the summons and complaint and, therefore, raises a presumption that process was mailed to Jeffrey Simon. Testimony as to an office practice or procedure in the regular course of business is sufficient to

establish a presumption of mailing (Spangenberg v Chaloupka, 229 AD2d 482 [2d Dept 1996]).

Contrary to cross movants' contention, Mr. Delgado's failure to recall whether he had personally mailed the summons and complaint to Jeffrey Simon does not rebut this presumption (see Soanzenberg v Chaloupka, 229 AD2d 482, supra). Similarly, mere denial of receipt by the addressee is insufficient to rebut the presumption of mailing since service is complete upon mailing (Soanzenberg v Chaloupka, 229 AD2d 482, supra). In order to rebut the presumption, the addressee must demonstrate that the process server's routine office procedure was not followed or that the procedure was "so careless that it would be unreasonable to assume that the notice was mailed," (Nassau Ins. Co. v Murray, 46 NY2d 828, 830 [1978]). The record is devoid of any evidence that Gotham's routine office procedure was not followed with regard to service on Jeffrey Simon or that Gotham's normal routine was in any manner careless.

Contrary to cross movants' contention, although the referee does not specifically refer in the report to Mr. Delgado's testimony regarding the mailing of the summons to Jeffrey Simon, the referee expressly found that mailing had been properly accomplished. The referee concluded that:

I credit the testimony of the process server that on January 22, 1998 he delivered copies of the Summons and Complaint to David Simon for David and for Jeffrey Simon, and that a

copy of the papers was thereafter mailed to Jeffrey Simon. Thus I find that the plaintiff has effectuated service on David and Jeffrey Simon as claimed. I credit the testimony and documentation of the process server as provided.

(referee report at 4 [emphasis added]).

Thus, the referee has clearly delineated in the report the factual issues and her observations of the witnesses and assessment of their credibility. Moreover, the referee's findings and conclusions are supported by the record. "The determination of a referee appoint to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue, since the referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand * * *. The findings of such a referee will not be disturbed if supported by the evidence in the record," (see e.g. Slater v Links at N. Hills, 262 AD2d 299, 299 [2d Dept 1999]; Frater v Lavine, 229 AD2d 564 [2d Dept 1996]). Therefore, the referee's recommendation that service be found to have been properly effectuated on David Simon and Jeffrey Simon is confirmed in all respects.

The court has considered the remaining arguments offered by David Simon and Jeffrey Simon and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion is granted and the special referee's report dated June 12, 2003, is confirmed and service is

found to have been properly effectuated on defendanrs David Simon and Jeffrey Simon on January 22, 1998; and it is further

ORDERED that defendants' cross motion to reject the special referee's report is denied; and it is further

ORDERED that defendants' motion to vacate their default is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/13/98



HON. WALTER B. TOLUB, J.S.C.