

**Gletzer v Harris**

2005 NY Slip Op 30317(U)

February 8, 2005

Supreme Court, New York County

Docket Number: 605036/01

Judge: Herman Cahn

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

PRESENT: MANI CANI  
*Justice*

PART 49

0605036/2001

GLETZER, MORRIS I.  
VS  
HARRIS, AMOS

INDEX NO. \_\_\_\_\_

MOTION DATE 10/15/04

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. 10

SEQ 2

CONFIRM/REJECT REFEREE REPORT

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

**FILED**

FEB 15 2005

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

NOT TO BE DECIDED IN ACCORDANCE  
WITH RULES 37.1 AND 37.2 MEMORANDUM  
DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/7/05

*John Cole*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X  
MORRIS I. GLETZER a/k/a MORRIS I. GLEGER,

Plaintiff,

Index No. 605036/01

-against-

AMOS HARRIS,

Defendant.

-----X  
**CAHN, J.:**

Defendant Amos Harris moves to reject the report of Special Referee Louis Crespo, Jr. in which the Special Referee determined that Harris is a domiciliary of New York and therefore subject to jurisdiction here, CPLR 4403, or, in the alternative, reopening the hearing, and allowing Harris to submit evidence rebutting plaintiff's argument regarding domicile. Plaintiff Morris I. Gletzcr, a/k/a Morris I. Gleger, cross-moves to confirm the report, and granting his motion for summary judgment to renew a judgment lien, nunc pro tunc, as of October 23, 2001.

On October 21, 1991, this Court entered a default judgment against defendant as the guarantor of a note, in favor of plaintiff, of \$470,437.50. This represented the unpaid portion of the underlying debt. On the same day, the judgment was docketed and filed.

In October 2001, plaintiff commenced this action by motion for summary judgment in lieu of complaint, CPLR 3213, seeking to redocket and renew the judgment lien that he obtained against defendant, nunc pro tunc, as of October 23, 2001, CPLR 5014. Defendant cross-moved to dismiss the action for lack of personal jurisdiction, contending that he is no longer amenable to the Court's jurisdiction as he is a resident and domiciliary of Missouri, and

[\* 3 ]  
has been since 1990.

By decision and order dated August 28, 2002, this Court held the motion in abeyance, and referred "the issue of whether the court has obtained jurisdiction over the defendant" to a referee to hear and report (Decision at 3 [Aff. of David, J. Kanfer, Exh 2]).

On June 21, 2004, a hearing on this issue was held before the Referee. At the hearing, plaintiff and defendant stipulated that the Referee consider three exhibits introduced by plaintiff: a certified copy of a deed to the premises located at 143 Avenue B, New York, New York, in the name of Amos Harris (the Apartment); a certified copy of defendant's August 25, 2003 deposition testimony in an action entitled Morris Gletzer v Amos Harris, pending in the Circuit Court, City of St. Louis, State of Missouri (the Missouri Action); and an Order and Judgment entered in the Missouri Action, dated December 4, 2003.

Counsel for the parties also stipulated to the following facts: (1) defendant resided in New York prior to 1991, then moved to St. Louis, Missouri; (2) while residing in New York, defendant lived at the Apartment; (3) Con Edison utility bills continue to be sent to the Apartment address; (4) Con Edison's records may reveal that defendant's name appears on such utility bills; and (5) as of the date of the hearing, telephone bills for the Apartment are rendered in defendant's name.

During the hearing, plaintiff read defendant's deposition testimony from the Missouri Action into the record. Defendant offered no evidence in support of his claim that he is a resident and domiciliary of Missouri.

On July 26, 2004, the Referee filed his report together with a transcript, and the exhibits introduced into evidence. In his Report, the Referee found that plaintiff had proven that

defendant was a New York domiciliary, and that therefore, the Court had obtained personal jurisdiction over defendant.

Specifically, the Referee found that the “proof reveals that Harris comes to New York approximately twice a month and stays approximately two to four days or approximately eight days a month” and that “he comes to his Apartment on other occasions, such as family and other social events and for ‘vacation’” (Report, at 8, ¶ 6). “In addition, he continues to own the apartment; which he never rents out,” “he continues to maintain utility and telephone services for the apartment and there is no testimony whether he does not pay the bills for the services,” and “he continues to receive mail at the apartment and has not changed his mailing address” (*id.*, at 8, ¶ 7).

The Referee further found that there “is no dispute that Harris was domiciled in New York in early 1990s” and that “his deposition testimony reveals he moved to St. Louis, Missouri, to work in a business owned by his brothers” (*id.*, at 11, ¶ 16). Moreover, the Referee found, “[t]here was no testimony that Harris maintains his residency in St. Louis as his permanent address” (*id.*), and that defendant’s testimony “reveals no evidence of an intention to permanently move from the New York Apartment” (*id.*, at 11, ¶ 17). Rather, the Referee found, “he continues to use the Apartment at whim whenever he wants to return to New York,” which “pattern of conduct has continued since 1991, that is, more than ten years Harris has continued to maintain his presence in New York” (*id.*).

The Referee determined that plaintiff thus:

has demonstrated the presumption that defendant continues to maintain his domicile in New York and defendant has not rebutted that presumption. The finding that defendant has a dual residency

in both New York and Missouri and continues to be domiciled in New York has ample evidentiary support; there is nothing in the record to rebut the presumption that Harris has discontinued his domicile in New York

Id., at 11, ¶ 18.

In reaching this conclusion, the Referee noted that the mere fact that defendant continues to use the Apartment, without more, does not establish that New York is his domicile.

However, the Referee specifically found that:

there is sufficient evidence that demonstrates substantial contact with New York, where, as here, defendant's visits, coupled together are lengthy as well as his access to and ownership of the Apartment, which is not hindered by a lease with third parties. He travels to New York and stays in the Apartment on average eight days a month, not including social or other family engagements or his "vacation" time in New York. Moreover, he has continued uninterrupted utility, telephone and mail service for his Apartment and pays taxes on the Apartment, and owns no realty in St. Louis, Missouri.

Id. at 11-12, ¶ 20. The Referee concluded that the above facts are "sufficient indicia of Harris' intent to continue his domicile in New York (id., at 12, ¶ 21), and that thus, "there is sufficient evidence to find that at the time this action was commenced the defendant continued to be domiciled in New York" (id. at 13-14, ¶ ¶ 25). Moreover, the Referee concluded, "the defendant's testimony ... and other proof has not rebutted that presumption," which "coupled with the documentary proof, demonstrates by the preponderance of the credible evidence that the defendant is subject to the jurisdiction of this Court" (id.).

In support of his motion to reject the Report, defendant argues that the Report is not adequately supported by the record, since none of the evidence submitted established that defendant had the requisite intent to return to or remain in New York. In the alternative,

defendant contends, this Court should use its authority under CPLR 4403 to reopen the hearing, and allow defendant to submit evidence to rebut plaintiff's last-minute argument regarding domicile.

It is well-established that the report of a special referee should be confirmed when the findings contained therein are supported by the record (In re Musano, 302 AD2d 302 [1<sup>st</sup> Dept 2003]; Nager v Panadis, 238 AD2d 135 [1<sup>st</sup> Dept 1997]), and the referee has clearly defined the issues and resolved matters of credibility (Kaplan v Einy, 209 AD2d 248 [1<sup>st</sup> Dept 1994]). The Referee's Report will be confirmed, as it is substantiated by the record.

Contrary to defendant's contentions, the Referee properly found that there was ample evidence in the record to demonstrate that defendant was a domiciliary of New York at the time this action was commenced, and that defendant failed to overcome the presumption that New York remains his legal domicile.

"Establishment of a domicile in a State generally requires a physical presence in the State and an intention to make the State a permanent home" (Antone v General Motors Corp., 64 NY2d 20, 28 [1984]; see also Kartiganer v Koenig, 194 AD2d 879 [3d Dept 1993]). The first domicile acquired is presumed to continue until a new one is acquired (see Zimmerman v Mingo, 171 AD2d 662 [2d Dept 1991]; Porcello v Brackett, 85 AD2d 917 [4<sup>th</sup> Dept 1981], aff'd 57 NY2d 962 [1982]). Indeed, abandonment of an established domicile is a pre-requisite to the acquisition of a new one (see Matter of Pingpank, 134 AD2d 263 [2d Dept 1987]). Moreover, "once a domicile is established in New York, it is not lost by temporary absences from the State, provided there is a corresponding intention to retain New York as one's domicile" (Unanue v Unanue, 141 AD2d 31, 39 [2d Dept 1988]).

The evidence offered by plaintiff at the hearing demonstrates that defendant never abandoned his New York domicile, notwithstanding his temporary absences, and, in fact, intended to maintain his domicile in New York.

Specifically, the evidence presented by plaintiff at the hearing reveals that defendant has owned the Apartment since 1987, has never sold nor rented it (Report, at 5, 8), and continues to pay property taxes on the Apartment (*id.*, at 4). Since 1991, defendant has regularly traveled “back and forth often” from Missouri to New York, at least once or twice a month (*id.*, at 3). Defendant generally stays at his apartment for at least 5 days at a time on each of these visits (*id.*, at 4). He continues to receive mail at the Apartment, and has not filed a change of address form, and continues to maintain the same telephone line at the Apartment (*id.*, at 4, 5). The Apartment is the place to which defendant continues to return (*id.*, at 11).

These facts clearly evidence defendant’s intention to retain his New York domicile, despite any residence in Missouri. Thus, the Referee’s findings are supported by the record.

A referee’s report should be confirmed in its totality where, as here, the reviewing court finds nothing in the record contrary to the findings in the referee’s report (Namer v 152-54-56 West 15 Street Realty Corp., 108 AD2d 705 [1<sup>st</sup> Dept 1985]; see also Kardanis v Velis, 90 AD2d 727 [1<sup>st</sup> Dept 1982]).

The Referee also properly found that defendant failed to overcome the presumption that he maintains his domicile in New York. The party seeking to change domicile has the burden of proving such change of domicile by clear and convincing evidence (Matter of Urdang, 194 AD2d 615 [2d Dept 1993]; see also Matter of Pingpank, 134 AD2d, at 264 [“An

existing domicile continues until new one is acquired, and it is incumbent upon the party seeking to prove a change of domicile to establish such a change by clear and convincing evidence”]).

Thus, defendant had the burden to show, by clear and convincing evidence, that he was no longer a New York domiciliary. Defendant, however, offered no evidence at the hearing in support of his claim, while plaintiff offered defendant’s own sworn testimony from the Missouri Action, which demonstrated that defendant remains a New York domiciliary.

Defendant next argues that the hearing should be reopened, so that he can submit new evidence to rebut plaintiff’s “last minute, prejudicial jurisdictional theory” regarding domicile. He argues that he has been prejudiced because plaintiff’s post-hearing brief (which was simultaneously exchanged with defendant’s post-hearing brief) asserted, for the first time, that defendant has continued to be a domiciliary of New York. Moreover, defendant argues, although he attempted to submit a reply letter to the Referee refuting plaintiff’s domicile argument, the Referee denied defendant’s request to consider his reply.

Defendant’s claim that he was “surprised” and prejudiced by plaintiff’s domicile argument is without merit. (*id.*, ¶ 50; Exh D). The record shows that defendant was on notice of the facts intended to be proved by plaintiff at the hearing, and had the opportunity to rebut these facts at the hearing. The Court rejects defendant’s contention that he was prejudiced by plaintiff’s domicile argument, and defendant’s motion to reopen the hearing is denied.

In any event, much of defendant’s “new” evidence is contrary to his own testimony in the Missouri Action, and thus does not establish, by clear and convincing evidence, that Missouri is his domicile.

The record supports the Referee’s findings as to jurisdiction, and the Report must

be confirmed (see Scarab Equities Corp. v 684 Owners Corp., 170 AD2d 409 [1<sup>st</sup> Dept 1991]; see also Visco v Marion, 268 AD2d 303 [1<sup>st</sup> Dept 2000]; State Farm Mutual Ins. Cos. v Goldberg, 226 AD2d 115 [1<sup>st</sup> Dept 1996]).

The only remaining issue before the Court is plaintiff's cross motion for summary judgment, pursuant to CPLR 3213, for an order permitting him to renew the judgment lien in the amount of \$470,437.50, nunc pro tunc, as of October 23, 2001, the date the CPLR 3213 motion was filed and served.

Although a judgment remains valid and enforceable for 20 years, it only remains viable as a lien against real property for a period of ten years (CPLR 5203 [a]), unless such judgment is renewed in accordance with the provisions of CPLR 5014. CPLR 5014 provides that an action upon a money judgment may be maintained between the original parties where ten years have elapsed since the judgment was originally docketed, in order to renew the lien for another 10 year period on real property (see Levine v Bornstein, 4 NY2d 241 [1958]; Pangburn v Klug, 244 AD2d 394 [2d Dept 1997]; Quarant v Ferrara, 111 Misc 2d 1042 [Sup Ct, Queens County 1981]). Thus, CPLR 5014 extends the lien status of the judgment by granting a renewal judgment to be docketed at the expiration of the original judgment (see Matis v DeLasho, 191 Misc 2d 338 [Sup Ct, Westchester County 2002]; Quarant v Ferrara, 111 Misc 2d 1042, supra)

In response to plaintiff's motion papers, other than his personal jurisdiction argument, defendant does not contest plaintiff's entitlement to an order renewing his judgment lien. Accordingly, plaintiff's motion for summary judgment renewing his judgment lien in the amount of \$470,437.50 is granted (see The Cadle Company v Biberaj, 307 AD2d 889 [1<sup>st</sup> Dept 2003]; Pangburn v Klug, 244 AD2d 394, supra).

Defendant does argue, however, that if plaintiff is granted summary judgment, such relief should not be granted nunc pro tunc. The Court rejects this argument. This action to redocket a lien has been protracted by reason of the Missouri litigation, and this Court clearly had jurisdiction over defendant when the original motion for summary judgment was filed. Thus, defendant's cross motion for summary judgment is granted, nunc pro tunc, as of October 23, 2001.

Accordingly, it is hereby

ORDERED that defendant's motion for an order rejecting the Report of Special Referee Louis Crespo, Jr. is denied; and it is further

ORDERED that plaintiffs' cross motion to confirm the Report is granted, and the Report is confirmed; and it is further

ORDERED that plaintiff's cross motion for summary judgment is granted, nunc pro tunc, as of October 23, 2001; and it is further

ORDERED that the Clerk is directed to enter a renewal judgment in favor of plaintiff and against defendant in the amount of \$470,437.50; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Judgment Clerk, and upon service of a copy of this order with notice of entry, the Clerk shall mark his records accordingly.

Dated: February 8, 2005

**FILED**  
 FEB 15 2005  
 NEW YORK  
 COUNTY CLERK'S OFFICE  
 Enter: Alan Cohen  
 J.S.C.