

**Mars v Dobrish**

2007 NY Slip Op 31644(U)

June 8, 2007

Supreme Court, New York County

Docket Number: 0116675/2003

Judge: Marcy S. Friedman

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

PRESENT: Hon. Marcy S. Friedman  
Justice

PART 57

Index Number : 116675/2003

MARS, ARNOLD J.

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

vs

DOBRISH, ROBERT Z. ESQ.

MOTION DATE \_\_\_\_\_

Sequence Number : 013

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

CONFIRM/REJECT REFEREE REPORT

MOTION CAL. NO. \_\_\_\_\_

is motion to/for reject referee's report

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1

Replying Affidavits \_\_\_\_\_

2, 3

Memo of Law

4

Cross-Motion:  Yes  No

m1

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

JUN 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6-8-07

[Signature]  
HON. MARCY S. FRIEDMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

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ARNOLD J. MARS,

Index No.: 116675/03

*Plaintiff(s),*

*against*

ROBERT Z. DOBRISH, ESQ., et al.,

DECISION/ORDER

*Defendant(s).*

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Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

By prior order of this court dated October 13, 2006, plaintiff's motion to reject the report of Special Referee Marilyn Dershowitz dated June 27, 2006, finding that plaintiff had waived the right to depose plaintiffs, was denied without prejudice to an application to the referee to reconsider her decision. More particularly, the court found that there was no basis in the record to set aside the Special Referee's findings about the delay in the completion of discovery, but the court noted that "the Special Referee did not have correspondence between the parties regarding plaintiff's efforts to schedule the depositions between the May 18 and June 27 conferences, and that such efforts may be material to whether plaintiff should be precluded from deposing defendants." Following Referee Dershowitz's reconsideration of her prior decision, she issued a report dated March 7, 2007, again finding that plaintiff was not entitled to take defendants' depositions because he had failed to schedule them within the deadline set for discovery. Based on her review of correspondence during the time period at issue, Referee Dershowitz stated in the March 7 report that plaintiff failed to avail himself of the opportunity to take the defendants' depositions, "offered no reasonable excuse for his failure to go forward," and "failed to contact

the [referee] by phone as the parties had been advised they might, in the event of a dispute or problem.”

Plaintiff now moves to set aside this finding of the Special Referee as being contrary to the evidence and an abuse of discretion. Plaintiff’s counsel claims that the Special Referee was informed at the May 18 conference that depositions would not commence for several weeks due to trial schedules of two of defendants’ counsel and a previous commitment of plaintiff’s counsel from June 3 to June 8. Plaintiff also claims that letters sent to defendants in June 2006 show that he attempted to get the depositions scheduled with defendants, and these letters contradict the findings of the referee that he failed to follow through on his obligations to pursue the depositions.

“It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor.” (Poster v Poster, 4 AD3d 145 [1<sup>st</sup> Dept 2004], rearg denied 2004 NY App Div LEXIS 4856; Rezzadeh v Lucas, 253 AD2d 698 [1<sup>st</sup> Dept 1998].) Thus, “the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility.” (Nager v Panadis, 238 AD2d 135, 135-136 [1<sup>st</sup> Dept 1997]; United States Trust Co. of New York v Olsen, 194 AD2d 481 [1<sup>st</sup> Dept 1993]; Pittonj v Boland, 278 AD2d 396 [2d Dept 2000].)

Here, correspondence reviewed by the Special Referee with respect to efforts made by

plaintiff between May 18 and June 27, 2006 to schedule defendants' depositions shows that the scheduling of defendants' depositions was in dispute and that plaintiff suggested that a conference call be held to set the remaining deposition dates. However, plaintiff submits nothing to show that he proposed or otherwise attempted to schedule firm dates for defendants' depositions after May 18 and before June 27. As late as June 8, 2006, he failed to do anything to ensure that depositions would be completed by the final June 27 deadline, and once again merely requested defendants' schedules. (Pape Aff. in Opp., Ex. E.) Moreover, plaintiff does not submit any evidence that he initiated any calls to the Special Referee prior to June 27 in order to resolve the dispute between the parties. Thus, contrary to plaintiff's argument, the Special Referee's findings with respect to plaintiff's efforts to schedule the defendants' depositions are not contradicted by the evidence.

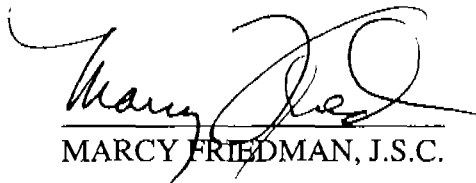
Plaintiff's failure to schedule defendants' depositions is of particular significance in light of the fact that, after numerous delays, this court set a final deadline of March 15, 2006 for the completion of all depositions, which was extended by court order to April 15, 2006. (See id.) Notwithstanding this order, the parties agreed at a conference with the Special Referee to extend the deadline to June 27. While plaintiff's counsel demonstrated professional courtesy in soliciting dates from defendants' counsel for defendants' depositions, once the dispute over scheduling arose it was incumbent on plaintiff to take appropriate steps to resolve the dispute before the Special Referee in advance of the deadline. Plaintiff has shown no excuse for the failure to do so. As plaintiff therefore did not avail himself of the opportunity to conduct the depositions, the Special Referee's findings should be upheld. (See Vargas v Villa Josefa Realty Corp., 28 AD3d 389 [1<sup>st</sup> Dept 2006].)

Plaintiff's motion to reject the report of the Special Referee is accordingly denied and it is ORDERED that the report of Special Referee Marilyn Dershowitz dated March 7, 2007 is confirmed; and it is further

ORDERED that plaintiff shall file a Note of Issue by June 29, 2007.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 8, 2007

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
JUN 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK