

Sabotage, Inc. v Jean Touch, Inc.

2007 NY Slip Op 34506(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 108431/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Sabotage, Inc. and Martin P. Greenberg,

Plaintiff

-against-

Jean Touch, Inc. and
Victor Harari a/k/a Victor Hatari

Defendants.
-----X

DECISION/ORDER

Index No.: 108431/06
Seq. No.: 003

Present:
Hon. Judith J. Gische
J.S.C..

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltf n/m (CRR) w/ ESR affirm	1
Def x/motion (RRR) w/ AID affirm, exh	2
RR, transcript	3,4

FILED

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Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

In connection with a prior motion by defendants Jean Touch, Inc and Victor Harari a/k/a Victor Hatari to dismiss the complaint in these two actions: Lawrence Alimento v. Victor Harari a/k/a Victor Hatari and Jean Touch, Inc., Index No. 108430/06; and Sabotage Inc. and Martin P. Greenberg v. Jean Touch, Inc. and Victor Harari a/k/a Victor Hatari, Index No. 108431/06, defendants argued that this court had not acquired personal jurisdiction over Harari in either action because he had not been properly served by the plaintiff.

The court granted both motions only to the extent of directing a traverse hearing before a special referee who would take testimony and render a report with recommendations.

The hearing has been held and the referee (Howard Leventhal) rendered a report which he filed on January 18, 2007 with the transcript of the proceedings before him. CPLR § 4403. In each case plaintiff seeks to confirm the referee's report but defendants reject the report and seek an order dismissing each case for improper service. In the interest of judicial economy, the motions to confirm and reject in each case are consolidated herein for decision in a single decision/order, an original of which will be filed in each case.

Applicable Law

The referee's function is to determine the issues referred to him (or her), as well as to resolve conflicting testimony and matters of credibility. Pursuant to CPLR § 4403 the court may confirm or reject in whole or in part any report made by the Special Referee. The court may also make new findings with or without the taking of additional testimony, provided it has the benefit of the transcripts and trial exhibits (which it has in this case).

As a general rule, however, the court will not disturb the Referee's findings, and the report should be confirmed, if his or her findings are supported by the record and if s/he has clearly defined the issues, and fairly resolved matters of credibility. Kaplan v. Einy, 209 AD2d 248 (1st dept. 1994); Freedman v. Freedman, 211 AD2d 580 (1st dept. 1995); The Board of Managers of the Boro Park Village-Phase I v. Boro Park, 284

AD2d 237 (1st dept. 2001). The Referee's recommendations are entitled to great weight since s/he was the trier of fact and had the opportunity to see and hear the witnesses, and observe them on the stand. Frater v. Lavine, 229 AD2d 564 (2nd dept. 1996).

Discussion

Referee Leventhal has decided in each action that defendant Harari was personally served with the summons and complaint. He has, therefore, sustained the traverse.

This decision is based upon the testimony of the process server, an employee of Jean Touch, Inc, ("Hanan") and Mr. Harari himself. The referee found the process server credible. The referee did not find the testimony by Hanan or Harari credible.

The process server testified that Harari tried to avoid service and refused to accept the complaint as he approached him. When this happened, and as Harari began to retreat from him, the process server lay the papers on the floor within inches of the defendant. The Referee has determined that this "good service" since based upon long established appellate authority on this issue. Personal service does not require a hand to hand exchange of the papers being served. Bossuk V. Steinberg, 58 NY2d 916 (1968); McDonald v. Ames Supply Co., Inc., 22 NY2d 111 (1968).

Defendants urge that the report be rejected because the process server used subterfuge to serve him with papers and he claims that as a matter of law, there was no need for him to pretend to be a customs agent to serve him with papers. The referee, however, has disposed of this claim by finding the process server's testimony, that he did not misrepresent himself as a customs agent, credible.

Other claims by defendants, that the papers served were improperly marked, or lacking an index number, were not proved at the hearing. In any event, the court has the discretion of excusing the absence of such information if there is no prejudice to the defendants. Cruz v. New York City Housing Authority, 269 AD2d 108 (1st Dept 2000). Since none was proved, or now pled, this is not a basis to dismiss either case.

The referee has discharged his duties. The report sets forth the essential facts and resolves the issue referred to the referee; he has also fairly resolved matters of credibility. Kaplan v. Einy, 209 AD2d 248 (1st dept. 1994); Freedman v. Freedman, 211 AD2d 580 (1st dept. 1995); The Board of Managers of the Boro Park Village-Phase I v. Boro Park, 284 AD2d 237 (1st dept. 2001); Frater v. Lavine, 229 AD2d 564 (2nd dept. 1996). The plaintiffs' motions to confirm the report is granted. The report is hereby confirmed in its entirety. Defendants shall serve their answer within ten (10) days of being served with a copy of this decision with notice of entry.

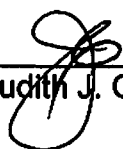
The preliminary conference in each of these cases is scheduled for June 2007 at 9:30 a.m. in Part 10, 80 Centre Street.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 10, 2007

So Ordered:


Hon. Judith J. Gische, J.S.C.

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