

**Herman v Gill**

2008 NY Slip Op 30384(U)

February 4, 2008

Supreme Court, New York County

Docket Number: 0100684/2001

Judge: Eileen Bransten

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

PRESENT: Eileen Bransten  
Justice

PART 6

Index Number : 100684/2001  
**HERMAN, GLENN**  
vs.  
**GILL, RONALD W.**  
SEQUENCE NUMBER : 008  
CONFIRM/REJECT REFEREE REPORT  
3

INDEX NO. 100684/01  
MOTION DATE 11-27-09  
MOTION SEQ. NO. 08  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for confirm report

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

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

**FILED**  
FEB 08 2008  
NEW YORK  
COUNTY CLERKS OFFICE

**IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM**

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

Dated: 2-4-08

Eileen Bransten  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

-----X  
GLENN HERMAN and ROBIN HERMAN,

Petitioners,

-against-

Index No.100684/01  
Motion Date: 11/27/07  
Motion Seq. No.: 08

RONALD W. GILL,

Respondents.

-----X  
PRESENT: EILEEN BRANSTEN, J.

Petitioners Glenn Herman and Robin Herman (the "Hermans") move for an Order confirming the report of Special Referee Leslie L. Lowenstein on the ground that it is supported by the evidence. Mr. Gill opposes the motion.

Background

In June 2003, this Court confirmed an arbitration award related to dissolution of the parties' law partnership and directed them to settle a judgment. In July 2005, the parties consented to an Amended Judgment. The only problem was that the Amended Judgment, which was based on the arbitration award, did not clearly resolve whether certain specified partnership debts had been paid, if so by whom, and in the end, which party was indebted to which.

By Order dated March 23, 2007, this Court Ordered that a Special Referee hear and report concerning whether (1) the parties' partnership debts have been satisfied, (2) who paid

the debts and how much each party paid, and (3) whether pursuant to the parties' 2005 judgment the Hermans were entitled to recover money from Mr. Gill, and if so, how much. Affirmation in Opposition to Motion ("Opp."), Ex. D, at 4.

On September 21, 2007, after conducting a hearing and considering the parties' memoranda of law, Special Referee Leslie Lowenstein issued a "Referee's Report and Recommendations" ("Report"). Special Referee Lowenstein found and concluded that:

"The proof and testimony and evidence adduced at the hearing sufficiently establishes that the partnership debt as listed in [the Amended Judgment] was either satisfied by payment or is uncollectible by reason of the creditors' failure to seek a timely judgment for the arrears (statute of limitations). To the extent that the partnership debt has been paid or remains uncollectible I find that all of the partnership debts have been satisfied.

\* \* \*

"[Petitioners--the Hermans] should be credited with \$75,919.58 for payments that the petitioners made in satisfaction of the partnership's third party debt. Respondent as the partner of the petitioners should be held responsible for one half of these payments with same summing in the amount of \$37,959.79.

\* \* \*

"A review of the submitted papers establishes that under the terms of the judgment, in the event that it is determined that the partnership no longer has any debts to third parties, that petitioners are due and owing from the partnership a net credit of \$104,984.17 of which \$52,492.09 or one half is the respondent's responsibility. The submitted papers further establish that respondent is indebted to the partnership for [the sum] \$128,114.71. As such the respondent is indebted to the petitioners for one half of such sum \$64,057.36. These two amounts total in the sum of \$116,549.45.

“\* \* \* [The Hermans] are entitled to a recovery from the respondent as the result of the court’s 2005 judgment the sum total of \$154,509.24. \* \* \* [The] sum is derived from one half of the payments made by the petitioners on behalf of the partnership to third parties (\$37,959.79) and sums previously determined to be due and owing by the respondent to the petitioners under the court’s 2005 judgment (\$116,549.45).”

Affirmation in Support (“Supp.”), Ex. A.

The Report contains the following recommendations:

“\* \* \* [That] the court direct the respondent to satisfy the foregoing sum by payment of same to petitioners within thirty days after service upon the respondent of the court’s order directing such payment together with notice of entry thereof.

“In the event that the respondent fails to timely pay the sum of \$154,509.24 as directed by the court, petitioners should be permitted to enter a money judgment in their favor against respondent for a like sum together with costs, interest and disbursements, all without further court order (CPLR 2222).”

Supp., Ex. A.

The Hermans move to confirm the Report because the determination “accords with the overwhelming preponderance of the evidence adduced at the hearing.” Supp., at ¶ 8.

Mr. Gill opposes the motion, urging that contrary to the Report debt is still outstanding and, that based on the Herman’s partial payments, the statute of limitations has not run. Opp., at 3. He further contends that the Special Referee failed to account for personal expenses that the Hermans made and that the “somewhat ambiguous” decision of the arbitrator was not followed.

Analysis

“It is well settled that a special referee’s findings of fact and credibility will generally not be disturbed where substantially supported by the record.” *RC 27th Avenue Realty Corp. v. New York City Housing Auth.*, 305 A.D.2d 135 (1st Dept. 2003); *see also, Giannicos v. Bellevue Hospital Medical Ctr.*, 42 A.D.3d 379, 379-389 (1st Dept. 2007); *Fiabane v. Goldstein*, 27 A.D.3d 281 (1st Dept. 2006) (no basis to disturb findings that were largely based on credibility).

Special Referee Lowenstein carefully considered the parties’ submissions. He examined the debts listed in the Amended Judgment (*see, Opp.*, Ex. C, at 5) and concluded, based on the evidence, that they were either satisfied or uncollectible and that the Hermans were entitled to a total of \$75,919.58 from the partnership, including \$9,000 for satisfaction of HSBC’s line of credit, \$36,712.34 for credit card debt, \$4,303.54 for payment to Fleet Bank, \$15,000 for payment to David Gould, \$1,056 for payment to Budget Counseling, \$7,847.70 for payment of HSBC credit cards and \$2,000 for a payment to Studebaker (for equipment leases).

Special Referee Lowenstein did not simply award the Hermans everything that they requested. He listened to the testimony, considered the evidence, examined the Amended Judgment and arrived at supported conclusions. Special Referee Lowenstein found “credible the testimony adduced of Robin Herman, respecting the payment of credit card debt in that

such payments represented payments for business rather than personal expenses.” Opp., Ex. E, Report, at 9. Moreover, even assuming that there is more collectible debt (and there is no evidence to support that contention), that does not defeat Mr. Gill’s obligation to pay that which was already satisfied. This Court will not disturb the credibility determinations made after a full hearing. Thus, Mr. Gill is responsible for \$37,959.79, which is half of the partnership debt that the Hermans paid off.

Additionally, based on the judgment, the Hermans were entitled to the sums of \$117,388.27 (Opp., Ex. C, Amended Judgment, at 3 [for cases Petitioners brought in and settled]), \$21,290.25 (Opp., Ex. C, Amended Judgment, at 4 [offset amount due for legal fees from *Kantor v. Buck*]) and \$35,437.35 (Opp., Ex. C, Amended Judgment, at 5 [money partnership owed the Hermans])--for a total of \$174,115.87--from the partnership. They owed a total of \$69,131.70 (\$34,166.70 [Opp., Ex. C, at 4] and \$34,965 [Opp., Ex. C, at 4]). The difference between what was owed to the Hermans and what they owed is \$104,984.17, half of which--\$52,492.09--Mr. Gill is responsible for.

The Amended Judgment further makes clear that Mr. Gill owed the partnership the sums of \$4,762.61, \$73,402.47 and \$49,949.63 (Opp., Ex. C, at 4)--for a total of \$128,114.71--half of which (\$64,057.36) he is responsible for.

Based on these calculations the Special Referee concluded that Mr. Gill must pay the Hermans \$37,959.79 (half the partnership debt); \$52,492.09 (half of what is owed by the

partnership to the Hermans), and \$64,057.36 (half of the debt he owes to the partnership) for a total of \$154,509.24, which is due the Hermans.

Mr. Gill has not established a basis for disturbing the Special Referee's conclusions, which are supported by the evidence. Thus, the recommendations in the Report are confirmed.

Accordingly, it is

ORDERED that petitioners' motion to confirm the Report is granted; it is further

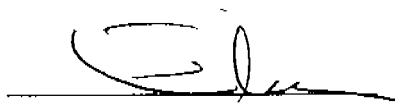
ORDERED that respondent is to pay petitioners \$154,509.24 within thirty days after service upon him of the court's order directing such payment together with notice of entry thereof; and it is further

ORDERED that in the event respondent fails to timely pay the sum of \$154,509.24 as directed by the court, petitioners may enter a money judgment in their favor against him for a like sum together with costs, interest and disbursements, without further Order.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
February 4, 2008

ENTER



Hon. Eileen Bransten

HON. EILEEN BRANSTEN

**FILED**  
FEB 08 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

