

Rosen v Calico Jacks, LLC

2012 NY Slip Op 31407(U)

May 15, 2012

Supreme Court, New York County

Docket Number: 116745/08

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

MELISSA ROSEN,

INDEX NO. 116745/08

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 005, 006
007, 008

CALICO JACKS, LLC et al.,

Defendants.

MOTION CAL NO. _____

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

PAPERS NUMBERED

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

1, 4, 7, 10, 12

Answering Affidavits- Exhibits _____

2, 5, 8, 11

Replying Affidavits _____

3, 6, 9, 13

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

MAY 25 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated:

5/15/12

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

MELISSA ROSEN,

Plaintiff,

- against -

CALICO JACKS, LLC et al.,

Defendants.

INDEX NO.
116745/08

DECISION/ORDER

FILED

DONNA MILLS, J.:

MAY 25 2012

Motion sequence numbers 005, 006, 007 and 008 are consolidated for decision. In motion sequence 005, plaintiff seeks an order disqualifying Camacho Mauro Mulholland LLP and Andrea Sacco Camacho, Esq. from acting on behalf of Calico Jacks and Stephanie Torres. In motion sequence 006, defendants seek an order setting aside the liability judgment and damages award pursuant to CPLR §§4404(a) and 4404(b) respectively. In motion sequence 007, plaintiff seeks an order pursuant to CPLR §4403, rejecting the Referee's Report-Findings of Fact and Conclusions of Law. Finally, in motion sequence 008, defendants seek an Order pursuant to CPLR §4403 confirming the Referee's Report-Findings of Fact and Conclusions of Law; vacating the default judgment against Stephanie Torres, and permitting her to file an answer; and setting aside the verdict in the underlying action.

This is an action for personal injuries sustained by the plaintiff on March 29, 2008 while present on premises known as Calico Jacks. As a result of this incident, the plaintiff sustained personal injuries to the right hand and wrist. An action was commenced in the Supreme Court, New York County on December 16, 2008 on behalf of the plaintiff. Issue was joined on behalf of defendants Calico Jacks, LLC, John Ciccio, Efstatios Kynaliscians, Christopher Lash and Joe Hitti. Defendant Stephanie Torres did not answer and a default judgment was obtained on January 12, 2010.

At a framed issue hearing before the trial commenced, this Court granted a directed verdict in plaintiff's favor, after ruling that the default judgment against Torres was binding upon Calico Jacks. Plaintiff discontinued against the remaining individual defendants.

At trial the jury awarded a judgment for the plaintiff, awarding \$200,000.00 for past pain and suffering and \$1,080,000 for future pain and suffering.

Plaintiff now seeks the disqualification of Camacho Mauro Mulholland LLP and Andrea Camacho, Esq. as attorneys for defendants Calico Jack and Stephanie Torres. Disqualification motions have become a cottage industry. All too frequently, attorneys bring such motions as a litigation tactic. Even where the situation presented seems to implicate a disciplinary rule if read literally, the court must be wary to prevent its misuse, particularly when it is unnecessarily detrimental to the adverse party's rights. See, H.H.B.K. 45th Street Corp. v. Stern, 158 A.D.2d 395, 396, 551 N.Y.S.2d 517.

Disqualification should not be ordered lightly, particularly where the disqualification would not advance the very purposes that the disciplinary rule seeks to promote. DR 5-105 (c) is intended to protect clients from an attorney who is incapable of zealously representing the potentially competing interests of each client. Mechanical, uncritical application of the disciplinary rule in this case would not only result in injustice, but would not protect the defendants, who are members of the class that the rule is intended to protect. See, S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 444, 515 N.Y.S.2d 735, 508 N.E.2d 647 (Kaye, J.). Disqualification here would be purposeless and contrary to public policy.

By decision and order of this Court dated April 7, 2011, the issue of whether proper service of process was effectuated upon defendant Stephanie Torres on December 22, 2008, pursuant to CPLR §308(2), was referred for assignment to a Special Referee to hear and report. A traverse hearing on the reference issue was held on January 5, 2011 before

Special Referee Lancelot Hewitt.

At the conclusion of the Traverse Hearing, the Special Referee made the following findings of fact: (1) plaintiff attempted to effectuate proper service upon defendant, Torres, in this action on December 22, 2008, when Rudolph Wright, a licensed process server, delivered a copy of the summons and complaint to Calico Jacks and thereafter mailed a copy of the summons and complaint to defendant, Torres, at Calico Jacks; (2) defendant, Torres, was not an employee of Calico Jacks on December 22, 2008; (3) John Ciccio was not a co-worker of defendant, Torres, on December 22, 2008; and (4) John Ciccio did not accept plaintiff's summons and complaint in this action on behalf of defendant, Torres, on December 22, 2008. Based upon these findings, Referee Hewitt concluded that personal service was not effectuated on defendant, Torres, in this matter.

It is well settled that 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 (Kaplan v. Einy, 209 A.D.2d 248, 251, 618 N.Y.S.2d 777; Namer v. 152-54-56 West 15th St. Realty Corp., 108 A.D.2d 705, 706, 485 N.Y.S.2d 1013, lv. dismissed sub nom.; Walker v. Sant'Andrea, 72 N.Y.2d 954, 534 N.Y.S.2d 667, 531 N.E.2d 299), since the Special Referee is considered to be in the best position to determine the issues presented (*id.*).

In the matter at bar, this Court must confirm the report, as a review of the report reveals that Special Referee Hewitt cogently and concisely analyzed the issues presented, and evaluated and credited the witnesses testimony. Referee Hewitt also correctly determined that plaintiff's evidence of service was not proven by the testimony of the process server, and in any event, it was effectively rebutted by the defendants' testimony.

In light of this Court's determination that plaintiff did not effectuate proper service upon Ms. Torres, defendants' motion to vacate the determination granting a directed

verdict in favor of the plaintiff with regards to liability should be granted, setting aside the judgment and award of damages, and setting the matter down for a new trial.

Accordingly it is

ORDERED that plaintiff's motion to disqualify the defendants' lawyer and law firm is denied; and it is further

ORDERED that the report of Referee Hewitt dated April 17, 2012 be confirmed; and it is further

ORDERED that the defendants motion to vacate the default judgment against Stephanie Torres, and the directed verdict in favor of the plaintiff against the defendant Calico Jack and Stephanie Torres is granted; and it is further

ORDERED that the defendants' motion vacating the judgment and award against them is granted, and this matter set down for a new trial on liability and damages; and it is further

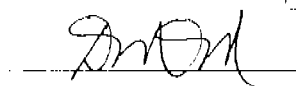
ORDERED that counsel are directed to appear for a conference in Room 574, 111 Centre Street, on June 5, 2012, at 10:30 AM.

FILED

Dated: 5/15/12

MAY 25 2012

ENTER:



COURT CLERK

J.S.C.

DONNA M. MILLS, J.S.C.