

**Byrne v Droskoski**

2016 NY Slip Op 30922(U)

May 12, 2016

Supreme Court, New York County

Docket Number: 103022/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
BRENDAN BYRNE, BARKLEY TRADING LLC,  
and BARKLEY CAPITAL LLC,

Plaintiffs,

-against-

Index No. 103022/08

Mot. seq. no. 008

**DECISION AND ORDER**

JAMES A. DROSKOSKI, HLV TRADING, INC.,  
HLV CAPITAL, CHARLES VACCARO, VELEZ  
CAPITAL MANAGEMENT, LLC, GLB  
TRADING INC., and VISION TRADING, LLC,

Defendants.

-----X  
BARBARA JAFFE, JSC:

For plaintiff:  
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631-258-0851

By notice of motion, plaintiffs move pursuant to 22 NYCRR § 202.44 for an order ~~confirming~~ an award granted in their favor by a Judicial Hearing Officer (JHO) after an inquest, and directing the clerk to enter judgment against defendants HLV Trading, Inc. (HLV) and Charles Vaccaro for the sum of \$3.5 million. In the alternative, plaintiffs ask, pursuant to CPLR 4404(b), that the matter be reopened for the court to make new findings of fact based on additional testimony in order to substantiate the amount awarded by the JHO. They also seek pre-judgment interest from September 4, 2007, the time of defendants' breach of contract and fraud. (NYSCEF 52).

In an affidavit, Vaccaro takes issue with plaintiff Byrne's inquest testimony and denies having been notified of any hearing or court appearances. He alleges that "plaintiff apparently has been notifying a law firm that has not represented me in over six years. I no longer reside in

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New York and have not received any notice via mail or any other means." (NYSCEF 53).

In reply, plaintiffs deny Vaccaro's factual allegations, and observe that Vaccaro never advised any party of his change of address. (NYSCEF 54).

Plaintiffs settled the case against defendant Droskoski and the action was discontinued as against him. (NYSCEF 49).

#### I. PERTINENT FACTS

By summons and verified complaint filed on February 27, 2008, as pertinent here, plaintiffs sued HLV and Vaccaro for breach of contract and conversion. (NYSCEF 2). HLV and Vaccaro filed a verified answer on or about May 1, 2008. (NYSCEF 1). By order dated November 10, 2010, the justice previously presiding in this case granted the unopposed motion of HLV's and Vaccaro's attorney to be relieved from representing them, stayed the action for 30 days to permit them to retain a new attorney, and ordered that their failure to appear at a compliance conference scheduled for January 12, 2011, would result in the entry of a default judgment against them. (NYSCEF 22). An affidavit dated December 10, 2010, reflects that the November 10 order was served on HLV and Vaccaro at Vaccaro's last known address, the same address at which he was served with the summons and complaint. (NYSCEF 2, 24).

Thereafter, the record reflects no appearances by or on behalf of HLV or Vaccaro or any other defendant apart from Droskoski. However, in a stipulation so ordered on May 11, 2011, counsel for plaintiffs and defendant Droskoski agreed that Vaccaro's deposition, scheduled for March 15, 2011 (NYSCEF 25), was completed on April 12, 2011 (NYSCEF 27).

By decision and order dated July 6, 2015, another justice of this court granted plaintiffs a default judgment against defendants on liability, and referred the matter for an inquest (NYSCEF

49), which was held on September 30, 2015 (NYSCEF 50).

At the inquest, the JHO examined the contract between plaintiffs and defendant HLV, found that Vaccaro had signed the contract solely in his capacity as president of HLV, and characterized as "too vague" plaintiff Byrne's testimony as to whether Vaccaro should be held personally liable for HLV. However, upon hearing Byrne further, he sustained plaintiffs' claims against Vaccaro. Notwithstanding Byrne's representation that he had come to the inquest with financial records "showing what the value of Barkley Trading would have been," the JHO recommended the entry of judgment in the amount of \$3.5 million in damages based solely on Byrne's testimony and the contract. (*Id.*).

## II. FINDINGS

Vaccaro's claim that he was unaware of any of the dates on which he failed to appear is disregarded. Having been served with his attorney's motion to be relieved and with the order relieving his attorney, and absent any indication that he notified anyone that he was no longer at his last known address, Vaccaro cannot avoid the default. In any event, his affidavit does not constitute a cognizable motion to vacate.

Pursuant to 22 NYCRR 122.9, a determination made by a judicial hearing officer in respect to any proceeding at which he or she presides shall be made by issuing a written decision and "shall indicate the reasons upon which the decisions or findings and recommendations contained in the report are based."

Pursuant to CPLR 4403, a judge may confirm or reject, in whole or in part, the report of a referee, make new findings with or without taking additional testimony, and may order a new trial or hearing. A referee's report should be confirmed if the referee's findings are supported by

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the record (*Barrett v Toroyan*, 45 AD3d 301 [1<sup>st</sup> Dept 2007]; *Baker v Kohler*, 28 AD3d 375-376 [1<sup>st</sup> Dept 2006], *lv denied* 7 NY3d 885) and the referee has "clearly defined the issues and resolved matters of credibility." (*Nager v Panadis*, 238 AD2d 135 [1<sup>st</sup> Dept 1997]). The court may reject findings not supported by the record. (*Kardanis v Velis*, 90 AD2d 727 [1<sup>st</sup> Dept 1982]).

Here, as the JHO set forth no factual basis for recommending an award of \$3.5 million, there is an insufficient basis upon which to confirm his recommendation as to damages. (See *Munson v Munson*, 243 AD2d 1031 [3d Dept 1997] [remitting matter to JHO as he failed to set forth reasoning, either on record or in written decision, for determination]; *Matter of Popper*, 242 AD2d 297, 298 [2d Dept 1997] [same]).

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the Judicial Hearing Officer's report of September 30, 2015 is partially confirmed to the extent of holding Vaccaro and HLV liable; it is further

ORDERED, that a new assessment of damages shall be held before a different Judicial Hearing Officer, and it is further

ORDERED, that the assessment be scheduled for the earliest possible date and the clerk shall notify all parties of the date and time of the inquest.

ENTER:

  
Barbara Jaffe JSC

**BARBARA JAFFE**  
**J.S.C.**

DATED: May 12, 2016  
New York, New York