

Greif v Mas
2018 NY Slip Op 30810(U)
April 27, 2018
Supreme Court, New York County
Docket Number: 805294/17
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK
COUNTY**

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

LINDA GREIF,

Plaintiff,

- v -

FRANCIS MAS,

Defendant.

INDEX NO. :805294/17

MOTION DATE: 4-26-18

MOTION SEQ. NO.:002

MOTION CAL. NO.:

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

In this medical malpractice action, defendant moves, pursuant to CPLR 3211(a)(8) to dismiss this action based on improper service. Plaintiff, appearing *pro se*, opposes the motion.

In his affidavit submitted in support of the motion, defendant states that contrary to the affidavit of service, a copy of the Summons with Notice, and a Notice of Commencement of the Action was not delivered to a receptionist in his office who fits the description set forth in the affidavit of service and no such individual fitting the description is employed by him. Specifically, he states that while the affidavit of service indicates that the initiating papers were served on a white female, with brown hair, age 35-44 years, height 5' 4', and 131-160 lbs, no one matching that description is employed by him [and that]... his office manager

has blond hair and his assistant has black hair and brown skin.” He also states that he never authorized anyone to accept service on his behalf, and that he was never personally served with the Summons with Notice, and a Notice of Commencement of the Action, and that the only legal papers he received were in the mail.

In opposition to the motion, plaintiff argues that defendant has failed to raise an issue of fact as to the presumptive validity of the affidavit of service. Plaintiff contends that the only issue concerns whether a person of suitable age and discretion was served at defendant’s medical office, and that the affidavit of service is sufficient to establish proper service. In particular, she argues that although defendant states in his affidavit that no one employed by him matches the description of the receptionist described in the affidavit, this statement is insufficient to raise a triable issue of fact as to whether the receptionist constituted a person of suitable age and discretion for the purposes of CPLR 308(2), citing Albilis v. Hillcrest General Hospital, 124 AD2d 499 (1st Dept 1986)(upholding Special Referee’s finding that service of a copy of the summons and complaint upon a receptionist at the professional building at which the defendant worked as a physician constituted service on a person of suitable age and discretion under CPLR 308[2]).

In reply, defendant submits a second affidavit in which he states that “[a]lthough I share office space with another physician, my only employees are Monique and Tamika,” who do not fit the description in the affidavit of service. He also states that he has “no knowledge if any of the other doctor’s employees fit the description on the affidavit of service—they come and go.” He further that his office address is “65 Central Park West #1, New York, New York [and not] 65 Central Park West [as stated in the affidavit of service],[and that] “the building has a doorman at the door and another that sits behind a desk but no female receptionist.” He also states that “the only legal papers I received were the papers I received in the mail. I never received copies of legal papers through any other matter.”

While an affidavit of service constitutes prima facie proof of proper service, when, as here, a defendant’s affidavit contains details denying service, a traverse

hearing is needed to resolve the issue of personal service. See Finkelstein Newman Farrar LLP v. Manning, 67 AD3d 538, 539 (1st Dept 2009)(remanding matter for a traverse hearing where “defendant’s sworn nonconclusory denial of service sufficiently controverted the veracity or content of the affidavit of service...”). Moreover, the holding in Albilia supra on which plaintiff relies, is not to contrary since in Albilia jurisdiction was found based on the service of the receptionist only after a traverse hearing.

In view of the above it is

ORDERED that defendant’s motion is granted only to the extent that the issue of whether defendant was properly served based on service on a person of suitable age and discretion under CPLR 308(2) is referred to Special Referee to hear and report with recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for defendant shall on or before May 17, 2018, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall plaintiff and defendant’s counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that failure to timely comply with the immediately preceding paragraph shall result in the waiver of defendant’s defense alleging improper service of process; and it is further

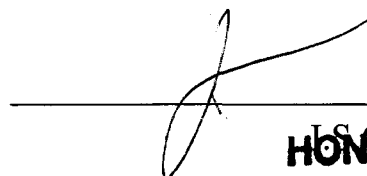
ORDERED that the parties shall appear at the hearing, including with all

witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the JHO/Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: April 27, 2018


HON. JOAN A. MADDEN
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION