

Rivera v Zamor

2020 NY Slip Op 31238(U)

May 1, 2020

Supreme Court, Kings County

Docket Number: 524853/2017

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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RONNIE RIVERA,

Plaintiff(s),

Decision and Order

-against-

Index No. 524853/2017

Mot. Seq.: 4 & 5

MILLIONARD ZAMOR,

Defendant(s).

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The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiff’s Notice of Motion to Confirm Referee Report dated November 25, 2019; Attorney Affirmation of Joseph Decolator, Esq., affirmed on November 25, 2019; Referee’s Report (Exhibit A); Transcript of Hearing (Exhibit B); Order of the Hon. Lawrence Knipel dated December 18, 2018 (Exhibit C); Notice of Entry of Order dated December 18, 2018 (Exhibit D).....	1
Defendant’s Notice of Motion to Reject Referee Report, undated; Affidavit of Millionard Zamor, sworn to on December 11, 2019; Affidavit of Roberte Zamor, sworn to on December 11, 2019; Referee’s Report and Transcript of Hearing (Exhibit A).....	2
Plaintiff’s Attorney Affirmation in Opposition of Joseph Decolator, Esq., affirmed on December 19, 2019; Referee’s Report (Exhibit A).....	3

MONTELIONE, RICHARD J., J.

In this personal injury action, plaintiff Ronnie Rivera filed the summons and complaint on December 27, 2017. Defendant Millionard Zamor was personally served pursuant to CPLR 308. No answer was interposed and plaintiff moved for default judgment. On July 24, 2018, the Hon. Lawrence Knipel granted plaintiff’s motion for default judgment (motion sequence #1) and an inquest was scheduled for October 16, 2018. On September 6, 2018, an Order to Show Cause

(motion sequence #2) was brought by defendant to “speak with the Judge” and that he had a “schizoaffective disorder” and that he would like time to obtain a lawyer. On October 15, 2018, Defendant’s Order to Show Cause was granted to the extent that the motion was adjourned to November 20, 2018 “for movant to seek counsel” and the inquest was likewise adjourned to November 20, 2018. Defendant subsequently brought a second Order to Show Cause (motion sequence #3) to dismiss and for a “reversal of the default judgment” against him. The two motions and the inquest were subsequently adjourned to December 18, 2018 and Hon. Lawrence Knipel granted the Orders to Show Cause to the extent that “this matter is referred to a special referee to hear and report whether defendant had sufficient mental capacity to have been served on 1/3/18.” A hearing took place before Referee Miriam Sunshine and on September 24, 2019, she found, *inter alia*, that defendant had the capacity to be served on January 3, 2018. Subsequently, plaintiff Ronnie Rivera moves in the instant motion to confirm the report of the referee and to schedule an inquest and assessment of damages in this case. Defendant Millionard Zamor cross-moves to reject the report of the referee and to grant defendant’s motion to dismiss.

Plaintiff argues, *inter alia*, that based upon the report of Referee Miriam Sunshine, where she recommended that a decision be issued that the defendant had the capacity to be served on January 3, 2018, that an inquest be scheduled accordingly.

Defendant opposes and argues, *inter alia*, that the report of Referee Miriam Sunshine should be rejected and that defendant’s medical records concerning his mental illness should be allowed into evidence for consideration of defendant’s motion to dismiss. Further defendant argues that he would not have been able to appear in court because he was hospitalized around the time he was served.

CPLR 309 (b) reflects the following:

(b) Upon a person judicially declared to be incompetent. Personal service upon a person judicially declared to be incompetent to manage his affairs and for whom a committee has been appointed shall be made by personally serving the summons within the state upon the committee and upon the incompetent, but the court may dispense with service upon the incompetent.

Generally, however, the section is only applicable to defendants for whom a court has already appointed a fiduciary pursuant to an adjudication of incompetency or similar status (*see gen. Hickey v. Naruth Realty Corp.*, 71 A.D.2d 668, 419 N.Y.S.2d 12 [2nd Dept.1979]); *see also* Alexander, 2012 Practice Commentaries, McKinney's Cons Law of CPLR 1201, at C1201:3). Moreover, 14 NYCRR 22.2 mandates that services upon a patient in a mental health facility requires court order and attendance of the facility's director except in specified circumstances.

In the instant case, from the numerous filings by defendant and on behalf of defendant by his sister, Roberte Zamor as well as her appearance at the hearing conducted by the Referee, it is abundantly clear that a Guardian Ad Litem must be appointed for defendant in the instant case (*see* CPLR 1202; *see also* *Anonymous v. Anonymous*, 256 A.D.2d 90, 681 N.Y.S.2d 494 [1st Dept 1998], *leave to appeal denied*, 2003, 99 N.Y.2d 509, 760 N.Y.S.2d 101, 790 N.E.2d 275).

As such, based on the foregoing, plaintiff's motion to confirm the referee's report is granted and defendant's cross-motion to confirm the referee's report is denied as to capacity to accept service.

However, it appears that defendant Millionard Zamor is incapable of adequately defending or prosecuting his rights and therefore, the Court hereby determines that the appointment of a Guardian Ad Litem (GAL) is proper and necessary to protect the rights of the

defendant herein. An off-list appointment is made herein based upon appointee's familial relationship with defendant and her familiarity with the instant case.

Therefore, it is

ORDERED that Roberte Zamor, sister of defendant Millionard Zamor, at 880 Albany Avenue, Brooklyn, New York 11203, telephone number 917-514-0953 be appointed Guardian Ad Litem for defendant Millionard Zamor in this action with the directive that she seeks legal advice or representation, either privately or through one of the legal services offices as annexed as a list to this order; and it is further

ORDERED that defendant Millionard Zamor's motion to dismiss and/or vacate the default judgment (motion sequence #3), held in abeyance, is hereby re-calendared for consideration on the merits on July in the Default Judgment Motion Part, at Supreme Court, Kings County, 360 Adams Street, Brooklyn New York 11201, at 9:30 a.m., in Room 359 (or as posted on the Room door, or as the court may otherwise direct) and that all parties, and the GAL, shall appear in the Default Judgment Motion Part in Room 359 (or as posted on the Room door or as otherwise directed), along with counsel, if retained or through special appearance; and it is further

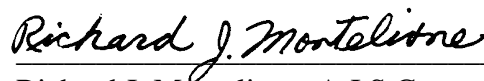
ORDERED that in the event personal appearances are prohibited by administrative order, all parties shall notify the court via email (twu@nycourts.gov) or fax (212-952-6286) of contact information that will allow the court to alternatively schedule a skype or telephone argument of this motion, and within the notice specify the above caption, index number, email address and contact phone numbers; and alternatively, the court reserves the right to consider the motion fully submitted; it is further

ORDERED that defendant may supplement his papers no later than at least four weeks prior to the return date and any supplemented papers must be filed and served upon the plaintiff's counsel by first-class mail with a certificate of mailing or via email and plaintiff may supplement his papers at least two weeks prior to the return date and any supplemented papers must be filed and served upon defendant and his GAL by first-class mail with a certificate of mailing or via email, and upon his counsel by email; and it is further

ORDERED that the inquest in this matter held in abeyance pending resolution of this motion; and

This constitutes the decision and order of the court.

Dated: May 1, 2020



Richard J. Montelione, A.J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.

LEGAL RESOURCES THAT MAY BE AVAILABLE TO SELF-REPRESENTED
PARTIES:

- FORECLOSURE HELP: FREE LEGAL SERVICES FOR HOMEOWNERS, LEGAL CLINIC WEEKDAYS, 10:00AM-1:00PM, Kings County Supreme Court, 360 Adams Street, Room 546, first Come, First Served. Meet one-on-one with an attorney or housing counselor. Receive advice, referrals or services. There is no charge for advice, referrals, or services. If you cannot visit the clinic, call Brooklyn Legal Services at 718-246-3279.
- BROOKLYN LEGAL SERVICES, 105 Court Street, Brooklyn, NY (718-237-5500); Brooklyn Bar Association Lawyer Referral Service, www.brooklynbar.org, 718-624-0843;
- FOR OLDER ADULTS-JASA is an agency serving older adults. 212-273-5272;
- NYC Department for the Aging, Aurora Salamone, Director (MUST CALL director before anyone else regarding formal requests from this office) 212-442-3105;
- FREE LEGAL SERVICES-Foreclosure Intervention and Prevention, Second Wednesday of every month from 2:00pm-5pm at Brooklyn Borough Hall, 209 Joralemon Street, Brooklyn, NY 11201 (partnered with Brooklyn Bar Association Volunteer Lawyer's Project, Inc. (718) 802-3777 to make an appointment.
- ADULT PROTECTIVE SERVICES-718-722-4824, 4812;

NOTE: The information provided by the court is not intended to be a substitute for legal research or legal representation. If you are involved in a lawsuit, it is strongly recommended that you seek legal counsel. The court is not an advocate for any party and will remain completely impartial.

WHAT COURT PERSONNEL CAN DO	WHAT COURT PERSONNEL CANNOT DO
<ul style="list-style-type: none"> ● Explain court procedures in Kings County Supreme Court. 	<ul style="list-style-type: none"> ● Explain how those rules and procedures apply to your specific case. ● Explain the rules and procedures of other courts
<ul style="list-style-type: none"> ● Provide available court forms, instructions, and brochures 	<ul style="list-style-type: none"> ● Help you fill out forms ● Advise you about whether your papers are legally sufficient
<ul style="list-style-type: none"> ● Discuss procedural options that may be available to a litigant 	<ul style="list-style-type: none"> ● Evaluate your options ● Advise you about which option to choose ● Predict how the court will rule in your case
<ul style="list-style-type: none"> ● Explain general legal terminology ● Provide information about where to look for statutes and court rules 	<ul style="list-style-type: none"> ● Evaluate whether you should start a case ● Advise you about which laws may be applicable in your situation ● Interpret statutes or court rules for you