

Demirovic v Performance Food Group Inc.
2020 NY Slip Op 32084(U)
June 26, 2020
Supreme Court, Kings County
Docket Number: 511926/16
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of June, 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice,

-----X
HADZIRA DEMIROVIC,

Plaintiff,

-against-

PERFORMANCE FOOD GROUP INC., PERFORMANCE TRANSPORTATION LLC, DIMAS CRUZ and JACK LOCICERO,

Defendants,

-----X

Index No. 511926/16

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

74-94 96-101
97-101 105-106
105-106 109

Upon the foregoing papers, plaintiff Hadzira Demirovic moves, to reject, modify, rehear and retry the findings contained in Referee Richard Allman's ("Referee") September 12, 2019 report ("Referee Report"), pursuant to CPLR 4403, and seeks an order making new findings and recommendations regarding said report (Mot. Seq. No. 8).

Defendants, Performance Food Group, Inc., Performance Transportation, LLC and Dimas Cruz ("defendants") cross move for an order, pursuant to CPLR 4403 and 22 NYCRR §202.44, confirming the Referee Report and, upon confirmation, transferring this action to Richmond

County, pursuant to CPLR 510(1) and 511 (Mot. Seq. No. 9). Plaintiff opposes defendants' motion.

Background

Plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on June 18, 2015 as the result of a three-vehicle accident that occurred at an intersection in Richmond County. Plaintiff was stopped at a red light when her vehicle was struck in the rear by a vehicle owned and operated by defendant Jack Locicero ("Locicero"). Prior to striking the plaintiff's vehicle, Locicero's vehicle was struck by a tractor trailer owned and operated by the moving defendants.

Plaintiff commenced this action in Kings County. Regarding venue, the complaint alleges that Locicero was a resident of Kings County. After defendants answered the amended complaint, they moved to change venue to Richmond County, pursuant to CPLR 510(1) and 511, on the ground that Locicero and the plaintiff both resided in Richmond County at the time of the accident. Plaintiff, in opposition to the motion, argued that venue in Kings County was proper, since the evidence submitted by defendants established that Locicero was a resident of Kings County at the time of the accident. Plaintiff cross-moved to change venue to New York County, in the event that Kings County was found to be an improper venue.

Pursuant to an order of this Court dated April 5, 2017, the Court granted defendants' motion to change venue to Richmond County and denied plaintiff's cross-motion to change venue to New York County. Plaintiff moved for leave to reargue the respective motions. Subsequently, by order of this Court dated August 16, 2017, the Court granted reargument, and upon reargument, adhered to its original determination. Plaintiff appealed, and the Appellate Division, Second Department reversed and remanded for a further hearing.

By order of this Court dated May 15, 2019, the Court referred said matter to the Referee to hear and report regarding Locicero's residence. On September 12, 2019, a hearing was held before the Referee, after which it was determined that Locicero's actual residence was located at 80 St. James Place in Staten Island, Richmond County.

Discussion

CPLR 4403 provides that upon a motion or on the court's own initiative, the judge required to decide an issue "may confirm or reject, in whole or in part . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." "The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" (*Bank of N.Y. Mellon v Giti Graffi*, 172 AD3d 1148, 1149 [2019], quoting *Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2017]). The court may modify or reject a referee's recommended findings if they are not substantially supported by the record (*see JNG Constr., Ltd. v Roussopoulos*, 170 AD3d 1136, 1141 [2018]).

However, a referee's determination of credibility in a report is entitled to deference, given that "the referee had the opportunity to see and hear the witnesses" (*Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897, 898 [2011]; *see also Contarino v North Shore Univ. Hosp. at Glen Cove*, 13 AD3d 571, 572 [2004]).

Thus, the court should confirm a referee's report and adopt the recommendations made therein "whenever the referee's findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Bank of N.Y. Mellon*, 172 AD3d at 1149, quoting *Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2017]; *see also Pathak v Shukla*, 164 AD3d 690, 691-692 [2018]).

Here, defendants argue, in support of their motion, that they have established that the Referee's Report should be confirmed, since the defendants have shown that the Referee's recommended findings are substantially supported by the record and the referee clearly defined the issues and resolved matters of credibility (*see JNG Constr., Ltd.*, 170 AD3d at 1141). Further, defendants argue that the Court should grant a change of venue transferring the matter from Kings County to Richmond County, since plaintiff's residence was in Richmond County at the time of the within accident.

Plaintiff, in opposition, argues that the Referee's Report should be rejected or the Court should order a new hearing since Locicero's testimony at the hearing, his deposition, and in an affidavit was inconsistent, and showed that Locicero had multiple residences at the time the within action was commenced. Plaintiff argues that the Referee ignored the inconsistent answers given by Locicero and that the Referee's conclusion "could not be reached under any fair interpretation of the evidence." The Court disagrees.

The Court finds that the Referee clearly defined the issue to be determined was whether Locicero resided in King's County on June 18, 2015, the date of the accident. Additionally, the Court finds that the Referee's conclusion regarding Locicero's residence was reasonably based on Locicero's testimony. When questioned about his residence in clear, unambiguous terms, Locicero unequivocally answered that he never stayed, or slept in Kings County, and that he used a Brooklyn address for business purposes only. The Referee did not dismiss Locicero's inconsistent testimony when plaintiff's attorney asserted that Locicero testified that he "resided" in Brooklyn. Rather, the Referee responded that the fact that Locicero stated he resided in Kings County had to do with the casual nature of expressing himself, instead of the legally precise nature required by the law. Moreover, the Court notes that the Referee resolved the issue of credibility and found that Locicero's "testimony was not incredible as a matter of law inasmuch as it was not manifestly

untrue, physically impossible, or contrary to common experience” (*Allen v Federation of Jewish Philanthropies of N.Y.*, 175 AD3d 1226, 1229 [2019] [internal quotations omitted]). The Court, thus, finds that plaintiff has failed to demonstrate that the Referee’s conclusion was not supported by the record (*see Tihomiroy v Tihomiroy*, 123 AD3d 808, 809 [2014]).

Based on the record, the Referee determined that Locicero’s residence was in Richmond County, since Locicero testified that he sleeps and lives at 80 St. James Place in Staten Island, Richmond County. CPLR 510(1) provides that the court, upon motion, may change the place of trial of an action where the county designated for that purpose is not a proper county. “For venue purposes, a residence is a place where a party stays for some time with the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency” (*Gruenwald v Polatseck*, 114 AD3d 904, 905 [2d Dept 2014] [internal citations omitted]).

Thus, the Court finds defendants have demonstrated that the Referee Report and recommendations should be confirmed as the Referee’s findings are supported by the record, and the Referee has clearly defined the issues and resolved any matters of credibility. It is well settled that “the question of residence is a factual one, based on a variety of factors and circumstances, where there is conflicting evidence, the resolution of the conflict lies within the province of the finder of fact, and should not be disturbed on appeal unless it is obvious that the conclusion could not be reached under any fair interpretation of the evidence” (*Matter of Jones v Blake*, 120 AD3d 415, 416 [2014] *lv denied* 23 NY3d 908 [2014] quoting *Matter of Fernandez v Monegro*, 10 AD3d 429, 430 [2d Dept. 2004] [internal quotations omitted]).

A court reviewing the findings and recommendations of a referee will generally “look with favor upon a [r]eferee’s report inasmuch as the [r]eferee, as a trier of fact, is considered to be in the best position to determine the issues presented” (*Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705, 706 [1985] [internal quotations omitted]; *see also Alex M. v City of New York*, 148

AD3d 533, 533 [2017]). Accordingly, the Court confirms and adopts the Referee's Report and the recommendations contained therein (*see* CPLR 4301).

Based on the foregoing, it is hereby,

ORDERED that plaintiff's motion for an order rejecting, modifying, rehearing and retrying the findings contained in the Referee Report is denied (Mot. Seq. No. 8); and it is further,

ORDERED that the branch of defendants' cross motion seeking to confirm the Referee Report is granted, and the Referee Report is hereby confirmed (Mot. Seq. No. 9); and it is further,

ORDERED that the branch of defendants' cross motion seeking a change of venue of this action (Index No. 511926/16) to Richmond County is granted (Mot. Seq. No. 9), and it is further,

ORDERED that the Kings County Clerk is directed to transfer all papers filed in this action (Index No. 511926/16) to the Clerk of Supreme Court, Richmond County upon service of a copy of this order with notice of entry and payment of the appropriate fees.

This constitutes the decision and order of the Court.

ENTER



J.S.C.

HON. KATHY J. KING