

507 W. 139th LLC v Harris

2021 NY Slip Op 31093(U)

April 6, 2021

Supreme Court, New York County

Docket Number: 161263/2017

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

507 W. 139TH LLC,

Plaintiff,

- v -

ANTHONY HARRIS,

Defendant.

-----X

INDEX NO. 161263/2017

MOTION DATE 04/07/2020

MOTION SEQ. NO. 002

INTERIM ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for VACATE - JUDGMENT.

ORDER

Upon the foregoing documents, it is

ORDERED that this matter having come on before this court on April 7, 2020, on motion of the defendant for an order vacating the default judgment entered against him on July 29, 2019, and the plaintiff having appeared by Marshal Coleman, Esq., and the defendant Arthur Harris having appeared pro se on his own behalf, and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an appointment is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on

the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

the issue of whether 507 West 139th Street, Apartment 3, New York, New York, was the actual place of abode of defendant Anthony Harris on January 16, 2018, the date on which Kevin Zucker, process server, states in his affidavit, sworn to on January 17, 2018, that he left the pleadings herein with a person of suitable age and discretion at such address.

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff and defendant pro se shall immediately consult one another during a telephone conference with the court (either party may post on NYSCEF letter with cc: other side, requesting such conference), within 15 days from the date of service of a copy of this Order with notice of entry, and

thereafter, plaintiff's counsel shall, with proof of service by NYSCEF upon defendant pro se, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for plaintiff and defendant pro se of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing conducted via Microsoft Teams, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel and pro se defendant must arrange their schedules and those of their witnesses, accordingly; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the

manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, in light of this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

DECISION

Plaintiff's counsel is correct that the affidavit of the process server establishes prima facie that service of process was properly effectuated. However, this court disagrees with plaintiff that defendant has failed to raise an issue of fact as to whether such service was proper, and therefore whether this court lacked personal jurisdiction over the defendant pursuant to CPLR 5015(a)(4). Defendant's statement, in his affidavit, that he no longer resided at the premises on January 16, 2018, when the process server affirms that he delivered the pleadings to a person of suitable age and discretion at defendant's actual place of abode, raises such issue of fact. Such implicates questions of credibility that cannot be resolved, as a matter of law, but require an evidentiary hearing. New York State Elec & Gas Corp v Allen, 246 AD2d 855 (3d Dept, 1998), cited by plaintiff, is inapplicable to the facts at bar. Unlike the herein case in which plaintiff seeks damages for unpaid rent

under a residential lease, New York State Elec & Gas Corp involved a claim for property damage caused by the negligent operation of a motor vehicle, in which service of the summons and complaint pursuant to CPLR 308(4) implicated the requirements of Vehicle and Traffic Law § 505(5) that pertained to defendant, as a motor vehicle licensee/alleged tortfeasor.

Debra A. James
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4/6/2021
 DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input checked="" type="checkbox"/> REFERENCE