Cooley v Harkins
2015 NY Slip Op 30020(U)
January 12, 2015
Supreme Court, New York County
Docket Number: 151250/2013
Judge: Peter H. Moulton

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 57
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CHRISTOPHER COOLEY,

Index#151250/2013

Plaintiff,

-against-

Motion Seq.#003

DAVID HARKINS and PAMELA MEAGER,

Defendant

----------X

PETER H. MOULTON, J.S.C.:

Plaintiff Christopher Cooley (Cooley) moves, pursuant to CPLR § 4403 and Rule 202.44 of the Uniform Rules of the Supreme Court, to have this court reject the report of Judicial Hearing Officer Ira Gammerman (the referee) that found that service of the Summons and Complaint in this action was improperly made. Cooley submits that the referee exceeded the limited scope of the traverse hearing as specifically framed by a prior court order, restricted his counsel from properly questioning Defendant Pamela Maeger (Maeger), excluded documents already deemed admitted in evidence, and ignored the rules of evidence. Cooley further states that the referee's recommendation was unsupported by the evidence in the record and contrary to applicable law. Cooley also states that the referee failed to file a written report after the conclusion of the hearing in this matter.

Maeger cross-moves to confirm the referee's report, arguing that the referee's findings of fact and conclusions of law are substantially supported by the record, and that the referee

correctly defined the issues and weighed the evidence and testimony presented. Maeger further seeks, pursuant to CPLR §§ 5015[a][4] and 5015[a][1], to have this court vacate the underlying default judgment against her based on her claim that the default was obtained due to service of process at an address at which she never resided, she further seeks to dismiss the default against her.

BACKGROUND

Cooley commenced this action to renew a judgment previously entered on default against both defendants on March 25, 1993 under Index No. 25620/88 (Judgment).

The nature of the underlying action is alleged as follows: Cooley hired Maeger and defendant David Harkins' (Harkins) company in 1986 to do interior design work in his apartment. During that period, Maeger and Harkins requested that Cooley make a loan to their company. Cooley provided the loan, and a promissory note was signed and personally guaranteed by Maeger and Harkins. Maegar and Harkins subsequently defaulted on the promissory note. Cooley then sued on the promissory note, serving copies of the Summons and Complaint on Maeger, as is relevant here, at Two Haven Plaza in New York City on November 30, 1988. Both Defendants Maegar and Harkins defaulted in the lawsuit by failing to appear, and judgments were entered against them for the unpaid balance under the promissory note and for attorneys' fees incurred in the collection lawsuit.

In 2013, Cooley initiated the present action to renew the Judgment. By Decision and Order dated March 20, 2013, Justice

Saliann Scarpulla granted the plaintiff's CPLR § 3213 motion against Harkins on default.

Maeger, represented by counsel, appeared and opposed Cooley's summary judgment motion and cross-moved to dismiss it. Maeger stated that she had been unaware of the lawsuit during the past twenty-five years, and that she never knew about either the lawsuit or the previously entered Judgment until this action was filed. She stated that the Summons and Complaint that were purportedly served in 1988 were served at an address at which she never resided, Two Haven Plaza located in New York City. As such, Maeger cross-moved to dismiss the complaint and vacate the Judgment because the court never obtained personal jurisdiction over her when the underlying Summons and Complaint were served in 1988. After reviewing the parties' motion papers, by Decision and Order, dated October 4, 2013, Justice Scarpulla directed a traverse hearing. Subsequently, the action was transferred to this court in connection with Justice Scarpulla's change of assignment to the Commercial Division. This court in turn referred the traverse to the referee for a hearing. The traverse took place on June 3, 2014 and July 28, 2014.

June 3, 2014 Hearing Date

On the June 3, 2014 hearing date, Cooley's former attorney, Peter Oram, Esq. (Oram), who represented him in the underlying 1988 lawsuit, testified. Oram testified that he had learned from Cooley that Maeger resided at Two Haven Plaza, and that he had verified

that address by looking her name up in the then-current NYNEX "white pages" telephone directory. Oram further testified that the address listed in the telephone directory corresponded with Maeger's known phone number. Based on that, Oram stated that he provided that address information to the process server (see June 3, 2014 Transcript, p. 15, lines 13-15). A copy of Oram's letter to the process server, dated November 18, 1988, providing the address for Maeger as Two Haven Plaza, was admitted in evidence at the hearing (see Plaintiff's Trial Exhibit 1). Cooley then successfully introduced in evidence, as Trial Exhibits 2-4, certified copies of the relevant pages of the telephone directories for each of the years 1986-1989 (see Plaintiff's Trial Exhibits 2-4). Those pages do not show listings for either "Pamela Maeger" or "Pamela Margerm" (a pseudonym by which she is also known). They do, however, show that in 1986 and 1987, there was a "P. Maeger" listed as residing at 24 East 73rd Street. Then, in 1988 and 1989, the directories show a "P. Maeger" listed as residing at Two Haven Plaza, the address where service of process was made in 1988. Maeger's counsel cross-examined Oram.

During that cross-examination, Oram testified that he never instructed the process server to serve Maeger at any address other than Two Haven Plaza. Oram further testified that he did not question the process server's nail and mail service of the Summons and Complaint, even though it failed to indicate Maeger's unit within the multi-floor building (see June 3, 2014 Transcript, p. 35-36, lines 23-26; 1-4). Oram then testified that he did not send

out any post-judgment execution documents, or any other documentation to initiate collection efforts against Maeger (see June 3, 2014 Transcript, p. 37, lines 1-8). Following Oram's testimony, the June 3, 2014 hearing was adjourned.

July 28, 2014 Hearing Date

On July 28, 2014, Maeger testified on her behalf regarding her place of residence and other relevant information in 1988, the year that service of the Summons and Complaint was made. Maeger testified that between 1980 and 1994 she resided at 24 East 73rd Street in New York City (see July 28, 2014 Transcript, p. 12, lines 15-19). She confirmed that the phone number listed in the telephone directory was correct, but stated that the telephone directory had incorrectly listed her as living at Two Haven Plaza in 1988 and 1989 instead of 24 East 73rd Street and that she had brought that error to the attention of her phone company (see July 28, 2014 Transcript p. 12, lines 16-19; p. 13, lines 2-7; p. 19, lines 17-23; p. 22, lines 13-22). When weighing Maeger's testimony against the telephone directory, the referee came to the following conclusion:

> COURT: I believe her. She is an honest woman. If she never lived there and that's the address the service was made, that's not good service.
>
> MR. GOLDSTEIN: Right.
>
> MR. PALITZ: But the telephone book shows she did live there, says one P. Maeger was there.
>
> COURT: Counselor, between her sworn testimony

> and a piece of paper, I'll accept her sworn testimony.
>
> (July 28, 2014 Transcript p. 20, lines 2-9).

Following the June 3, 2014 and July 28, 2014 hearing dates, the referee filed and "so-ordered" the transcripts of both hearing dates, finding that Cooley's service of the Summons and Complaint upon Maeger at Two Haven Plaza was defective. The referee also signed a written gray sheet indicating that he had issued a "report" by reference to the findings that he had made during the course of the June 3, 2014 and July 28, 2014 hearing dates. Cooley now asks the court to reject the referee's report while Maeger seeks to confirm that report.

DISCUSSION

It is well settled that the report of a special referee shall be confirmed whenever the findings contained therein are supported by the record and the special referee has clearly defined the issues and resolved matters of credibility (see Steingart v. Hoffman, 80 AD3d 444, 445 [1st Dept. 2011], citing Nager v. Panadis, 238 AD2d 135, 135-136 [1st Dept. 1997]; see also Melnitzky v. Uribe, 33 AD3d 373 [1st Dept. 2006]; Kaplan v. Einy, 209 AD2d 248 [1st Dept. 1994]).

Here, Cooley submits that the referee's report should not be confirmed because the referee: a) exceeded the limited scope of the traverse hearing as specifically framed by a prior court order, b) restricted Cooley's counsel from properly questioning Maeger, c)

excluded documents already deemed admitted in evidence, d) ignored the rules of evidence, and e) failed to file a written report after the conclusion of the hearing in this matter, in contradiction to established legal authority.

A. Scope of the Traverse Hearing

Cooley submits that the language of a prior court order issued by Justice Scarpulla limited the scope of the traverse hearing to "whether there was a good faith belief that the address served was defendant's last known address." Citing CPLR § 308[4], Cooley states that he "sustained his burden in proving the narrow issue framed for the traverse by Judge Scarpulla, i.e. that there was a reasonable basis for believing that the 'Two Haven Plaza' address was the defendant's dwelling place or usual place of abode."

Cooley's interpretation of the scope of the traverse hearing based on Justice Scarpulla's prior court order is incorrect. In addressing the nature of the traverse hearing, Justice Scarpulla's court order stated as follows:

> I have reviewed the papers submitted on Maeger's cross-motion, and conclude that there is a material issue of fact as to whether the Court lacked personal jurisdiction to enter the default judgment against Maeger in 1993. Accordingly, I order a traverse hearing to resolve the personal jurisdiction issue.
>
> (see Order Justice Saliann Scarpulla, Index 151250/2013, dated October 4, 2013).

Nothing in Justice Scarpulla's order suggests, as Cooley states, that the traverse hearing's scope was limited to "whether

there was a good faith belief that the address served was defendant's last known address." Instead, Justice Scarpulla's order states that the issue before the referee during the traverse was whether the "Court lacked personal jurisdiction to enter the default judgment against Maeger in 1993." Cooley's self-serving suggestions based on comments that were made at oral argument before Justice Scarpulla cannot alter the clear wording of Justice Scarpulla's order. Moreover, when ordering the traverse in accordance with Justice Scarpulla's prior order, this court placed no limitation of its own as to the scope of the traverse, and plaintiff did not move to reargue this court's order.

Additionally, Cooley has cited no legal authority in support of his argument that the scope of the traverse hearing was incorrect. CPLR § 308[4], which Cooley cites, provides the procedure for "nail and mail" service by stating, in relevant part, that where personal service cannot be made by subsections one through three of CPLR § 308, service may be made "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served." A reasonable or good faith belief that one has been served may factor into a court's consideration in the narrow context of service of process on a corporate employee where a process server reasonably relies on the corporate employee's representation that he or she can accept

service of process (see Fashion Page v. Zurich Ins. Co., 50 NY2d 265, 272 (1980)][where court held that corporation could not disavow service of process on account of a receptionist's misleading suggestion to a process server that she had authority to accept service on behalf of the corporation]).

The instant matter does not present such a circumstance, and there is no evidence here that Maeger misled Cooley into thinking that she resided at Two Haven Plaza. In fact, when testifying, Cooley could not recall whether Maeger ever provided him with any information at all as to where she resided. The transcript of Cooley's counsel's direct examination of Cooley on the July 28, 2014 hearing date contains the following exchange:

> MR. PALITZ: Do you have any recollection respecting the defendant's address during the calendar year 1988?
>
> MR. COOLEY: We had reason to believe that in that year she had taken up residence at 2 Haven Plaza.
>
> MR. PALITZ: And when you say you had reason to believe, can you explain that a little further for the Court?
>
> MR. COOLEY: Well, I can't think how else we would have thought that unless Ms. Maeger had told us that
>
> ...
>
> MR. PALITZ: When you say you had reason to believe, can you give me some more detail as to what supported that reason? Why did you believe that?
>
> MR. COOLEY: I thought that I had been informed that such was Ms. Maeger's address.
>
> MR. PALITZ: Who informed you?

> MR. COOLEY: I had thought that she had done so.
>
> MR. PALITZ: You thought she told you. Do you remember any specific conversation or did you--
>
> MR. COOLEY: No.
>
> THE COURT: He doesn't remember any specific conversation.
>
> (July 28, 2014 Transcript, p. 48, lines 7-26; p. 49, lines 1-16).

Consequently, the court finds Cooley's attempts to challenge the scope of the traverse hearing unpersuasive, and devoid of any legal or factual support. As such, the referee did not exceed the scope of the traverse hearing.

B. Cooley's Counsel's Questioning of Maeger

Cooley's next claim is that the referee placed limitations on his counsel's ability to question Maeger during her testimony on the second hearing date, July 28, 2014. The crux of Cooley's argument stems from his counsel's claim that he was unable to cross-examine Maeger with the telephone directory pages admitted into evidence on the June 3, 2014 hearing date that he believed proved that Maeger resided at Two Haven Plaza in 1988 and 1989 rather than at 24 East 73rd Street. Cooley's counsel claimed at the hearing that the pages, which were admitted and referenced in the transcript of the June 3, 2014 hearing, were material to his cross-examination of Maeger. Despite that, Cooley's counsel failed to bring the June 3, 2014 transcript to court on July 28, 2014. The

transcript of the July 28, 2014 hearing includes the following exchange between Cooley's counsel and the referee:

> MR. PALITZ: Sorry, your Honor, we didn't get the transcript because the testimony was short and clear.
>
> THE COURT: Counselor, you know how many cases I have?
>
> MR. PALITZ: I'm sorry.
> ...
>
> THE COURT: I'll let you finish questioning this witness and perhaps we don't need to bring her back again. But I'm not going to decide this case until I see the transcript of the trial proceeding.
>
> (July 28, 2014 Transcript at p. 14-16).

However, later the court permitted Cooley's counsel to have Maeger look at the telephone directory pages that indicated that a "P. Maeger" resided at Two Haven Plaza (see July 28, 2014 Transcript at p. 21, lines 13-26; p. 22, lines 1- 23). As such, the transcript of the July 28, 2014 hearing reveals that the referee permitted Cooley's counsel to question Maeger with respect to Cooley's central evidence in the hearing: that the telephone directory listed Maeger as residing at an address contrary to the address mentioned in her testimony. Indeed, the transcript reads as follows:

> MR. PALITZ: Ms. Maeger, I'm going to ask you to look at these --
>
> ...
>
> MR. PALITZ: Do you know any other P. Maeger that was using your phone number in 1988 and '89?
>
> MS. MAEGER: Who?

MR. PALITZ: Do you know another P. Maeger, other than yourself?

MS. MAEGER: No.

MR. PALITZ: --that was using the phone number?

MS. MAEGER: No.

MR. PALITZ: Did you ever contact the phone company and ask why there was a listing for P. Maeger at the telephone number, 288-4639 in the calendar years 1988 and 1989?

MS. MAEGER: That's not the right phone number that you just gave.

MR. PALITZ: 288-4636?

MS. MAEGER: Right. And yes, I did ask them. And they said it's not our problem. We don't print the phone book.

(July 28, 2014 Transcript, p. 21, lines 13-26; p. 22, lines 2-7).

The aforementioned questions posed to Maeger by Cooley's counsel were asked after the court permitted Cooley's counsel to have Maeger look at the telephone directory pages. As such the court finds no merit to Cooley's claim that his counsel was restricted from questioning Maeger.

C. Exclusion of Documents Deemed Admitted in Evidence

Cooley next argues that the referee excluded documents deemed admitted in evidence. For similar reasons to those stated above, Cooley's claims with respect to admitted documents being excluded are without merit. In support of Cooley's argument, Cooley points to the referee's decision not to adjourn the July 28, 2014 hearing

on account of Cooley's counsel's inability to cross-examine Maeger with telephone directory pages admitted in evidence. Missing from Cooley's claim, however, is that fact that later in the hearing that very same day the referee did permit Cooley's counsel to question Maeger with respect to Cooley's admitted telephone directory pages. Moreover, the referee made it made clear that he would consider any documents which were previously admitted into evidence on June 3, 2014, but not before the court on July 28, 2014. As such, Cooley incorrectly states that referee excluded documents deemed admitted in evidence.[1]

D. Hearsay Testimony

Cooley next claims that the referee incorrectly admitted hearsay at the hearing. Specifically, Cooley claims that the referee failed to adhere to the rules of evidence by allowing Maeger to provide hearsay testimony when she testified as to why her name and the Two Haven Plaza address appeared in the telephone directory pages. When questioned with respect to that, Maeger claimed that she had contacted the phone company about being listed as a resident at that address and that "they said, well, there's nothing we can do about it because we don't print the book" (July

[1]The July 28, 2014 transcript also makes reference to a series of documents, telephone bills, Con Edison bills, and bank statements attached to an affidavit that Maeger submitted when the matter was before Justice Scarpulla. Those documents appear to show Maeger residing at 24 East 73rd Street, not Two Haven Plaza. It is unclear why Maeger's counsel did not introduce the documents into evidence during the course of the hearing, as those documents appear to show Maeger residing at 24 East 73rd Street during the relevant years of 1988 and 1989.

28, 2014 Transcript, p. 22, lines 4-21). Cooley asserts that Maeger's statements constituted inadmissible hearsay since they alluded to a phone conversation with an unnamed person and were offered for their truth.

As often defined, hearsay is "a statement made out of court ... offered for the truth of the fact asserted in the statement" (People v. Romero, 78 NY2d 355, 361 [1991]). Such a statement "may be received in evidence only if [it] fall[s] within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable" (People v. Brensic, 70 NY2d 9, 14 [1987]). Further, in assessing reliability, courts must decide "whether the declaration was spoken under circumstances which render ... it highly probable that it is truthful" (id., at 14-15).

Here, the content of the phone company's response to Maeger constitutes hearsay, and Maeger has not argued that it falls within a recognized exemption to the hearsay rule. However, Cooley's counsel did not object to the receipt of that evidence during the course of the hearing, and therefore did not preserve a hearsay objection (see People v. Martinez, 171 AD2d 760, 760 [2d Dept. 1991]). In any event, even if Cooley's counsel had objected to the evidence at the hearing, and the objection had been sustained, the referee still could have found Maeger's sworn testimony regarding where she lived credible. Indeed, the referee, having had the opportunity to make determinations as to Maeger's credibility by perceiving her inflections, gestures, and other nuances, came to

the impression as a whole that Maeger's testimony was credible.

Cooley points to no other instances throughout the hearing where the referee erred in allowing hearsay testimony, further diminishing the significance of the sole instance referenced above.

E. Written Report

Cooley's final argument is that the referee erroneously "so-ordered" transcripts of the June 3, 2014 and July 28, 2014 hearing dates that contained his findings rather than issuing a separate written report. Decisions issued by a referee "shall comply with the requirements for a decision by the court and shall stand as a decision of the court" (see CPLR § 4319). As to the form of a decision issued by the court, CPLR § 4213 states that "[t]he decision of the court may be oral or in writing and shall state the facts it deems essential" (see CPLR § 4213[b]; see also Manzo v. Manzo, 1 AD2d 678 [2d Dept. 1955][If a court renders a written decision or oral opinion which sets forth the basis of its decision, that opinion suffices as a decision]). A memorandum of a referee, which concluded with the statement directing that "judgment is so-ordered" has been deemed to be sufficient as a "decision" (see Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester, 294 NY 254 [1945]).

Moreover, at least one court has recently held that a special referee's report does not have to be set aside on account of the referee's "so-ordering" of a hearing transcript in lieu of issuing a separate written report (see Stellar West 100 LLC v. Olavson,

2014 N.Y. Misc. LEXIS 2443, 1, 2014 NY Slip Op 31422(U), 1 [N.Y. Sup. Ct. May 30, 2014]). In Stellar, a defendant's motion to confirm the report of a special referee that had been dictated into the record and subsequently "so-ordered" was granted after the court found that the special referee's conclusions of law were fully supported by the record (Id.). The court found that it was unnecessary for the special referee to write a separate written report beyond what was contained in the findings dictated into the record that were later"so-ordered" following transcription.

Here, the referee "so-ordered" the June 3, 2014 and July, 28, 2014 hearing transcripts. Beyond that, the referee signed a written gray sheet indicating that he had issued a "report" by reference to the findings that he had made that were reduced to a transcript. Therefore, as was the case in Stellar, it would be superfluous to require that findings dictated into the record, and then "so-ordered" by a referee must also be memorialized in a written report. Judicial economy and common sense dictate otherwise. All of the referee's findings here, including his framing of the issues before him and determinations as to the credibility of the witnesses, are contained within the transcripts that he "so-ordered." Additionally, his conclusions of law, and the basis for those conclusions, are also contained in the dictated record of the hearing.

CONCLUSION

The referee's report here is confirmed in its entirety, as the referee's findings and conclusions or law were supported by the

record of the hearing and are therefore entitled to deference (see Plaza Funding Corp. v J.C. Dev. Corp., 155 AD2d 298 [1st Dept. 1989]). The exchanges contained throughout the June 3, 2014 and July 28, 2014 hearing dates reveal the referee's grasp of the issues presented by this case, as well as his assessments as to the weight to afford the documentary evidence presented as well as the testimony of the witnesses.

Accordingly, it is hereby

ORDERED that the report of Judicial Hearing Officer Ira Gammerman is confirmed in its entirety; and it is further

ORDERED that, in light of this court's confirmation of the report of Judicial Hearing Officer Ira Gammerman, the portion of Defendant Pamela Maeger's cross-motion seeking vacatur of the default judgment entered as against her on March 25, 1993 is hereby granted; and it is further

ORDERED that Plaintiff Christopher Cooley's application for a renewal judgment is denied as to Defendant Pamela Maeger; and it further

ORDERED that upon service of a copy of this Decision and Order, the Clerk of the court is directed to vacate the judgment entered on March 25, 1993 as to Defendant Pamela Maeger, and dismiss the action as to her.

This constitutes the Decision and Order of the Court.

Dated: January 12, 2015

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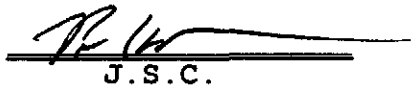

J.S.C.

HON. PETER H. MOULTON