

**Ferrari v City of New York**

2008 NY Slip Op 33686(U)

July 21, 2008

Supreme Court, New York County

Docket Number: 106808/06

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
PATRICIA FERRARI,  
Plaintiff,  
  
-against-

Index Number 106808/06  
Submission Date 5/27/08  
Mot. Seq. No. 003  
Cal. No. 31

THE CITY OF NEW YORK,  
Defendants.

**DECISION AND ORDER**  
-----X

Papers considered in review of this motion to confirm and cross-motion to reject a report of a special referee:

Papers	Numbered
Notice of Motion	<u>1</u>
Notice of Cross-Motion	<u>2</u>
Affirmation in Opposition	<u>3</u>

**FILED**

JUL 25 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**PAUL G. FEINMAN, J<sup>1</sup>:**

Defendant moves for an order pursuant to 22 NYCRR § 202.44 to confirm a report of a special referee after a traverse hearing ordered by this court. Plaintiff cross-moves for an order pursuant to CPLR § 4403 and NYCRR § 202.44 to reject the report. For the reasons set forth below, the motion is granted and the cross-motion is denied.

*Procedural History*

Plaintiff filed an action on May 17, 2006 against the City of New York arising out of a slip and fall and, after the City failed to timely interpose an answer, moved for entry of a default judgment. Cross-mot., Aff. in Supp. ¶ 5. The City cross-moved to dismiss the action claiming it was never properly served pursuant to CPLR 311 and therefore the court lacked personal

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<sup>1</sup> The court gratefully acknowledges the assistance of Ezra Zonana, 1-L, a summer intern from the Benjamin Cardozo School of Law in the research and drafting of this decision.

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jurisdiction over it. By Decision and Order dated May 7, 2007, this court denied plaintiff's motion for a default judgment due to his failure to comply with CPLR 3215(f) in that he failed to provide proof of his claim in the form of an affidavit or a verified complaint sworn to by plaintiff. The court held final determination of the cross-motion in abeyance, finding a disputed issue of fact as to whether service was made on the City of New York and referred the matter to a special referee to hear and report with recommendations pursuant to CPLR 4311 and 4320. *See Ferrari v City of New York*, Sup. Ct., New York County, Dec. & Ord. dated May 7, 2007, Feinman, J. In the decretal portion of its Order, the court directed the cross-movant City to move within 30 days of the special referee's decision to either confirm or reject it.

On October 29, 2007 a hearing was held before Special Referee Nicholas Doyle. *Ferrari v City of New York*, Sup. Ct., New York County, Nov. 27, 2007, Doyle, Special Ref., Mot. Ex. D. At the hearing, plaintiff's process server, Franklin Rich, testified, inter alia, that it is his practice to forward to the law firm engaging his service a copy of the date- and time-stamped summons and complaint (Mot. Ex. E, Traverse Hr'g., Oct 29, 2007 [hereinafter Trav. Hr'g. Tr.] at 5, 14); that he had no recollection as to serving the City in this matter (*Id.*, at 11-12); that he does not maintain a log book (*Id.* at 15); and that it is his practice to make notes (*Id.* at 15), although he failed to bring them to the hearing. *Ferrari* at 2. Mr. Rich provided his affidavit of service which was sworn to on July 10, 2006 (Trav. Hr'g. Tr. at 12), attesting that he served the City on July 5, 2006 by serving a copy of the summons and complaint upon a named employee of the City of New York authorized to accept service. *Id.* at 10. According to the special referee's report, plaintiff's attorney failed to provide a copy of the summons and complaint date and time stamped by the City. *Ferrari* at 4.

Phillip Clark, supervisor of staff responsible for accepting service of all papers on the City (*See Trav. Hr'g. Tr. at 19-20*), testified that there is a standardized, 18 step procedure for accepting service of process on the City. *Trav. Hr'g. Tr. 20-22, 31-32*. A part of this procedure includes the City's practice to return a date and time stamped copy of the caption page of the summons and complaint or an original copy of the documents to the process server. *Trav. Hr'g. Tr. at 23*. This serves as a receipt. *Id.* Additionally, Mr. Clark testified that the City's custom and practice is to log all appropriate information into its computer and to maintain a filed paper copy of the document. *Id. at 23-24, 26*. Each day the logs are researched by Mr. Clark. *Trav. Hr'g. Tr. at 25*. Mr. Clark testified that the person described in the affidavit as having received the document of service is employed by the City to accept service. *Id. at 41*. However, after conducting an extensive search, Mr. Clark testified that he was unable to find either a paper or electronic record of service upon the City. *Id. at 26-27*. Mr. Clark neither confirmed nor denied whether the person named in the affidavit of service was on duty at the time specified in the affidavit. *Id. at 31*.

Based on the testimony, the Special Referee determined that service was not properly effectuated and that plaintiff had not met her burden of demonstrating that the City was properly served pursuant to CPLR 311 and therefore recommended that the court hold that it has no jurisdiction over the defendant. *Ferrari at 4*.

The City moves to confirm this recommendation. The plaintiff opposes and cross-moves to reject the referee's report based on the untimeliness of defendant's motion and the insufficiency of the evidence regarding the invalidity of service.

#### *Analysis*

CPLR 4311 allows the court to issue an order of reference to direct a special referee to determine issues specified by the court. *See* CPLR 4311; *see also Shultis v Woodstock Land Dev. Assocs.*, 195 AD2d 677, 678 (3rd Dept 1993). CPLR 4403 states that “the judge required to decide the issue may confirm or reject, in whole or in part...the report of a referee.” Thus, the report of a referee is only a recommendation. *See* 3 NY Prac., Com. Litig. in New York State Courts § 30:15. However, “[g]enerally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record...because, as the trier of fact [the special referee] has an opportunity to see and hear the witness and to observe their demeanor.” *Poster v Poster*, 4 AD3d 145, 145 (1st Dept 2003), quoting *Frater v Lavine*, 229 AD2d 564, 564 (2nd Dept 1996).

#### 1. Timeliness

As a threshold matter, the court must first address plaintiff’s motion that the City’s motion to confirm the special referee’s report is untimely. The special referee report was filed on November 27, 2007. *Ferrari* at 5. The court, as noted above, directed the City to move to confirm or reject within 30 days of completion of the reference. The motion to confirm was filed on March 28, 2008, four months after the referee’s report was filed.

CPLR 4403 and 22 NYCRR § 202.44 of the Uniform Civil Rules for the Supreme Court govern motions to confirm or reject referee reports. Under the Uniform Rules, the plaintiff is required to move to affirm or reject within 15 days and if the plaintiff does not move, then defendant shall move within 30 days. Here, although the City did not move within the court-directed 30 days, neither did the plaintiff move thereafter within its regulated time. It has been held that “[t]he failure of a party to comply with the time limitation of CPLR 4403, while

regrettable, is not fatal to the court's power to act on the report." *Gould v Venus Bridal Gown & Accessory Corp.*, 148 Misc 2d 589, 590 (Sup. Ct., New York County 1990).

This court's decretal paragraph was meant as a reminder of the parties of the need to confirm or reject the report rather than to supersede the CPLR or Uniform Court Rule. Thus, it reiterated that the defendant (the cross-movant to the original motion) had 30 days to make its motion after the reference. Of course, nothing prevented plaintiff from complying with the provision in the Uniform Rule that required it to move to confirm or reject within 15 days of the completion of the reference. Thus, while it is true that neither party followed the dictates of the court, the CPLR, or the Uniform Court rules, the court, as in *Gould*, will consider the merits of both the City's motion to confirm and the plaintiff's cross-motion to reject.

## 2. Review of the Referee's Report on its Merits

Plaintiff argues that the special referee's report should be disaffirmed because its conclusions are not supported by the evidence submitted at the hearing. In particular, plaintiff argues that the referee failed to give the proper weight to the affidavit of service of the process server, and gave too much weight to the testimony concerning the procedures used by the City of New York to accept process. The City argues that the court should not reassess the weight of the evidence and that the special referee's recommendation is supported by the evidence.

CPLR 311 [a] [2] states that "[p]ersonal service upon a...governmental subdivision shall be made by delivering the summons as follows...upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county." It is well settled "that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made." *Persaud v Teaneck*

*Nursing Ctr.*, 290 AD2d 350, 351 (1st Dept 2002). “Strict compliance with all the service dictates of CPLR...311 is required in order to obtain jurisdiction.” *Id.* While an affidavit of service supports a finding of jurisdiction over a defendant (*Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135 [2nd Dept 1986]), “[a]n affidavit of service is not conclusive once there is a sworn denial of receipt.” *Matter of St. Christopher-Otilie*, 169 AD2d 690, 691 (1st Dept 1991), citing *Empire Natl. Bank v Judal Constr. of N. Y., Inc.*, 61 AD2d 789, 789 (2nd Dept 1978). Thus, where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence. *Rox Riv 83 Partners v Ettinger*, 276 AD2d 782, 783 (2nd Dept 2000). In its earlier decision, this court found that the affidavit of service in this action was sufficiently rebutted by a competing set of sworn statements such that the plaintiff would need to establish personal jurisdiction by a preponderance of the credible evidence at a traverse hearing.

Here, the special referee’s finding that the plaintiff did not carry his burden of proof at the traverse hearing is supported by the record. There are regulations in place which set standards a process server is expected to uphold. General Business Law § 89-cc states that “[e]ach process server shall maintain a legible record of all service made by him...in chronological order in a bound, paginated volume.” 22 NYCRR § 208.29 states that “the process server shall be required to bring to [a] hearing all records in [his or her] possession.” Thus, where petitioner’s process server failed to produce a proper record of service in a bound, paginated volume as required by General Business Law § 89-cc, the court found in this a basis to dismiss for lack of jurisdiction. *See First Commercial Bank of Memphis v Ndiaye*, 2001 NY Slip Op 21449, 733 NYS2d 562, 566 (Sup. Ct., Queens County 2001). The underlying purpose of these record keeping provisions

is to prevent and deter the abuses inherent in “sewer service” (a practice of filing false affidavits of service, when in fact no service at all was accomplished). *Id.* at 564. While a process server’s failure to offer a log book does not necessarily discredit his or her testimony or warrant dismissal of the action (see *Kardanis v Velis*, 90 AD2d 727, 727 [1st Dept 1982]), here the process server had no recollection of the service at issue and the referee was entitled to find as he did.

While the process servers’s affidavit of service stating that process was served on a City employee provides some evidence of service, this must be evaluated in light of the City’s witness who testified that there is a standardized, 18 step procedure for accepting service of process on the City and that this process mandates, inter alia, that a copy of the document being served be date and time stamped and returned to the process server; that a paper copy of the document be filed manually by the City; and that a record of service be electronically logged via computer. Thus, the City’s normal procedures would produce at least three separate indications that it had been served: the paper copy of service, an electronic log of service and a date and time stamped copy of the summons and complaint returned to the possession of the plaintiff’s process server. Here, although the City’s witness testified as to having conducted an extensive search for both an electronic and a paper record of service, none could be located. The elaborate detail of the City’s procedure for accepting service, which were testified to at the traverse hearing, argues against plaintiff’s contention that the City likely lost the summons and complaint.

Additionally, the process server testified that his normal procedure is to give the stamped copy of the documents served to the client who hired him. Plaintiff, however, fails to provide a date and time stamped copy of the summons and complaint. Finally, plaintiff’s process server testified he does not maintain a log book, and that while he did make notes concerning service,



he failed to bring them to the hearing, thus failing to comply with 22 NYCRR 208.29. Together, these failures undermine plaintiff's contention that proper service of process was effectuated. The special referee's weighing of all the evidence led to the conclusion that both quantitatively and qualitatively plaintiff failed to prove by a preponderance that service was properly effectuated. The court finds no basis to for setting aside the special referee's findings. Indeed, any fair reading of the transcript and weighing of the evidence preponderates in favor of accepting his recommendation that this court does not have personal jurisdiction over the defendant City. It is therefore

ORDERED that the City's motion to confirm the special referee's report is granted; and it is further

ORDERED that the City's cross-motion to dismiss this action for lack of personal jurisdiction filed under motion sequence number 001 which was previously held in abeyance is hereby granted and the Clerk of the Court is directed to enter judgment dismissing this action in its entirety; and it is further

ORDERED that the plaintiff's cross-motion to reject the special referee's report is denied.

This constitutes the decision and order of this court.

Dated: July 21, 2008  
New York, New York

*Paul H. Finnegan*  
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J.S.C.

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