Deutsche Bank AG v Vik
2016 NY Slip Op 30374(U)
March 4, 2016
Supreme Court, New York County
Docket Number: 161257/2013
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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DEUTSCHE BANK AG,

Plaintiff,

- against -

ALEXANDER VIK, CARRIE VIK, as an individual and as Trustee of the CSCSNE TRUST, THE CSCSNE TRUST, C.M. BEATRICE, INC., and SEBASTIAN HOLDINGS, INC.,

Defendants.

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Index No. 161257/2013

Mot. Seq. 004

SINGH, J.:

A Judicial Hearing Officer (JHO) presided over a traverse hearing concerning whether plaintiff Deutsche Bank AG (DB) properly served defendants Alexander Vik (Mr. Vik), Carrie Vik (Mrs. Vik), and the Cscsne Trust (the Trust). Plaintiff moves and defendants cross-move to confirm in part and to reject in part the report of the JHO. In the alternative, plaintiff moves to extend the time for service of process on the Viks and the Trust.

In November 2013, a court in the United Kingdom entered a judgment of $300 million in favor of DB against a defendant in this action, Sebastian Holdings, Inc. (SHI). DB commenced the instant action to enforce the judgment against SHI and the other defendants. DB claims that the Viks and the Trust are responsible for the judgment entered against SHI, on the grounds of alter ego liability and fraudulent conveyance.

In this action, DB served the Viks using the leave and mail service under CPLR 308 (2), which allows service upon a natural person to be effected

> "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . ."

Process for both Viks was left with someone at an apartment building in Manhattan and mailed to a house in Connecticut. The Trust was also served under CPLR 308 (2), care of Mrs. Vik, purportedly a trustee of the Trust. Before Mrs. Vik became its sole owner in 2012, both Viks owned an apartment in the building in Manhattan. Mrs. Vik is the sole owner of the house in Connecticut.

Defendants moved to dismiss the complaint on several grounds, including improper service, arguing that the Viks were not served under CPLR 308 (2). The Viks claim that they have always used the Manhattan apartment as a pied-a-terre and that it was not a place of business, dwelling place, or usual place of abode for either of them. Mr. Vik claimed that the house in Connecticut was not his last known residence or his actual place of business, and that his residence is in Monaco. However, in regard to Mrs. Vik, it was established that the Connecticut house is her residence.

Defendants also contested service on the Trust, arguing that since Mrs. Vik was not served, the Trust could not have been served through her, and that even if Mrs. Vik had been properly served, the Trust could not have been served through her, because she was not a trustee of the Trust at the time of service. Mrs. Vik alleged that she resigned as trustee of the Trust in October 2013. This action commenced in December 2013.

The court's decision on defendants' motion was held in abeyance pending a hearing to determine factual questions regarding the Viks' residence, abode, and place of business

(*Deutsche Bank AG v Vik,* 2015 WL 458284, 2015 NY Misc LEXIS 291, 2015 NY Slip Op 30163[U] [Sup Ct, NY County 2015]). There was also a question regarding the effectiveness of Mrs. Vik's resignation of her trusteeship. Defendants claimed that the trust indenture was confidential and disclosed only one paragraph of it to plaintiff and the court. However, as part of the hearing, the JHO reviewed the entire trust indenture in camera.

The JHO, Justice Ira Gammerman, held the hearing on April 28, 2015. The Viks testified and both sides submitted post-hearing memoranda and additional evidence to the JHO, who issued his decision on July 9, 2015 during a telephone conference with the attorneys. DB's present motion includes a transcript of the phone conversation.

During the phone conference, the JHO explained that his task was to recommend answers to four questions posed in the court's decision. The first question was whether the Manhattan apartment was Mr. Vik's dwelling place or usual place of abode. The JHO's answer to that was "no". The second question was whether the house in Connecticut was Mr. Vik's dwelling place or actual place of business. The JHO answered "yes". The third question was whether the Manhattan apartment was Mrs. Vik's dwelling place or usual place of abode. The answer was "no". The fourth question was whether Mrs. Vik was a trustee of the Trust at the time of service. The JHO answered that question "no".

The JHO's decision means that plaintiff did not serve Mr. Vik, Mrs. Vik, and the Trust. DB urges the court to confirm the JHO's second answer and reject the others. Defendants urge the court to confirm the first, third, and fourth answers and reject the second.

During the phone conference, the JHO discussed Mr. Vik's testimony that he spent one day at the Manhattan apartment in 2013 and that he visits it "relatively infrequently" (tr at 4).

The JHO stated,

> "I'm not persuaded that that testimony is accurate, but I can't find that even though I disbelieve the one day testimony, that's a sufficient basis for me to conclude that there is enough contact between Mr. Vik and the apartment for the apartment to constitute a dwelling place or usual place of abode for service to be effective pursuant to CPLR 308 (2).
>
> "There is an affidavit that Mr. Vik had submitted previously in which he indicates that he uses the apartment as pied-a-terre a few times a year, and there is another affidavit in which he indicated that he estimated that he stayed in the apartment, I'm not clear what year this was, approximately 20 times.
>
> "However, even if I was to credit some of this earlier testimony, even if he stayed at the apartment for 20 times, that would be insufficient in my view to qualify as a dwelling place or usual place of abode"

(tr at 4).

The JHO found that enough evidence and testimony was adduced at the hearing to show that the Connecticut house was Mr. Vik's usual place of business. The JHO noted that Mr. Vik has a separate office space at the house where both Viks are employed and that it is a place of business for both. The JHO noted that DB submitted testimony by Mr. Vik admitting that he had an office in the annex of the house, that he held meetings there, and that staff was employed there.

The JHO continued. "Although the question was not among those that were referred to me, it's my view that the Connecticut house can be considered a co-residence for Mr. Vik as well, notwithstanding the fact that he claims that Monaco is his sole residence" (tr at 5). The JHO said that he based this conclusion on the fact that at various times Mrs. Vik and the couple's children reside at the Connecticut house, the children went to school in Connecticut, Mr. Vik has a Connecticut driver's license, he is a member of a local golf club there, and he "previously

represented that he lives in Connecticut and can be frequently found there with his family" (*ibid.*). The JHO said that Mr. Vik's claim that Monaco is his residence does not preclude a finding that Connecticut is his co-residence, and that New York recognizes that a person can have more than one residence.

As to Mrs. Vik, the JHO stated that Manhattan is not her actual place of business, dwelling place, or usual place of abode. The JHO stated that Connecticut was Mrs. Vik's dwelling place, "leaving aside the issue of whether or not she has a residence in Monaco" (tr at 6). As for the Trust, the JHO said that it was not served because at the time that Mrs. Vik was served on behalf of the Trust, she was no longer the trustee, having resigned earlier.

Upon a motion to confirm or reject the report of a referee, the judge "may confirm or reject, in whole or in part, the verdict of an advisory jury or 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" (CPLR 4403). Where the reference is to hear and report, as in this case, the referee's findings and recommendations are advisory only; they have no binding effect on the court (*Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678 [3d Dept 1993]; *see Garrick-Aug Assoc. Store Leasing v Shefa Land Corp.*, 270 AD2d 68, 69 [1st Dept 2000]). Nonetheless, in general, "New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as 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 [1st Dept 1985] [citation and internal quotation marks omitted]).

> "The rule is well settled that where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility, and generally courts will

> not disturb the findings of a referee to the extent that the record substantiates his findings and they may reject findings not supported by the record"

(*Kardanis v Velis,* 90 AD2d 727, 727 [1st Dept 1982] [citation and internal quotation marks omitted]). The judge should confirm the referee's report when the referee has clearly defined the issues, has solved any problems of credibility, and the record on the whole supports the referee's findings (*Gass v Gass,* 42 AD3d 393, 393 [1st Dept 2007]; *Thomas v Thomas,* 21 AD3d 949, 949 [2d Dept 2005]; *Nager v Panadis,* 238 AD2d 135, 135-36 [1st Dept 1997]; *Freedman v Freedman,* 211 AD2d 580, 580 [1st Dept 1995]).

Where the record does not support the referee's finding, the court is within its authority to reject such portion of the report (*see Borenstein v Rochel Props., Inc.,* 216 AD2d 34, 34 [1st Dept 1995]), and may do so upon its own independent review of the record without taking additional testimony (*Jacynicz v 73 Seaman Assoc.,* 270 AD2d 83, 86 [1st Dept 2000]).

DB urges the court to reject the JHO's finding that the Manhattan apartment is not Mr. Vik's dwelling or abode. DB stresses that Judge Gammerman found Mr. Vik's evidence on the amount of time spent at the Manhattan apartment not to be credible. It is true that the JHO doubted Mr. Vik's truthfulness. However, it is also true that the JHO resolved that issue. He decided that, although Mr. Vik made some statements that the JHO could not credit, all the evidence, taken together, did not compel a conclusion that the Manhattan apartment was Mr. Vik's dwelling or abode. Both Viks testified in front of the JHO, who saw them and heard them and weighed the evidence. Because the JHO has first-hand knowledge of testimony, courts generally defer to the JHO's credibility determinations (*Tihomirovs v Tihomirovs,* 123 AD3d 808, 809 [2d Dept 2014]).

DB argues that the Viks's admitted use of the Manhattan apartment satisfies the law's interpretation of dwelling place or usual place of abode. DB argues that, while the Viks alleged that they used the apartment as a pied-a-terre (defined by Dictionary.com as "a residence, as an apartment, for part-time or temporary use"), the evidence shows otherwise. Mrs. Vik testified that she used it 10 or 12 times in 2013 and Mr. Vik said he stayed there from a few nights to 20 nights a year. DB points out that evidence shows that the Viks regularly visit a daughter who goes to college in Manhattan, attend events in New York City, personally decorated the apartment with artwork and furniture, keep toothbrushes and toiletries there, pay cable, phone, internet service, and utilities for the apartment, and have a maid who comes to clean. Nonetheless, these facts are not inconsistent with use of the apartment as a pied a terre. The court cannot say that the JHO's finding is not supported by the record. The JHO's first and third determinations that the Manhattan apartment is not the Viks's abode or dwelling place will be confirmed.

The answer to question two is confirmed. The finding that the Connecticut house is Mr. Vik's actual place of business is supported by the record. The evidence clearly points to the fact that Mr. Vik operated his company or companies out of an annex of the house.

Regarding the fourth question, the JHO decided that at the time of service on the Trust, Mrs. Vik was not a trustee. The court will adopt the JHO's recommended answer because it is based on a trust indenture which the JHO read in camera and on Mrs. Vik's testimony. It is again noted that, even if Mrs. Vik was a trustee when the Trust was purportedly served, since she was not served, the Trust was not served.

DB states that the Viks refused to divulge the identity of the person who became trustee

after Mrs. Vik resigned. Later, on court order in another case, defendants disclosed the identity of the new trustee in a letter dated October 2015. Therefore, this person should be regarded as the trustee who succeeded Mrs. Vik.

DB urges the confirmation of the finding that the Connecticut house is Mr. Vik's last known residence. Defendants argue that the court did not pose this question to the JHO, who exceeded his authority by deciding it. "A referee's authority is derived from the order of reference and a referee who attempts to determine matters not referred to him [or her] by the order of reference acts beyond and in excess of his [or her] jurisdiction" (*McCormack v McCormack*, 174 AD2d 612, 613 [2d Dept 1991], citing CPLR 4311).

Although the decision in which the reference was ordered held that "[w]hether Vik's last known residence is in Connecticut is an issue of fact" (*Deutsche Bank,*, 2015 WL 458284, *9, 2015 NY Misc LEXIS 291, *19, 2015 NY Slip Op 30163[U], *14), it is true that the issue was not part of the four questions explicitly referred to the JHO. Also, during the hearing, defendants objected to that issue being considered. However, because the decision did pose the question, the JHO did not act beyond this authority by answering. The answer will be confirmed, as the question "was relevant to the issues referred to the Referee to hear and" report (*Alleyne v Grant*, 124 AD3d 569, 570 [2d Dept 2015]).

In addition, on a motion to confirm or reject the report, the Supreme Court can make its own findings (CPLR 4403; *Board of Mgrs. of Brightwater Towers Condominium v Lukashevskaya,* 37 Misc 3d 1202[A], 2012 NY Slip Op 51843[U], *3 [Sup Ct, Kings County 2012]). Based on a review of the record, the court decides on its own that the Connecticut house is Mr. Vik's co-residence. At the hearing, the parties testified about where they both lived and

where their children went to school. The record amply supports the finding that the Connecticut house is Mr. Vik's co-residence.

DB's alternative motion requests that, should the court agree with the JHO that service was not properly made, DB should be granted an extension of time to serve the Viks and the Trust. The court may extend the 120–day period to serve process, upon motion and "good cause shown or in the interest of justice" (CPLR 306–b). The decision to allow more time for service is a matter within the court's discretion (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). Good cause and the interest of justice are defined by separate criteria and contemplate separate grounds for an extension of time for service of process (*id.* at 104). Good cause requires a "threshold" showing that the plaintiff made reasonably diligent efforts to make timely service (*id.* at 104). Interest of justice is a broader and more flexible approach (*id.* at 104-105). The interest of justice standard takes in several factors in determining whether a party should have more time to effect service, including, diligence in attempting service, the parties' competing interests, the expiration of statutes of limitations, the merit of the case, the length of time service was delayed, any prejudice to defendant, and the promptness of the request for extension of time (*id.* at 105-106; *McKenney v Beth Abraham Family of Health Servs.*, 99 AD3d 630, 630-631 [1st Dept 2012]; *Hernandez v Abdul-Salaam*, 93 AD3d 522 [1st Dept 2012]; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011]).

DB alleges that, within 18 days of filing this action in December 2013, it served all three defendants under CPLR 308 (2) and (4). On February 28, 2014, defendants made their motion to dismiss based on lack of service, which led to the order for a hearing. In August 2015, the JHO filed the recommendations from the hearing. Also, DB states that the Trust was served based on

Mr. Vik's prior statement that Mrs. Vik was a trustee and that, after the Trust was served, it was revealed that she was no longer trustee.

Under good cause and the interests of justice, DB is entitled to more time to serve defendants. While the court previously ruled that DB's process server did not act with due diligence before serving the Viks under CPLR 308 (4), that decision does not affect the present finding that, overall, there has been a showing of diligence in attempting to serve and in attempting to prove that service took place. In addition, the previous decision declined to dismiss the complaint on the basis that it lacked merit, and defendants show no prejudice.

Defendants state that DB did not move for extra time to serve for more than a year and a half after being notified that defendants were contesting service. This is correct, but DB's position is that it waited for the hearing on jurisdiction to be completed. Under the present circumstances, this is reasonable. This case is different from those where extensions of time were refused (*see Johnson v Concourse Vil., Inc.*, 69 AD3d 410, 410-411 [1st Dept 2010] [the plaintiff failed to show diligence in trying to serve, did not give notice of the claim for more than three years and three months, and did not follow up with the process server regarding completion of service; the claims had no merit and defendant was prejudiced]). The cases cited by defendants in which an extension of time was denied do not support their arguments (see *Slate v Schiavone Constr. Co.*, 4 NY3d 816, 817 [2005] [the plaintiff showed "extreme lack of diligence" and there was a delay of "more than a year and a half after running of the statute of limitations before defendant received any notice of the action"]; *HSBC Bank USA v Carvalho*, 128 AD3d 471, 471-472 [1st Dept 2015] ["extreme lack of diligence shown by plaintiff . . . and the long delay (more than five years after the claim accrued) before defendant received any notice

of the action" and lack of merit]; *Okoh v Bunis*, 48 AD3d 357, 357 [1st Dept 2008] ["no explanation whatsoever why plaintiff's attorney waited more than 14 months to ask for an extension, and then only in response to defendants' motion to dismiss" and no showing of merit]; *American Tel. & Tel. Co. v Schnabel Found. Co.*, 38 AD3d 580, 580 [2d Dept 2007] [plaintiff showed "overall lack of diligence in prosecuting" the action, did not try to serve the defendant until over a year after the action began; failed to show merit, and failed to offer a valid excuse for the delay]).

In conclusion, it is

ORDERED that plaintiff Deutsche Bank AG's motion to confirm the referee's report in part and reject it in part is partially granted and partially denied:

1) the part of plaintiff's motion to reject the finding that the Manhattan apartment was not Mr. Vik's dwelling place or usual place of abode is denied;

2) the part of plaintiff's motion to confirm that the house in Connecticut was Mr. Vik's dwelling place or actual place of business is granted;

3) the part of plaintiff's motion to reject that the Manhattan apartment was not Mrs. Vik's dwelling place or usual place of abode is denied; and

4) the part of plaintiff's motion to reject that Mrs. Vik was not a trustee of the Trust at the time of service is denied; and it is further

ORDERED that the Connecticut house is Mr. Vik's co-residence; and it is further

ORDERED that defendants Alexander Vik's, Carrie Vik's, and the Cscsne Trust's cross motion to confirm the referee's report in part and reject it in part is partially granted and partially denied:

1) the part of defendants' cross motion to confirm the finding that the Manhattan apartment was not Mr. Vik's dwelling place or usual place of abode is granted;

2) the part of defendants' cross motion to reject that the house in Connecticut was Mr. Vik's dwelling place or actual place of business is denied;

3) the part of defendants' cross motion to confirm that the Manhattan apartment was not Mrs. Vik's dwelling place or usual place of abode is granted; and

4) the part of defendants' cross motion to confirm that Mrs. Vik was not a trustee of the Trust at the time of service is granted; and it is further

ORDERED that the complaint is dismissed without prejudice on the ground that service was improper; and it is further;

ORDERED that plaintiff shall serve defendants Alexander Vik, Carrie Vik, and the Cscsne Trust within 120 days of the date of this order.

Date: March 4, 2016
New York, New York

Anil C. Singh