

Young v Vaknin

2018 NY Slip Op 30129(U)

January 22, 2018

Supreme Court, New York County

Docket Number: 651000/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

JOHN YOUNG,

INDEX NO. 651000/2016

Plaintiff,

MOTION DATE _____

- v -

ALON VAKNIN, BEN YEHIEL HARUSH

MOTION SEQ. NO. 003

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 27, 28, 29, 30, 31, 32, 33, 34, 36

were read on this motion to/for REJECT REFEREE'S REPORT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action to recover on a promissory note, plaintiff John Young moves, pursuant to CPLR 4403, to reject the Referee Report and Recommendation of Special Referee Jeremy Feinberg, dated May 25, 2017, in which report Mr. Feinberg determined, after a traverse hearing conducted on April 10, 2017, that service of process on defendant Alon Vaknin was improper. Upon rejection of the report, plaintiff seeks the entry of a judgment against Vaknin in the amount of \$1,393,746.80, plus interest at the rate of 14% per annum from April 15, 2015.

The facts of this matter are set forth in detail in the interim decision and order of this Court dated March 3, 2017. Doc. 22.¹ Pursuant to that order, this Court granted plaintiff's motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against defendant Ben

¹ All references are to the documents filed with NYSCEF in connection with the captioned action.

Yehiel Harush in the amount of \$1,393,746.80, plus interest at the rate of 14% per annum from April 15, 2015. Id. This Court granted plaintiff's motion for summary judgment in lieu of complaint as against Vaknin only to the extent of referring this matter to a Special Referee for the purpose of conducting a traverse hearing to determine whether service of process on Vaknin was proper. Id.

On April 10, 2017, Special Referee Feinberg conducted a traverse hearing at which he heard the testimony of Vaknin and the process server who purported to serve him. Doc. 30. On May 25, 2017, Special Referee Feinberg issued a "Referee Report and Recommendation" in which he concluded that plaintiff failed to properly serve Vaknin. Doc. 31. Plaintiff now moves, pursuant to CPLR 4403, to reject the Referee Report and Recommendation and to direct that a judgment be entered in his favor and against Vaknin in the amount of \$1,393,746.80, plus interest at the rate of 14% per annum from April 15, 2015.

New York Courts will generally "look with favor upon a Referee's report, inasmuch as the Referee, 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 A.D.2d 705, 706 (1st Dept. 1985) quoting *Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Commn. of the City of New York*, 81 A.D.2d 64 (1st Dept. 1981), *revd on other grounds* 55 NY2d 512 (1982). "It is well settled that where questions of fact are submitted to a [R]eferee, it is the function of the [R]eferee 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 [R]eferee '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) quoting *Matter of Holy Spirit Assn.*, 81 AD2d, at 71.

Here, since Special Referee Feinberg “conducted a hearing that was fair and comprehensive, identified the issues, resolved all matters of credibility, and reached a conclusion that is supported by the evidence, the report must be confirmed.” *Jan S. v Leonard S.*, 26 Misc3d 243, 884 NYS2d 848, 858-859 (Sup Ct New York County 2009) citing *Nager v Panadis*, 238 AD2d 135, 135-136 (1st Dept 1997). Further, this Court agrees with Special Referee Feinberg that the case of *Vid v Kaufman*, 282 AD2d 739 (2d Dept 2001), relied on by plaintiff, does not warrant a different result since there was “far more evidence” that the defendant in that case was served at his actual place of business. Thus, plaintiff’s motion to reject the report is denied and the report is confirmed. Doc. 26, at p. 8.

Plaintiff asks in the alternative that, in the event this Court confirms the report, that he be granted “leave to re-serve the papers in this action [on Vaknin] under the existing index number.” Pltf.’s Aff. In supp., at par. 14. However, since no such alternative relief is sought in the notice of motion or the wherefore clause of his affirmation, this relief cannot be granted. See CPLR 2214 (a); *Arriaga v Michael Laub Co.*, 233 AD2d 244 (1st Dept 1996). Even if plaintiff had properly requested this alternative relief, he fails to address why he is entitled to an extension of time to serve Vaknin for “good cause shown” or in the “interest of justice.” See CPLR 306-b.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff John Young to reject the Referee Report and Recommendation of Special Referee Jeremy Feinberg, dated May 25, 2017, is denied; and it is further

ORDERED that the Referee Report and Recommendation of Special Referee Jeremy Feinberg, dated May 25, 2017, is hereby confirmed; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that the complaint is dismissed as against defendant Alon Vaknin and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that this matter is referred to a Special Referee for the purpose of conducting an inquest to calculate the reasonable attorneys' fees to be awarded to plaintiff; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiff shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

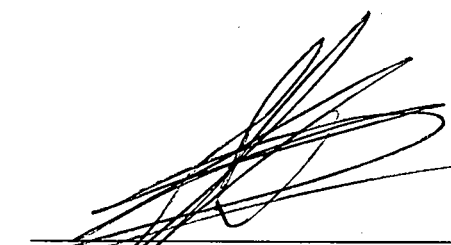
ORDERED that, within twenty days hereof, plaintiff shall serve a copy of this order on defendants Alon Vaknin and Ben Yehiel Harush and on the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that motion sequence 001 is hereby resolved by the instant decision and order; and it is further

ORDERED that this constitutes the decision and order of this Court.

1/22/2018

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE: -

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: