

**Munoz v Martinez**

2018 NY Slip Op 31597(U)

July 9, 2018

Supreme Court, New York County

Docket Number: 154810/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2
Justice

MARIANO MUNOZ, Plaintiff, INDEX NO. 154810/2017
MOTION DATE 08/27/2018
MOTION SEQ. NO. 003

DONNEL MARTINEZ, Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for CONFIRM REFEREE REPORT

Upon the foregoing documents, it is ordered that the motion is granted without opposition.

FACTUAL AND PROCEDURAL BACKGROUND

On November 9, 2012, plaintiff Mariano Munoz was violently attacked and injured by defendant Donnell Martinez. As a result of the attack, defendant was convicted of attempted murder in the second degree and is currently incarcerated.

Defendant thereafter commenced an action in Supreme Court, Bronx County seeking monetary damages against the City of New York. The Bronx County action was resolved by a settlement for defendant in the amount of \$95,000. Following that settlement, the New York State Office of Victim Services, through its attorney, Eric Schneiderman, Attorney General of the State of New York, commenced a special proceeding in the Supreme Court, Albany County pursuant to

The nature of the action commenced by defendant, styled Donnell Martinez v City of New York, et al, Bronx County Index Number 300854-14, is not specified in plaintiff's motion papers.

Executive Law section 632-a(6) (the “Son of Sam” Law)<sup>2</sup> for a preliminary injunction “freezing certain funds payable to defendant, a convicted person, for the benefit of any judgments obtained, or to be obtained, by crime victims or their representatives against defendant for damages arising from the acts constituting the statutorily specified crimes (Executive Law section 632-a[1][e]) for which he was convicted.”<sup>3</sup> On June 28, 2016, the Supreme Court, Albany County (Ryba, J.) directed the release of \$38,477.75, representing the amount exempt from execution pursuant to Executive Law section 632-a (3) and CPLR 5205(k), to defendant’s attorney, Jeffrey Stern, Esq., for fees and disbursements. After Stern was paid, \$62,802.50 of defendant’s settlement proceeds remained and a statutory payment of ten percent of that amount, or \$6,280.25, was made to defendant, thereby leaving a balance from the settlement proceeds of \$56,522.25.

By order dated March 28, 2017, Justice Ryba stated that defendant, his attorney (Stern), and the office of the Comptroller of the City of New York, as well as any persons or entities acting on their behalf, were “enjoined, restrained and forbidden from in any way disbursing, distributing, encumbering, transferring, or assigning, to anyone, and for any reason whatsoever, the whole or any portion of the \$56,522.25 balance of the \$95,000.00 settlement obtained” by defendant in his Bronx County action against the City of New York. Justice Ryba further directed that the Comptroller “shall retain said funds until further order of the Court directing the payment or release of such funds or any part thereof.”

On May 24, 2017, plaintiff commenced the captioned action alleging, in effect, that, as a result of the assault by defendant, he is entitled to damages in the amount of \$56,522.25, the

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<sup>2</sup> The purpose of the Son of Sam Law is to serve the interests of “compensating the victim, and making sure the criminal does not profit from crime” and “bringing a measure of economic justice to victims of crimes.” *Sandusky v McCummings*, 164 Misc 2d 700, 703 (Sup Ct, New York County 1995) quoting Bill Jacket, L 1992, ch 618, mem of approval, dated July 24, 1992, 1992 McKinney’s Session Laws of NY, at 2903.

<sup>3</sup> The special proceeding was styled *New York State Office of Victim Services, on behalf of Mariano Munoz v Donnell Martinez*, Supreme Court, Albany County Index Number 2449-16.

balance of the defendant's settlement proceeds held by the Comptroller. Although defendant was personally served with the summons and complaint on June 28, 2017, he neither answered nor otherwise appeared in this action.

This Court, in its order of November 8, 2017, found that plaintiff had established his entitlement to a default judgment on liability against defendant but, since plaintiff had not established his monetary damages, ordered an inquest to determine whether he was entitled to an award of \$56,522.25, the amount claimed herein. The Court further ordered that a Special Referee be designated to hear and report the amount of monetary damages due to plaintiff;

The inquest was held on April 10, 2018, by Special Referee Joseph Burke. Two witnesses testified at the inquest. First was the plaintiff, who testified about the extent of his injuries and the treatment he underwent, including the resulting pain and remaining scars. The second witness was Ahna Blutreich, M.D., who presented her credentials and medical background and testified about her review of plaintiff's medical records, the extent of plaintiff's injuries, and his continuing medical problems.

Based on the testimony and the records which he reviewed, Special Referee Joseph Burke recommended that plaintiff be found entitled to recover the entire remaining funds, totaling \$56,522.25.

Plaintiff now moves, in effect, pursuant to CPLR 4403, to confirm the Special Referee's Report and to direct that a judgment be entered in his favor and against the defendant, who has defaulted in this action, in the amount of \$56,522.25.

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 Burke “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 (1<sup>st</sup> Dept 1997). Thus, plaintiff's motion to confirm the report is granted and the report is confirmed.

Accordingly, it is hereby:

ORDERED that the Report of Special Referee Joseph Burke, dated May 29, 2018, is hereby confirmed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Mariano Munoz and against defendant Donnell Martinez. in the amount of \$56,522.25 and it is further

ORDERED that the office of the Comptroller of the City of New York is directed to pay or release to the plaintiff Mariano Munoz funds currently being held by the order of Justice Ryba, dated March 28, 2017, in the special proceeding of *New York State Office of Victim Services, on behalf of Mariano Munoz v Donnell Martinez*, Supreme Court, Albany County Index Number 2449-16, in the amount of \$56,522.25 and it is further

ORDERED that, within twenty days, plaintiff's attorney is to serve this order, with notice of entry, on defendant's attorney, Jeffrey Stern, Esq., on the office of the Comptroller of the City of New York, on the New York State Office of Victim Services, through its attorney, Barbara Underwood, Attorney General of the State of New York, on defendant Donnell Martinez and on the Clerk of the Court (Room 141B); and it is further


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

7/9/2018  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
KATHRYN E. FREED, J.S.C.