

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ANIL C. SINGH Justice

PART 45

Index Number : 650198/2012
PASANELLA, MARCO
vs.
QUINN, JAMES
SEQUENCE NUMBER : 005
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 13, 2016

[Signature], J.S.C.
ANIL C. SINGH

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
In the Matter of the Arbitration Between

MARCO PASANELLA and PREMIUM WINES
AND SPIRITS, LLC,

Petitioners,

-against-

JAMES QUINN and Q WINES, LLC,

Respondents.
-----X

DECISION AND
ORDER

Index No.
650198/2012

HON. ANIL C. SINGH, J.:

Petitioners move for an order: 1) modifying the report of the special referee following a traverse hearing; and 2) lifting the restraint on petitioners' income execution against respondent James Quinn. Respondent opposes the motion and cross-moves for an order: 1) confirming the recommendation of the special referee that service was not effectuated because the process server was not authorized to serve process in this action under Connecticut and New York law; 2) rejecting the Special Referee's report to the extent it states that service was otherwise proper, because service was also invalid because the notice of petition and verified petition were not properly affixed to Quinn's residence as required by CPLR 308(4); and 3) vacating the default judgment and dismissing this action for lack of jurisdiction due to the absence of service.

A traverse hearing was held before Special Referee Jeffrey A. Helewitz on January 7, 2016, and February 18, 2016. The referee issued a recommendation and report dated February 18, 2016.

The referee's report concluded that service on respondents was not proper because they were served by an indifferent person in a situation in which service by an indifferent person is not permitted by Connecticut law. However, the report stated further that should petitioners find any legal support for their proposition that service by an indifferent person on a Connecticut resident is permitted for suits emanating from a different state, then the referee would find that respondents were properly served pursuant to CPLR 308(4).

Discussion

CPLR 4403 provides that this Court has the power to confirm, in whole or in part, the report of a referee to report.

A referee's report is not binding, but is intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks and citation omitted)). However, "[i]t is well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dep't 2003; see also Namer v. 152-54-56 W. 15th St Realty Corp., 108 A.D.2d

705, 706 [1st Dept., 1985]; Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept., 2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept., 1982]). “The court, in confirming a referee’s report, properly defers to the findings of the referee, who was in the best position to weigh the evidence and make credibility determinations” (92 N.Y.Jur.2d References section 57).

Although the parties dispute whether the process server was an individual authorized under the laws of Connecticut and New York to serve process, it is undisputed that the only law that applies to the method of service in this matter is the law of New York. The method of service employed was affix-and-mail service under CPLR 308(4). We disagree with the referee’s finding that service was proper pursuant to that statutory provision.

Eric Rubin, the process server, was called as a witness at the traverse hearing.

He testified as follows:

Q. On the last time that you attempted service at that address what further steps did you take with respect to the service?

A. Again I would have knocked on the door.

Q. Okay. Aside from that, what other steps?

A. Well, after doing that, seeing if somebody is home, if they don’t come to the door then it would be affixed to the door. In this case I affixed it to the door.

Q. How did you do that?

A. Wedged it between the door handle and the door so it is wedged and it will not come out unless it is removed by hand.

(Transcript dated February 18, 2016, p. 15, lines 9-20).

New York courts have held consistently that “wedging” a summons and complaint to a door is an improper form of affixation under CPLR 308(4). Rather, a method must be used that ensures a genuine adherence, such as a nail, tack, tape, rubber band or some other device (Merchandise Nat’l Bank v. Lister, 5 A.D.2d 653 [1st Dept., 1958] (wrapping the summons around the doorknob with a rubber band); Empire Ins. Co. v. Marquez, 168 A.D.2d 810 [3rd Dept., 1990] (summons and complaint wedged in door frame of locked screen door); Van Raalte v. Metz, 161 A.D.2d 760 [2nd Dept., 1990] (wedging pleadings in a door frame does not constitute “affixation”); PacAmOr Bearings, Inc. v. Foley, 92 A.D.2d 959 [3rd Dept., 1982] (wedging of summons between door and door jamb is an insufficient affixation); Walker v. Manning, 209 A.D.2d 691 [2nd Dept., 1994] (rolling up summons and complaint and leaving them in handle of storm door is insufficient); Steltzer v. Eason, 131 A.D.2d 833 [2nd Dept., 1987] (rolling process up and wedging it between door knob and frame of door is insufficient); Werner v. Schweit, 138 A.D.2d 592 [2nd Dept., 1988] (slipping the papers between screen door and door jamb is improper); Bruckner by the Bridge, LLC v. Gonzales, 48 Misc.3d 1211(A) (N.Y. Civ. Ct., Bronx Co., 2015)).

On this record, the Court finds that service was not effectuated in this matter, regardless of whether the process server was authorized to serve process under Connecticut law. Accordingly, it is

ORDERED that the report of the special referee is confirmed in part and rejected in part; and it is further

ORDERED that petitioners' motion for an order modifying the Special Referee's report and lifting the restraint on petitioners' income execution against respondent James Quinn is denied; and it is further

ORDERED that the cross-motion for an order confirming the Special Referee's finding that service was not effected properly and vacating the default judgment and dismissing the action for lack of jurisdiction is granted; and it is further

ORDERED that the income execution is vacated; and it is further

ORDERED that the action is dismissed for lack of jurisdiction.

The foregoing constitutes the decision and order of the court.

Date: July 13, 2016
New York, New York



Anil C. Singh