11-4283-cv

United States Court of Appeals
for the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff - Appellee,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ROBERT D. MAYBERGER, IN HIS OFFICIAL CAPACITY AS CLERK OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, JOHN G. RUSK, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS,"

Defendants – Appellants,

STATE OF NEW YORK, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT AND ITS MEMBERS,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE

Ekaterina Schoenefeld
Plaintiff-Appellee Pro Se
Schoenefeld Law Firm LLC
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(609) 688-1776

Dated: May 1, 2015

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PRELIMINARY STATEMENT

In their submissions to this Court and the New York Court of Appeals, Defendants argued the rule of constitutional avoidance – i.e., that Section 470 can reasonably be interpreted as merely requiring nonresident attorneys to provide an address for service of papers or to designate an agent for service – which, as Defendants argued, could save the statute. Dkt. No. 121 at 6. Relying exclusively on such a narrow reading of § 470 under the rule of constitutional avoidance, Defendants essentially conceded that the requirement that nonresident attorneys maintain an actual, physical law office would constitute discrimination against nonresident attorneys in violation of the Privileges and Immunities Clause.[1/]

The New York Court of Appeals has now held that § 470's term "office for the transaction of law business" does in fact mean that a nonresident attorney must maintain an actual physical office space for the practice of law in the State. By requiring that nonresident attorneys maintain a physical law office in New York but not imposing any office requirement at all on residents, Section 470 imposes a significant economic burden on nonresident attorneys by placing them at a

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[1/] As Defendants' counsel argued before the New York Court of Appeals: "The issue before the court is whether Judiciary Law Section 470 can, and therefore should, be interpreted narrowly to avoid raising a serious Constitutional question," essentially admitting there are "grave doubts about the statute" that call for applying the rule of constitutional avoidance. 02/17/15 Argt. Tr. 2:8-11, 5:19-6:2 (available at https://www.nycourts.gov/ctapps/arguments/2015/Feb15/Transcripts/021715-39-Oral-Argument-Transcript.pdf) (May 1, 2015).

competitive disadvantage and preventing them from practicing law on substantially equal terms with residents. In other words, § 470 essentially serves as an artificial trade barrier prohibited by the Privileges and Immunities Clause. *In re Gordon.* 48 N.Y.2d 266, 271 (1979) (citations omitted).

The only state's interest proffered by Defendants on appeal – i.e., "service of papers" – does not constitute a "substantial" state interest sufficient to justify the existence and continuing enforcement of § 470's office requirement. Service of papers – the provision which was severed from the original language of the statute in 1909 – can easily be accomplished via other, less restrictive means that are available today. As Chief Judge Lippman observed—writing for the unanimous Court of Appeals—"it is clear that service on out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted." Dkt. No. 139 at 7. Noting other means available for service upon nonresident attorneys, the Court of Appeals concluded that "there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary." Dkt. No. 139 at 7.

Thus, the district court was correct to hold that Section 470 infringes on nonresident attorneys' right to practice law in violation of the Privileges and Immunities Clause and its decision should be affirmed.

ARGUMENT

On April 8, 2014, this Court certified the question of what are the minimum requirements necessary to satisfy Section 470's mandate that nonresident attorneys maintain an "office for the transaction of law business" within the state to the New York Court of Appeals ("Court of Appeals"), which it accepted. Dkt. No. 121.

On March 31, 2015, the Court of Appeals issued its opinion, "interpret[ing] the statute as requiring nonresident attorneys to maintain a physical law office within the State." Dkt. No. 139 at 4-5 (noting that §470's purpose was to make an exception to the then-existing residency requirement, the Court of Appeals concluded that "[b]y its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here").

I. Section 470 Discriminates Against Nonresident Attorneys by Requiring That They Maintain a Physical Law Office to Practice Law in the State.

In issuing certification, this Court observed that, with respect to New York residents, neither the Judiciary Law, nor the New York Civil Practice Law, nor the Rules of Professional Conduct require a resident attorney to maintain any office at all. Dkt. No. 121 at 6-7. Yet, with respect to nonresident attorneys, "Section 470 mandates that they shoulder the additional obligation to maintain some sort of separate office premises within the state." *Id.* at 7 (internal citations omitted).

The Court of Appeals has now held that Section 470's term "office for the transaction of law business" means that a nonresident attorney must maintain an

actual, physical law office for the purpose of practicing law in the State. Dkt. No. 139 at 4. And, as this Court has observed, "[t]his additional obligation carries with it significant expense—rents, insurance, staff equipment *inter alia*—all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one." Dkt. No. 121 at 8. The Court then concluded, "In sum, as it stands, it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the [P&I] Clause." *Id.* at 9.

In other words, as Plaintiff and *amici* N.Y.-Licensed Nonresident Attorneys argued, the physical law office requirement constitutes a substantial burden and prevents nonresident attorneys from practicing law in the state on equal terms with residents. Dkt. No. 41 at 44-50; Dkt. No. 64 at 15-23.

II. Defendants Cannot Establish That Section 470 Advances a Substantial State Interest, or That There Is a Substantial Relationship Between the Statute and That Interest.

Defendants' argument that "service of process" constitutes substantial state interest justifying the continued existence and enforcement of § 470 is meritless.[2]/

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[2]/ In response to Defendants' argument that the rule of constitutional avoidance requires that the court should strive to retain statute's constitutionality when it can, Chief Judge Lippman astutely observed: "sometimes they're hopeless" and "[w]e can't retain them." 02/17/15 Argt. Tr. 6:12-19 (available at https://www.nycourts.gov/ctapps/arguments/2015/Feb15/Transcripts/021715-39-Oral-Argument-Transcript.pdf) (May 1, 2015).

The Court of Appeals rejected Defendants' argument that it should apply the rule of constitutional avoidance and read § 470 narrowly, reasoning:

> The statute itself is silent regarding the issue of service. When the statute was initially enacted in 1862, however, it did contain a service provision. … Upon the enactment of the Code of Civil Procedure in 1877, the provision was codified at section 60 of the Code. In 1909, the provision was divided into two parts – a service provision, which remained at section 60 of the Code, and a law office requirement, which became section 470 of the Judiciary Law. Notably, after we invalidated a New York residency requirement for attorneys in Matter of Gordon (48 NY2d 266 [1979]) the legislature amended several provisions of the Judiciary Law and the CPLR to conform to that holding (L 1985, ch 226). Section 470, however, was not one of the provisions amended and has remained virtually unchanged since 1909.
>
> Even assuming the service requirement had not been expressly severed from the statute, it would be difficult to interpret the office requirement as defendants suggest. As the Second Circuit pointed out, even if one wanted to interpret the term "office" loosely to mean someplace that an attorney can receive service, the additional phrase "for the transaction of law business"' makes this interpretation much less plausible. Indeed, the Appellate Division departments have generally interpreted the statute as requiring a nonresident attorney to maintain a physical office space.

Dkt. No. 139 at 5-6 (internal citations omitted).

Even assuming, *arguendo*, that the service requirement had not been severed from the statute, there is no substantial relationship between the stated purpose of service of process and § 470's office requirement. As Defendants argued before this Court and the Court of Appeals, the state's interest is to enable the service of process and other legal papers. In particular, they claimed that the purpose is to provide litigants with an option to personally serve nonresident attorneys with

papers such as court orders requiring immediate attention or action, to allow litigants by choosing personal service to obtain an earlier return date on motions, or to have an alternative mode of service that may be more convenient or less expensive for voluminous or oversized documents.

What Defendants fail to recognize, however, is that New York is a big state: a nonresident attorney practicing in Manhattan or Brooklyn might not necessarily rent an office there if the sole purpose of the office were to comply with § 470. And, hand delivery is far easier from New York City to Princeton, New Jersey than to a lawyer's office in Massena, New York. It is also unclear why service via personal delivery is superior even if both lawyers are in the state – for instance, where one lawyer is located in New York City and the other in Buffalo.

In the meantime, a nonresident attorney who rents office space in New York in order to comply with § 470, incurs additional substantial costs, and risks potential delays in having her mail forwarded from her New York office to her out-of-state location. Such nonresident lawyer may also have to defend herself against disqualification motions or even face evidentiary hearings about whether she has a New York law office. Dkt. No. 50 at 18-20.

For instance, in *Willing v. Truitt*, an attorney's compliance with § 470 was the subject of an evidentiary hearing by a special referee – including oral testimony by four witnesses, documentary exhibits, and the post-hearing submission of briefs

and transcripts of witnesses' testimony – all on the sole issue of whether the plaintiff's counsel maintained a law office in this state at the time it commenced a lawsuit on behalf of its client. *Willing v. Truitt*, No. 600809/2009 (N.Y. Sup. Ct., Oct. 20, 2010) (unpublished order) (reproduced at Appendix A1-A8).

In another case, *EIC Associates v. Nacirema Environmental Services Co*., an order issued after the district court's Memorandum-Decision and Order in this case—which Defendants did not move to stay pending this appeal—the trial court dismissed plaintiff's complaint because of counsel's failure to comply with Section 470, finding that the district court's decision and order in the instant case was not a valid injunction and, in any event, it applies only to Defendants named in this case. No. 652308/11, 2012 WL 10008215 (N.Y. Sup. Aug. 27, 2012).

Finally, Defendants' claim that Section 470 does not discriminate against nonresident attorneys "but rather places such attorneys on equal footing with resident attorneys, who necessarily have at least one location within the State—their residence—at which to receive personal service of legal papers" is meritless. While CPLR 2103(4) does state that service may be made "by leaving it at the attorney's residence within the state," as a practical matter, this provision is meaningless: nothing requires New York attorneys to disclose their residential addresses. Simply put, if a New York-based attorney practices law "on the kitchen table in her studio apartment" (but uses a virtual office or a mail drop on her

business cards), there is no way for a litigant or opposing counsel to ascertain where that studio apartment is located in order to serve her with process.[3]/

In other words, the continuing enforcement of the statute constitutes a substantial unnecessary burden on nonresidents in terms of costs, lost clients, and inability to practice in New York state courts (despite being duly licensed there), delays in receiving legal papers due to mail forwarding issues, and the resulting risk of missed deadlines and exposure to malpractice lawsuits, as well as the distractions from their practices arising from disqualification motions and motions to dismiss due to a failure to comply – whether real or perceived – with § 470.

III. There Are Other, Less Restrictive Means Available for Achieving the State's Stated Purpose of Service of Papers.

While acknowledging that the "State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here," the New York Court of Appeals stated:

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[3]/ According to the Ethics Opinions issued by the New York State and New York City Bar Associations, Rule 7.1(h) regulating attorneys' advertisements which states that "[a]ll advertisements shall include … principal law office address" of the lawyer, does not require an attorney to list her actual physical location or a street address. NYSBA Ethics Op. 1025 (Sept. 29, 2014) (stating that "it is incorrect to interpret the attorney-advertising rule as an independent mandate for attorneys who advertise to maintain a physical office address," noting that "the more-electronically connected lawyer may be 'at least as accessible as a lawyer who rents a dedicated office space, and concluding that the required address "may be the Internet address of a [purely] virtual law office"); NYC Bar Ass'n Formal Opinion 2014-2 (June 2014) (finding that a lawyer would comply with Rule 7.1(h) if she lists in her advertisements an address of "a physical location that offers business services and facilities, such as private or semi-private work spaces, conference rooms, telephones, printers, photocopy machines, and mail drop services to lawyers").

> … it is clear that service on out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted. The CPLR currently authorizes several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email (see CPLR 2103 [b]). Under our own Court rules, the admission of attorneys who neither reside nor have full-time employment in the State is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for the service of process for actions or proceedings brought against them relating to legal services offered or rendered (see Rules of the Court of Appeals [22 NYCRR] § 520.13 [a]). ***Therefore, there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary.***"

Dkt. No. 139 at 7 (emphasis added).

Indeed, even in New Jersey the office requirement has undergone substantial changes while this appeal has been pending. Until 10 or so years ago, New Jersey required that all resident and nonresident attorneys maintain a bona fide office in the state. Dkt. No. 48 at 5-16. In February 2013 – after briefing in this appeal was completed – New Jersey Rule 1:21-1(a) was amended again, this time to eliminate the "brick-and-mortar" office requirement altogether. N.J. Ct. R. 1:21-1(a).

Other states have similarly updated their laws to reflect the realities of modern technology, such as the ability to serve papers electronically – e.g., email. For instance, in 2012, the Supreme Court of Florida amended Florida's court rules to require email service of all pleadings and other documents. Fla. R. Jud. Admin. 2.516(b)(1). Thus, requiring nonresident attorneys to accept service by email – which is already a permitted method under the New York Civil Practice Rules –

would constitute a less restrictive means of achieving the state's stated purpose of serving papers and would be in accord with Chief Judge Lippman's vision of a "digital courthouse." Indeed, as the Chief Judge stated in the State of the Judiciary:

> This year I will introduce legislation […] to implement mandatory e-filing in Supreme Court in all counties and in all classes of cases. It is time to end the "experiment," fully embrace modern technology, and by statute make e-filing a permanent part of New York practice.

The State of the Judiciary 2015 at 15 "Moving Towards a Digital Future: Mandatory E-Filing" (available at https://www.nycourts.gov/ctapps/news/SOJ-2015.pdf) (May 1, 2015).

In short, Section 470 fails under the Privileges and Immunities Clause because Defendants cannot establish that § 470 advances a substantial state interest, there is a substantial relationship between the statute and that interest, or that there are no other, less restrictive means available.

CONCLUSION

As stated above and in Plaintiff's original brief, the district court's memorandum-decision and order should be affirmed.

Dated: May 1, 2015
Princeton, New Jersey

Respectfully submitted,

By: /s/ Ekaterina Schoenefeld
Ekaterina Schoenefeld

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APPENDIX

10/20 @ 4P

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

PRESENT: STEVEN E. LIEBMAN SPECIAL REFEREE PART 86

Index Number : 600809/2009
WILLING, CURTIS L.
VS
TRUITT, ALAN BRENT
Sequence Number : 002
HEAR AND REPORT

INDEX NO. 600809/09
MOTION DATE JAN 26 2010
MOTION SEQ. NO. 002
MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

NYS SUPREME COURT RECEIVED
OCT 20 2010
MOTION SUPPORT OFFICE

FILED
OCT 20 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Upon the submitted referral, this matter, under sequence number 002, is disposed of in accordance with the accompanying Special Referee's Report and Recommendation.

Dated: SEP 17 2010

STEVEN E. LIEBMAN J.S.C.
SPECIAL REFEREE

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 86

----------X

CURTIS L. WILLING,

INDEX NO. 600809/09

Plaintiff,

SEQ. NO.: 002

-against-

REFEREE'S REPORT AND RECOMMENDATION

ALAN BRENT TRUITT,

Defendant.

----------X

TO THE SUPREME COURT : NEW YORK COUNTY - IAS PART 48

Within the context of the underlying application under motion sequence number 001 by the defendant to dismiss the plaintiff's complaint as disposed of by the court in accordance with the decision and order under motion sequence number 001 of the Honorable Marylin G. Diamond, dated October 30, 2009, and filed thereafter on November 9, 2009, the framed issue of whether the

Hopp Law Firm maintained a law office in this state at the time this action was commenced was referred for assignment to a Special Referee to hear and report with recommendations, or to hear and determine if the parties so stipulated in writing as permitted by CPLR §4317(a). Final determination of the underlying motion to dismiss the underlying action was otherwise held in abeyance pending receipt of the Special Referee's report and recommendations and a motion to confirm and/or disaffirm such report pursuant to CPLR §4403, or upon receipt of the Special Referee's determination of the framed issue.

This matter was assigned to the undersigned Special Referee for hearing on January 26, 2010. The plaintiff Curtis L. Willing and the defendant Alan Brent Truitt both appeared by their respective attorneys of record.

The referral hearing was conducted and concluded on January 26, 2010. Both the plaintiff and the defendant through their respective counsel did not consent nor stipulate to have the undersigned Special Referee assigned hear and determine the referenced issue instead of to hear and report in accordance with CPLR §4317(a). Consequently, the referenced matter proceeded to hearing on a hear and report basis. The attorneys for both parties offered opening statements on the record, but waived on record closing arguments in lieu of the submission of responsive post-hearing memoranda of law. Responsive post-hearing Memoranda of Law were submitted by both counsel by April 2, 2010, which are filed with this report. Both parties presented their respective cases on

the framed issue related to whether the Hopp Law Firm maintained a law office in this state at the time this action was commenced, *to wit:* March 16, 2009, through oral testimony of witnesses and documentary exhibits marked in evidence. All the exhibits marked and submitted in evidence at the hearing are similarly filed with this report, inclusive of the defendant's exhibits A through J and the plaintiff's exhibits 1 through 4, all offered and marked exhibits all being admitted by stipulation of counsel on the record. The transcription of the minutes of the referenced hearing, required to be filed with the Special Referee's report pursuant to CPLR §4320(b), was also submitted and filed with this report by the both parties and their respective counsel.

As governed by the underlying decision and order of reference, Justice Diamond recited to the underlying action wherein the plaintiff claimed that he was defrauded by the defendant in connection the sale of a Manhattan condominium unit. The plaintiff commenced this action by the filing a Summons and Complaint on March 16, 2009. [Exhibit A]. The Summons and Complaint as submitted, both dated March 16, 2009, listed The Hopp Law Firm, LLC, as plaintiff's attorneys with the only address specified therein being that of The Hopp Law Firm, LLC, located in Denver, Colorado. The pleadings were signed by Fred Van Remortel on behalf of The Hopp Law Firm, LLC. While the Summons listed both a Denver, Colorado and a New York City telephone number, the Complaint listed only a Denver, Colorado telephone number.

The defendant moved to dismiss this action on a motion

for summary judgment contending that, as the plaintiff's attorney of record, The Hopp Law Firm, LLC, did not maintain an office for the practice of law within the State of New York at the time that this action was commenced as required by Judiciary Law §470. The defendant has averred that the Complaint is a nullity since The Hopp Law Firm, LLC, did not have the authority to practice law in the State of New York at the time the action was commenced. The plaintiff argued that The Hopp Law Firm, LLC, in accordance with Judiciary Law §470, operated through Fred Van Remortel, Esq., who maintained an office in the State of New York in satisfaction of the requirements of Judiciary Law §470 and that Mr. Van Remortel's office and presence should be similarly imputed to The Hopp Law Firm, LLC.

Judiciary Law §470 provides that: "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

At the hearing the defendant presented two witnesses, Mr. Fred Van Remortel, Esq., being the New York "of counsel" to The Hopp Law Firm, LLC, as plaintiff's counsel of record, through which The Hopp Law Firm, LLC, maintained a New York office and Mr. Robert Feliciano, a licensed private investigator. The defendant essentially does not significantly dispute the fact that Mr. Van Remortel, personally or through his own personal professional corporation, may have had an office for the practice of law in the

State of New York in March 2009. However, the defendant asserts that The Hopp Law Firm, LLC, the attorney of record for the plaintiff in this action, did not in fact have an office for the transaction of a law business in New York State at the time of commencement of this action in March 2009, and that no witnesses' testimony nor any documentary proof submitted supported the fact that plaintiff's counsel of record The Hopp Law Firm, LLC, had any *bona fide* presence or office in this state at the time of commencement of this action on March 16, 2009.

The plaintiff, in addition to relying on Mr. Van Remortel's testimony, offered the testimony of Mr. Alan J. Berlowitz, Esq., an attorney who maintained an office next to and at the same premises claimed by Mr. Van Remortel at 1350 Avenue of the Americas and Elizabeth Morin, a legal assistant currently employed by Meloni & McCaffrey and who was previously employed by Guibord Homsy, LLP., at 1350 Avenue of the Americas and had also worked for Mr. Berlowitz at that office location. By Memorandum of Law the plaintiff has argued that, based upon the testimonial and documentary evidence offered, Mr. Van Remortel maintained a law office located at 1350 Avenue of the Americas, Suite 3100, New York, NY, continuously from November 2004 through July 2009, and through his "of counsel" relationship The Hopp Law Firm, LLC, did have, actual or imputed, a law office in the State of New York at the time of commencement of this action on March 16, 2009.

Upon consideration of the record, review of the submitted evidence, inclusive the proffered exhibits and the oral testimony

presented by the witnesses deemed herein credible, and weighing and evaluating the arguments of counsel presented by their respective memoranda of law, I find that The Hopp Law Firm did not maintain an office, either actual or imputed, in the State of New York for the practice of law as mandated by Judiciary Law §470.

The nature and extent of the factual circumstances provided by plaintiff and the defendant in this present instance, given the history of this specific proceeding and even with due consideration to the entire background of this litigation, amply support the finding that The Hopp Law Firm did not maintain an office in the State of New York for the practice of law sufficient to satisfy the plain meaning and intent of Judiciary Law §470 as mandated by the authority of the Appellate Division, First Department. (***Kinder Morgan Energy Partners, LP v. Ace American Insurance Co.***, 51 AD2d 580 [1st Dept., 2008]; ***Neal v. Energy Transportation Group, Inc.***, 296 AD2d 339 [1st Dept., 2002]; ***Lichtenstein v. Emerson***, 251 AD2d 64 [1st Dept., 1998]).

Accordingly, I hereby report and find that The Hopp Law Firm, LLC., did not maintain an office within the meaning and requirements of Judiciary Law §470 on the date of commencement of the underlying action to wit: March 16, 2009.

I respectfully recommend that the court confirm such finding of the Special Referee upon a motion pursuant to CPLR §4403 and, upon confirmation of this report, dispose of the defendant's underlying motion to dismiss the plaintiff's complaint and underlying action in a manner deemed appropriate by the court.

The foregoing constitutes the report and recommendation of the Special Referee.

DATED: SEP 17 2010

Respectfully submitted,

STEVEN E. LIEBMAN
Special Referee