

Matter of Melrod

2007 NY Slip Op 30472(U)

March 20, 2007

Supreme Court, New York County

Docket Number: 0115444/2006

Judge: Karen S. Smith

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: SMITH
Justice

PART 44

JOSEPH MORROB

- v -

Shant J Magal

INDEX NO. 115844/06

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ preclude a deposition and related document disclosure

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2</u>
_____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . 002 . . .

FILED

APR 02 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/20/07

K. S. S.

Check one: FINAL DISPOSITION

HON. KAREN SMITH J.S.C.
 NON-FINAL DISPOSITION

[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Mogul was living and working in New York. The documents demanded by Melrod include, but are not limited to, any and all correspondence between Mogul and Allison Melrod, records of any payments by Allison Melrod to Mogul, records of any payments by Mogul to or for the benefit of Allison Melrod and the previously mentioned medical records. An ex-Parte order directing Mogul's deposition and production of documents was issued by the Hon. William P. McCooe on October 16, 2006 and served on Mogul.

Mogul brought the instant application, by order to show cause, seeking a protective order precluding the deposition and document disclosure. In his affidavit in support of his motion Mogul states; 1) Melrod's demands are an improper abuse of process designed solely to harass and burden Mogul and 2) Mogul has no involvement Melrod's matrimonial action nor any knowledge which is in any way relevant to the prosecution or defense of that action. With respect to the issue of undue harassment, Mogul submits (as Exhibit G to his moving papers) a copy of a letter, dated July 26, 2005, from an attorney allegedly engaged by Melrod to threaten Mogul with litigation; "in connection with an alleged improper relationship you [Mogul] have been having with his [Melrod's] wife, Allison Melrod" and a letter, dated August 9, 2005, from Melrod addressed to Mogul's wife sending her a copy of the lawyer's letter (which the lawyer had sent to Mogul). Mogul also asserts he has no records which fall into any of the categories of records demanded by Melrod except Mogul's medical records of his treatment of Allison Melrod. As to Mogul's medical records of Allison Melrod's treatment, Mogul argues the records are the subject of Physician-Patient privilege but he may properly (and will) provide them if Allison Melrod submits a duly executed authorization for their release.

When considering an application for discovery to aid litigation pending in a sister state, the court is vested with the same broad discretion it would have if it were adjudicating an action

pending before it (see eg: *Matter of DataSafe, Inc. et al. v American Express et al.*, 2 AD3d 224 [1st Dept 2003]). CPLR § 3103 specifically provides that the court may issue a protective order denying discovery to; "... prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

In the exercise of its discretion in this matter, the court is granting respondent's motion for a protective order precluding the requested deposition and document discovery. Based upon the facts asserted in the papers and at oral argument, the requested discovery will cause unreasonable annoyance, expense and embarrassment to the respondent (who is not a party to the underlying action) while, on the other hand, be unlikely to disclose any information that will; 1) be useful to Melrod in the prosecution or defense of his matrimonial action or 2) he cannot obtain (or has not already obtained) from other sources.

Mogul's sworn affidavit in support of his motion directly states that he does not have any of the documents Melrod seeks except such documents as may be obtained through the use of a medical authorization duly executed by Allison Melrod. If the Maryland State Court considers this information relevant to the action pending before it, said court could direct the execution of such a medical authorization if Allison Melrod declines to provide one voluntarily. As it may reasonably be expected that Mogul's testimony at a deposition, if he were directed to appear, would be consistent with the sworn affidavit he has provided in support of this motion, it is unlikely that a deposition of Mogul would produce any further information relevant to Melrod's matrimonial action.

Mogul's affidavit stands in stark contrast to Melrod's basis for his assertion that Mogul was involved in a relationship with Allison Melrod (ie; that Allison Melrod has been evasive in her answers to Melrod's interrogatories about her alleged extra-marital activities and that Mogul

and Allison Melrod spoke on the telephone for a period of seven hours over the course of three months). Without some direct evidence that Mogul was, in fact, involved in an inappropriate relationship with Allison Melrod, Melrod's request amounts to nothing more than a fishing expedition. In New York, the courts have long held; "...there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare..." (*Blickstein v Blickstein*, 99 AD2d 287 [2nd Dept 1984]). If, as argued by Melrod, adultery is a relevant factor in the Maryland matrimonial action, information regarding Allison Melrod's activities should initially be obtained directly from her since she is person with first hand knowledge of her activities and the Maryland court has jurisdiction over her. On the other hand, there is little likelihood of obtaining any additional useful information from Mogul and a huge potential for harassment and embarrassment of Mogul that goes beyond the confines of deposition questioning. In as much as Melrod has already demonstrated his propensity to exercise that potential and given his scant evidence to justify his request for information from an individual who is a nonparty to the action, it is this court's determination that the requested deposition and coordinate disclosure of records would be unduly burdensome, and constitute; "...a tool for harassment [and] financial waste" (*Geller v Geller*, 240 AD2d 539 [2nd Dept 1997]). Accordingly, it is;

ORDERED that Mogul's request for a protective order precluding his deposition and the production of records pursuant to the order of the Hon. William P. McCooe dated and filed on October 16, 2006 is granted, and it is further;

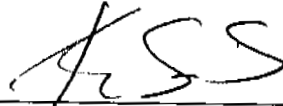
ORDERED that counsel for Mogul shall serve a copy of this decision and order upon the clerk of the court at 60 Centre Street and, upon receipt thereof, said clerk shall, forthwith, seal the file of these proceedings and said file shall not be open to review or inspection by anyone other

that the parties to this proceeding or their counsel of record except by further order of a court of competent jurisdiction.

The foregoing constitutes the decision and order of this court.

Dated: March 20, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
APR 02 2007
COUNTY CLERK'S OFFICE
NEW YORK