

**Matter of Kalafer**

2007 NY Slip Op 33891(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0107142/2007

Judge: Eileen Bransten

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

PRESENT: BRANSTEN

PART 6

Justice

Index Number : 107142/2007  
KALAFER, MICHAEL  
vs.  
OSTER, MARTIN M.D.  
SEQUENCE NUMBER : # 001  
PROTECTIVE ORDER

INDEX NO. 107142-07  
MOTION DATE 8/21/07  
MOTION SEQ. NO. #001  
MOTION CAL. NO.

vere read on this motion to/for

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED

NOV 30 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: Nov. 20<sup>th</sup> 2007

*Eileen Bransten*

J.S.C.

HON. EILEEN BRANSTEN

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X

In the Matter of the Application of MICHAEL  
KALAFER,

Petitioner

Index No.: 107142/07

Motion Date: 8/21/07

For an Order taking the deposition of MARTIN OSTER,  
M.D.

Motion Sequence No.: 001

Respondent

(and or) for the production of documents by MARTIN  
OSTER, M.D. for the use in an action pending in the  
State of New Jersey entitled MICHAEL KALAFER v.  
MARTIN OSTER, M.D., et al. Docket  
No. SOM-L-923-06

**FILED**  
NOV 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X

PRESENT: EILEEN BRANSTEN, J:

Respondent Martin Oster, M.D. ("Dr. Oster") moves this Court pursuant to CPLR 3103(a) for a protective order modifying the subpoena served by petitioner Michael Kalafer ("Mr. Kalafer"). Specifically, he seeks to bar Mr. Kalafer from questioning him about his personal contacts in New Jersey; limit his deposition to the facts of his care and treatment of the decedent, Claudia Kalafer ("Ms. Kalafer"); and quash that portion of the subpoena that seeks the production of any and all contracts between Dr. Oster and Columbia-Presbyterian Medical Center ("Columbia-Presbyterian"). Mr. Kalafer opposes the application.

### **BACKGROUND**

After Ms. Kalafer was diagnosed with Stage II breast cancer in January/February 2002, New-York licensed oncologist Dr. Oster administered chemotherapy to her at Columbia-Presbyterian until July 2002. Ms. Kalafer continued treatment with a different oncologist and a radiation therapist in New Jersey until December 2002. In June 2003, Ms. Kalafer was hospitalized for congestive heart failure and cardiomyopathy; she had no prior history of cardiac disease. On April 7, 2004, she died of cardiac arrest.

On February 27, 2006, Mr. Kalafer, individually and on behalf of Ms. Kalafer's estate, commenced a medical malpractice and wrongful death action in New Jersey Superior Court against Dr. Oster; Columbia-Presbyterian; Columbia Medical Center; Katherine C. Toomey, M.D.; Somerset Hematology-Oncology; Joel K. Braver, M.D.; Associated Radiologists/Warren Radiology Center; John Does, 1 to 10 fictitious names; Jane Does, 1 to 10 fictitious names; and ABC Corporation 1 to 10, fictitious names. *See*, Goldstein Aff, Ex C. Dr. Oster's motion to dismiss the action against him on personal-jurisdictional grounds was granted on July 21, 2006. *Id.*, Ex D. Mr. Kalafer's petition for that motion's reconsideration was denied on September 29, 2006. *Id.*, Ex E. On November 16, 2006, the Appellate Division of the Superior Court of the State of New Jersey denied Mr. Kalafer's leave for an interlocutory appeal of the order granting Dr. Oster's dismissal. *Id.*, Ex F.

In April 2007, the New Jersey Superior Court granted Mr. Kalafer's application for a commission to take Dr. Oster's non-party deposition in New York. *Id.*, Ex H. On May 21, 2007, Justice Sherry Klein-Heitler issued an order pursuant to CPLR 3102(e) directing Dr. Oster to appear for a deposition and produce any necessary documentation. *Id.*, Ex A. The Deposition Subpoena Duces Tecum orders Dr. Oster to give testimony; provide all medical documents related to his treatment of Ms. Kalafer; and produce all contracts between him, Columbia-Presbyterian, and its affiliates. *Id.*, Ex G.

By notice of motion dated June 25, 2007, Dr. Oster seeks a protective order modifying the subpoena. First, he contends that since the New Jersey Superior Court dismissed the claims against him on personal-jurisdictional grounds, Mr. Kalafer should be barred from questioning him about his personal contacts with New Jersey. Second, he avers that his deposition should be limited to the facts surrounding his care and treatment of Ms. Kalafer and to the relevant medical records; his expert opinion should not be elicited. Finally, he asks this Court to quash as overbroad and irrelevant that portion of the subpoena pertaining to his contracts with Columbia-Presbyterian and its affiliates.

#### ANALYSIS

"After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum \* \* \*" CPLR 3120. "Within twenty days of

service of a notice or subpoena duces tecum \* \* \* the party or person to whom the notice \* \* \* is directed, if that party or person objects \* \* \* shall state with reasonable particularity the reasons for each objection.” CPLR 3122(a). CPLR 3103(a) authorizes “[t]he court \* \* \* at any time \* \* \* on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

Here, Dr. Oster objected to Mr. Kalafer’s deposition subpoena duces tecum within the statutorily proscribed period and with the requisite particularity. An analysis of each of his objections follows.

#### Personal Contacts in New Jersey

Dr. Oster argues that because the New Jersey Superior Court dismissed the action as against him on personal-jurisdictional grounds, Mr. Kalafer must be precluded from questioning him on his personal contacts within New Jersey. *See*, Goldstein Aff at 11, ¶ 15. Mr. Kalafer contends that since the New Jersey Appellate Division has not substantively addressed Dr. Oster’s dismissal, that issue remains unresolved and the questioning is thereby legitimate. *See*, McCarthy Aff at 3, ¶ 7-8.

The New Jersey Superior Court rendered its decision dismissing Dr. Oster from the case and declined to reconsider it. *See*, Goldstein Aff, Ex E. Thus, he is no longer a party to the action. While Mr. Kalafer may disagree with this holding, his proper redress is an appeal to the New Jersey Appellate Division. Indeed, questioning Dr. Oster about his contacts with New Jersey will serve no purpose on appeal since the testimony elicited at a post-dismissal deposition will be *de hors* to the record. If Mr. Kalafer wanted discovery related to Dr. Oster's New Jersey contacts, he should have sought it in New Jersey before the dismissal. Moreover, this information is not material and necessary under CPLR 3101(a) to prosecute the action. Accordingly, Mr. Kalafer may not question Dr. Oster about his contacts in New Jersey.

Ms. Kalafer's Treatment/Expert Opinion

Dr. Oster avers that as a non-party treating physician, Mr. Kalafer's questioning must be limited to the facts pertinent to the treatment he rendered to Ms. Kalafer. Mr. Kalafer contends that

“[A]s a treating doctor, [Dr. Oster] should be required to provide testimony as to his care and treatment of [Ms. Kalafer], his medical records, and reports or correspondences he authored regarding the patient, what his usual and customary course of treatment is for such a patient, his communications with New Jersey physicians regarding the patient, and the opinions he reached that relate to the care and treatment of the patient (i.e., diagnosis; prognosis; risks of treatment; risks of lack of treatment; risk of diagnostic procedures; etc.).”

McCarthy Aff at 3, ¶ 10.

Since Dr. Oster has yet to be deposed, this Court can only rely on Mr. Kalafer's assertions as to his intention for the deposition's perimeters. Mr. Kalafer states that he seeks to question Dr. Oster on the opinions he reached that relate to Ms. Kalafer's treatment. This proposed line of questioning pertains to his factual observations of and treatments rendered to Ms. Kalafer. Moreover, since Dr. Oster actually treated Ms. Kalafer, his testimony on said care is "material and necessary in the prosecution \* \* \* of this action." *Capati v. Crunch Fitness International, Inc.*, 295 A.D. 2d 181 (1<sup>st</sup> Dept. 2002).

In addition, Mr. Kalafer contends that he intends to question Dr. Oster on his customary course of treatment for a patient akin to Ms. Kalafer. This line of questioning does indeed sound as if it could be an attempt to elicit expert testimony from Dr. Oster. But since the deposition has yet to take place, this Court will not presume that Mr. Kalafer will ask improper questions nor will it make rulings handcuffing his ability to fully question Dr. Oster. Dr. Oster's remedy is to make appropriate objections at the deposition itself.

#### Oster/Columbia-Presbyterian Contracts

Mr. Kalafer argues that a factual issue exists as to whether Dr. Oster was Columbia-Presbyterian's agent or apparent agent when he treated Ms. Kalafer. Therefore, he avers that his request for documentation from Dr. Oster concerning the employment relationship is

proper. *See*, McCarthy Aff at 3, ¶ 8. Dr. Oster contends that the documentation request is irrelevant, overly broad, and should be quashed. *See*, Goldstein Aff at 12, ¶ 17. Furthermore, he argues that Mr. Kalafer has failed to demonstrate special circumstances to justify obtaining the documentation from a non-party.

To be sure, the information regarding the Dr. Oster's relationship with Columbia-Presbyterian is relevant to this action. Indeed, knowledge of whether Dr. Oster had the authority to bind Columbia-Presbyterian to the decisions he made is material to Mr. Kalafer's prosecution against the hospital. *See*, *Capati*, 295 A.D. 2d 181. Therefore, Mr. Kalafer may question and seek documentation from Dr. Oster regarding his employment status with defendant Columbia-Presbyterian. While Dr. Oster is no longer a party to this action, he errs when he argues that Mr. Kalafer must show special circumstances to justify seeking these purported contracts from him. "There is no longer any necessity for 'special circumstances' [in the First Judicial Department]." *Schroder v Consolidated Edison Company of New York, Inc.*, 249 A.D. 2d 69 (1<sup>st</sup> Dept. 1998). Accordingly, Mr. Kalafer may seek these contracts from and question Dr. Oster on his employment relationship with Columbia-Presbyterian.

Accordingly, it is

ORDERED that this motion is granted to the limited extent that at Dr. Oster's despotism, Mr. Kalafer may not seek discovery related to Dr. Oster's contacts with New Jersey; and it is further

ORDERED that in all other respects, the motion is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York  
November 20, 2007

ENTER



Hon. Eileen Bransten

**HON. EILEEN BRANSTEN**

**FILED**  
NOV 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE