

<b>Gassab v R.T.R.L.L.C.</b>
2008 NY Slip Op 30179(U)
January 14, 2008
Supreme Court, New York County
Docket Number: 0122439/1999
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Branson  
Justice

PART 6

Chedli Prosser

INDEX NO. 122439/19  
MOTION DATE 9-28-07  
MOTION SEQ. NO. 015  
MOTION CAL. NO. \_\_\_\_\_

- v -

R.T.R.L.L.L.

The following papers, numbered 1 to 8 were read on this motion to/for Vacate verdict

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

and judgment ant cross-motions  
PAPERS NUMBERED  
1  
2, 3, 4, 5, 6, 7  
8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**  
JAN 23 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

Dated: 1-14-08

Eileen Branson  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
CHEDLI GASSAB,

Plaintiff,

-against-

R.T.R.L.L.C.,

Defendants.

AND THIRD AND FOURTH-PARTY ACTIONS  
-----X

PRESENT: EILEEN BRANSTEN, J.

Index No.: 122439/99  
Motion Date: 9-28-07  
Motion Sequence No.: 015

Pursuant to CPLR 1201 and 5015, plaintiff Chedli Gassab (“Mr. Gassab”) moves for an order vacating the jury verdict rendered on April 12, 2002 and the resulting judgment of November 24, 2003 and seeks a new trial on the grounds that “throughout the proceedings [he] was incompetent, rendering him incapable of adequately prosecuting or defending his rights, and hence required a guardian ad litem.” Affirmation in Support (“Supp.”), at ¶ 1.

Mr. Gassab’s former counsel Katz & Kreinces, LLP (“K&K”), Steinberg, Fineo, Berger & Fischhoff, P.C. (“S, B &F”), also his former attorneys, and defendants vigorously oppose the motion and cross-move for costs, reasonable attorneys’ fees and sanctions pursuant to 22 N.Y.C.R.R. 130-1.1. Mr. Gassab, in turn, himself cross-moves for imposition of sanctions against opposing counsel, defendants and K&K.

### Background

In October 1999, while working as a foreman to decoratively paint portions of The Russian Tea Room restaurant, Mr. Gassab fell off a scaffold and was injured.

Mr. Gassab met with Matthew R. Kreinces, Esq. (“Mr. Kreinces”) of K&K to discuss pursuing legal action. After a meeting that lasted several hours, Mr. Gassab signed paperwork authorizing K&K to commence this action against R.T.R.L.L.C. (“The Russian Tea Room”). Affirmation in Support of Cross-Motion and in Opposition on Behalf of K&K (“K&K Opp.”), Ex. A, at ¶¶ 3,5. The Russian Tea Room, in turn, sued Price Thomas Studios, Inc. (Mr. Gassab’s employer), Bronx Builders and Gorton Associates Incorporated (the employer also commenced a third party action against the latter two defendants as well).

During the course of disclosure, Mr. Gassab was deposed over two days.

It is unrefuted that Mr. Gassab actively discussed the case with his attorneys and participated in litigation-strategy conversations. Mr. Kreinces remembers that Mr. Gassab tape recorded a conversation they had and that Mr. Gassab once brought a binder containing cases, copies of correspondence and copies of his medical records to one of their meetings. K&K Opp., Ex. A, at ¶¶ 8-10. Mr. Kreinces recalls that Mr. Gassab asked “many questions.” *Id.*, at ¶ 12.

Lawrence Katz, Esq. (“Mr. Katz”), also of K&K, avers that “Mr. Gassab fully understood the issues that were going to be presented at the trial and had definite opinions as to what issues should and what should not be presented.” K&K Opp., Ex. B, at ¶ 4.

The trial of this case, over which this Court presided, began in March 2002 and lasted approximately sixteen days. Mr. Gassab testified over the course of several days. He did not encounter difficulties answering questions that were posed and relayed detailed information about jobs that he held, people who worked for The Russian Tea Room, the events surrounding his fall, his injuries and his medical treatment. K&K Opp., Ex. E.

Mr. Katz, who conducted the trial on plaintiff’s behalf, states:

“I spent almost the entire day with Mr. Gassab each of the sixteen days of trial. \* \* \* I spoke to him each day at lunch, during recess and at the end of the trial day. He had meaningful questions about the trial procedure and how things were going. He participated with me, thinking and expressing himself clearly as to what he thought the case should be settled for. The defendants had offered \$500,000.00 to settle the case and I believe the trial Court recommended \$1.8 million dollars. Mr. Gassab was clear that he felt that offer was inadequate as I did. He was willing to go along with the judge’s recommendation but that offer was never made.”

K&K Opp., Ex. B, at ¶ 5.

On April 12, 2002, the jury rendered its verdict against The Russian Tea Room. The jury awarded plaintiff \$300,000 for pain and suffering and loss of enjoyment of life to the date of the verdict, \$45,000 in lost earnings to the date of the verdict, \$302,000 for future pain and suffering and loss of enjoyment (assuming an additional 36-year life expectancy),

and \$210,000 for loss of earnings in the future (assuming a 14-year future earnings period).

The parties further stipulated that Mr. Gassab would be entitled to recover \$64,455.37 for his medical expenses.

Mr. Gassab made a motion to set aside the verdict, which was denied in a Decision and Order dated December 16, 2002.

He subsequently elected to fire his trial attorney and retained a new attorney Barbara Matthews, Esq. Next, he moved to discharge counsel--K&K--for cause in an attempt to avoid payment of its fee. *See*, K&K, Ex. F. In support of the motion, Mr. Gassab submitted a lengthy, detailed affidavit dated March 12, 2004, in which he swears, among other things:

“During my various consultations with Mr. Kreinces, I disagreed with many of his conclusions as to how he would continue my case, and each time I raised these questions, I was told that I would just have to ‘trust’ him.

“My first basis for concern was regarding a key witness, who was a fellow employee who was there on the day of the accident.

“Mr. Kreinces delayed meeting with this witness, and did not have adequate translating services available when he finally did meet with him, which raised a question at the trial as to whether this witness fully understood the affidavit he signed, therefore challenging his credibility. This, I believe, was very damaging to my case.

“The other area of concern that I had while Mr. Kreinces was preparing my case was regarding my earnings in my home country, which would have increased the basis for calculating my lost wages.

“When I asked him why he was not presenting proof related to this, he told me that the issue would be ‘too confusing’ for the jury.

“On or about December 26, 2001, I met with Mr. Kreinces and Mr. Katz regarding my case, [at] which time I voiced numerous concerns about how the trial was being prepared.

“At this time I reviewed the trial strategy with them, including which witnesses were going to testify and what areas they would testify to.

“While discussing proposed witnesses, we discussed testimony related to my neck and back injuries, and specifically, how, Dr. Kuo, who treated me, would testify.

“At this point in time I notified Mr. Kreinces that Dr. Kuo had relocated his offices, and Mr. Kreinces said he would locate him before the trial.

\* \* \*

“From the beginning of my case, I always indicated that the neck and back injuries caused me chronic pain, which keeps me up at night \* \* \*

“At this time we also discussed how the accident had made me impotent, which is a tremendous portion of the damages in my case.

“The discussion as to my impotence was related to tests I had had just the week before, on December 20, 2001, which was a duplex Doppler ultrasound, which had been performed by Dr. Nathan Bar-Chama.

“At this time, we discussed Dr. Nathan Bar Chama, the urologist who had prepared a report on these injuries and tests, and Mr. Kreinces told me that he had not yet received his report and that he would issue a subpoena for his testimony. However, the impotence issue was not raised at trial at all, and Dr. Nathan Bar-Chama did not testify. Numerous records of Dr. Parilla, which were in evidence at the trial, included the references to my complaints regarding my impotence.

“During this meeting, where Mr. Katz was present, he himself noticed that I was suffering from facial paralysis, which is evident when I speak. I explained

this situation to him, but I was later surprised during trial when all evidence related to this was omitted.

“I have been told by Ms. Matthews [appellate counsel] that when the facial paralysis issue came up in trial, Mr. Katz could have made a motion to have it permitted, but he did not, and therefore such testimony was barred.

“During trial, Mr. Katz admitted to me that Dr. Parrilla wasn’t called until the day before she testified, and during trial it became very apparent to me that Mr. Katz was not well-prepared, but rather, had anticipated a settlement before trial.

“During trial, it was also apparent to me that Mr. Katz did not adequately defend and/or object to certain testimony by defendants’ experts suggesting that my gait problems were related to the tumor on my sciatic nerve.

“Although I am not too familiar with the rules of evidence, I believe that Mr. Katz should have stopped this suggestion, as there would be no basis for this suggestion in evidence.

“I was also aware of the fact that the IAS Judge Walter Tolub recommended a settlement of \$2.5 million after jury selection, and that the trial judge herein recommended \$1.8 million considering the liability issues that needed proving.

\* \* \*

“Because I knew that the jury award was too low, I retained appellate counsel to appeal my case for me.

“Although Ms. Matthews did not make any promises about the outcome of the appeal, she did notify me that she would assess the overall record for error, which she did.

“During her assessment, she told me that the Judge had acted properly, but that key damage items were not presented to the jury.

\* \* \*

“During trial, it was apparent to me that Mr. Katz was not handling the trial well. The judge made comments about how the evidence on my brain injuries was not clear, and there were numerous trips to chambers on the issue of Workers Compensation insurance, because the witnesses kept mentioning it, when they were not supposed to.

“During the trial, the judge also told Mr. Katz that he could bring in the MRI of my neck and back injuries if he subpoenaed the technician who did the films, but Mr. Katz chose not to do this.

“I was disappointed that the motion for a new trial setting aside the damage verdict was not granted, but I now understand that this motion is made on the basis of the evidence that was presented, and after a thorough review of the record, it is apparent that it was counsel who did not submit sufficient evidence during my trial.

\* \* \*

“I believe that Mr. Katz did me a great disservice by omitting key evidence in my case, and that given what was presented, the judge had no choice but to deny the motion to set aside the verdict.

“I do not believe that Mr. Katz should receive fees in the amount of over \$300,000 for poorly presenting my case, and point out that after the liens are all paid, Mr. Katz will probably get more money from my trial than I will, and I have to live on this money for the rest of my life.

“I therefore request that Mr. Katz and Mr. Kreinces be discharged for cause, so that I can be permitted to sue them for malpractice.”

K&K Opp, Ex. F (emphasis added).

In March 2004, Mr. Gassab appeared in Court twice and executed stipulations regarding the release of settlement funds to pay costs associated with the case. K&K Opp., at ¶ 12; Exs. G, H.

On April 26, 2005, Mr. Gassab signed a satisfaction of judgment and acknowledged that The Russian Tea Room paid him in full the sum of \$967,888.55. K&K Opp., Ex. I.

In June 2007, more than five years after the jury verdict and more than two years after execution of the satisfaction of judgment, Mr. Gassab made this motion in which he seeks to vacate the judgment and jury award and proceed with a new trial. He argues that throughout the proceedings he was incompetent “rendering him incapable of adequately prosecuting or defending his rights.” Supp., at ¶ 1.

In support of the motion, he relies on an affirmation by Daniel Kuhn (“Dr. Kuhn”), a board certified psychiatrist licensed to practice in New York and New Jersey. In his affirmation, which is dated February 21, 2007 (almost five years after the trial of this case), Dr. Kuhn opines “with reasonable medical certainty that during the period spanning [his] relationship with Mr. Gassab, October, 1999, to June, 2003 that Mr. Gassab suffered a spectrum of cognitive deficits and psychiatric infirmities in the form of severe depression, significant anxiety and Post Traumatic Stress Disorder which very substantially impeded his ability to adequately make responsible decisions necessary to protect his legal rights.” Supp., Ex. A, at ¶ 2. Dr. Kuhn sets forth that in November 1999, Mr. Gassab was unable to care for

himself. *Id.*, at ¶ 4. He asserts that “review of additional records strongly reinforces” his impression of Mr. Gassab--that his “memory and concentration problems as well as his depression would necessarily have strongly impeded his ability to make in a responsible way the involved decisions that litigation necessarily entails in a responsible way”--that he had a “significant head and brain injury and ensuing mental and legal incompetence at least through approximately 2004.” *Id.*, at ¶¶ 7-8.

Dr. Kuhn further states:

“In January, 2000, several months after my initial evaluation of Mr. Gassab, I spoke with his attorney Matthew Kreinces wherein I reviewed with him the great severity of Mr. Gassab’s cognitive and psychiatric impairments and their strongly debilitating effects on his functioning. Had I been requested, I would have strongly endorsed the appointment of a guardian ad litem to supervise the litigation decision making that during the time I was involved with Mr. Gassab he was clearly too cognitively and psychiatrically impaired to adequately and responsibly protect his rights.”

Supp., Ex. A, at ¶ 20.

Additionally, Mr. Gassab relies on an affidavit dated February 26, 2007, from Kamran Fallahpour, Ph.D. (“Dr. Fallahpour”), a psychologist licensed to practice in New York. Dr. Fallahpour explains that in April 2000 it was obvious “at that time that Mr. Gassab’s cognitive and psychological infirmities severely incapacitated him, and would have strongly impeded his ability to participate effectively in decisions aimed at protecting or prosecuting his rights in a lawsuit.” Supp., Ex. B., at ¶ 3 (emphasis added). Dr. Fallahpour recounts

treating Mr. Gassab “from 1999 to the current time” and states that “despite the magnitude of his treatment, it was not until approximately latter 2005 after extensive neurofeedback treatments and intensive Cognitive Behavioral Therapy that Mr. Gassab started to show some significant and sufficient improvement in his short term memory and ability to learn, executive function (the mental capacity to control and apply one’s mental skills) and other cognitive deficiencies such that he could be trusted to make the type of self-responsible decisions that of the type that can be posed to a client in a litigation.” Supp., Ex. B, at ¶ 5.

Dr. Fallahpour points out:

“My impression with reasonable certainty regarding the deeply incapacitating extent of his cognitive and psychological deficits during the period of this lawsuit spanning 1999 through 2004 for certain was presented in the report that I submitted to Social Security dated October 15, 2001. In that report \* \* \*, I described Mr. Gassab as suffering from: poor memory; personality change; mood disturbance; emotional liability; loss of intellectual ability of 15 IQ points or more; oddities of thought, perception, speech or behavior; social withdrawal or isolation; blunt, flat or inappropriate affect; and intrusive recollections of a traumatic experience.

\* \* \*

“On April 17, 2002, several days after the completion of his trial in this case I issued an updated report to Workmen’s Compensation. In that report, I confirmed the persistence of many of the same problems with comparable severity that I observed when he first came under my care in 1999. \* \* \*

“Although he currently continues to display the significant effects of brain injury, in particular significant and varied cognitive impairments in memory, attention, concentration, word finding and depression etc. as well as Chronic Post Traumatic Stress Disorder, these conditions have improved to the point

that although he remains disabled he is able to evaluate the circumstances and decisions he needs to make for himself in a responsible way.

“Although I do not have the dates, prior to Mr. Gassab’s trial in March, 2002, I had telephone discussions with his attorney Mr. Kreinces wherein I conveyed my impression to Mr. Kreinces of Mr. Gassab’s severe mental incapacitation. Had I been asked at any time prior to his trial, I would have endorsed the value and need of a guardian ad litem to make the litigation decisions he was incapacitated from making.”

Supp., Ex. B, at ¶¶ 6-9.

Mr. Gassab urges that the failure to have a guardian ad litem appointed to protect his interests impairs jurisdiction over him, rendering the proceedings voidable. Supp., at ¶ 31. He argues that “[his own and defendants’] counsel’s inattention to \* \* \* actual or potential need for a guardian ad litem constitutes a potential fraud upon the court.” Supp., at 23.

Mr. Gassab further asserts that:

“The court would also have been at least partly informed of Mr. Gassab’s incapacity by an explanation from neuropsychologist Mary Hibbard, Ph.D. from Mt. Sinai School of Medicine when she testified that Mr. Gassab tested ‘extremely poorly’ in terms of ‘executive functioning,’ that executive functioning refers to a person’s competence to make decisions which goes to the core of competence under CPLR 1201. However, Dr. Hibbard was never asked to explain executive function and how it related to capacity or competence.”

Supp., at ¶ 42.

Mr. Gassab contends that it is reversible error not to at least conduct a hearing on the issue of competency in light of the expert affidavits he submitted. Reply Affirmation,

Affirmation in Opposition to Motions for Sanctions, and Affirmation in Support of Plaintiff's Cross-Motion for Sanctions Against Opposing Counsel, Defendants and Katz & Kreinces, LLP ("Reply"), at 6. This is particularly so, he contends, in light of an affirmation submitted by counsel for The Russian Tea Room in opposition to the motion to set aside the verdict, in which he stated that, at trial, Mr. Gassab "presented himself at trial as a meek, withdrawn individual with serious deficits in his ability to think and communicate." Reply, at ¶ 10 (characterizing the "unanimous defense chorus regarding Mr. Gassab's purported competence at trial" as "dishonest and hypocritical").

K&K, S, B&F, The Russian Tea Room, Bronx Builders and Price Thomas Studios, Inc. (collectively "Opponents") oppose the motion and cross-move for costs, attorneys' fees and sanctions. They argue, among other things, that it is undisputed that Mr. Gassab was competent when he signed the satisfaction of judgment, and therefore, he waived his right to challenge the proceedings. Affirmation in Opposition to Motion and in Support of Request for Sanctions by The Russian Tea Room ("Russian Tea Room Opp."), at ¶ 12.

Opponents also maintain that the record belies any finding of incompetency. K&K, for example, sets forth that neither "Dr. Kuhn's Affirmation nor Dr. Fallahpour's Affidavit \* \* \* are of any probative value on the instant motion. The standard for whether a guardian ad litem should be appointed for a party to an action is not whether they need supervision over decision making or whether they are capable of making responsible litigation decisions;

the standard is whether the party is capable of adequately prosecuting his rights. In this case, the actions and sworn statements of the plaintiff himself \* \* \* clearly demonstrate that he was adequately prosecuting his rights. As such the Affirmation of Dr. Kuhn and the Affidavit of Dr. Fallahpour are of no value and plaintiff's instant motion must be denied." K&K Opp., at ¶ 19.

#### Analysis

CPLR 1201 provides that a person shall appear by a guardian ad litem "if he is an adult incapable of adequately prosecuting or defending his rights." At issue here, is whether many years ago, Mr. Gassab was "incapable of adequately prosecuting or defending his rights." Because the evidence definitively establishes that Mr. Gassab was perfectly capable of "prosecuting or defending his rights," his motion to vacate the verdict and ensuing judgment is denied. There will be no retrial.

Mr. Gassab believes that he is entitled to at least a hearing concerning his alleged incompetence more than five years ago based on submissions from mental health professionals. He is wrong. Under the circumstances, the doctors' opinions hold absolutely no weight. Indeed, their conclusions are outrageous. Significantly, neither doctor examined the unignorable evidence that not only did Mr. Gassab have the capacity to adequately

prosecute his case, he remembered and recounted his accident, responded to repeated questioning, and played an active role in charting the course of this litigation.

Amazingly, years after the trial and years after he stopped treating Mr. Gassab, Dr. Kuhn concludes that Mr. Gassab's memory and concentration problems "would necessarily" have impeded his ability to make litigation decisions in 2002. Dr. Fallahpour likewise now opines that it was obvious to him "at that time" that Mr. Gassab was unable to make decisions relevant to prosecution of his action. Incredibly, both doctors spoke with Mr. Gassab's attorney about their patient's mental condition, knowing full well that litigation was ongoing, neither one of these experts, however, felt the need to reveal this important "obvious" information.

The doctors' opinions, which if given half a decade ago may have had some value (at least in terms of potentially requiring a hearing to ascertain Mr. Gassab's ability to adequately prosecute or defend his rights), cannot be considered in a vacuum. The opinions are of no value now in light of the unmistakable evidence that Mr. Gassab was in fact perfectly capable of prosecuting his rights and took an active role in doing so.

Mr. Gassab considered commencing an action to recover for injuries sustained in his accident, evidencing he was capable of adequately prosecuting his rights. In furtherance of prosecuting his rights, he retained K&K after a meeting that lasted hours. To vindicate his rights, he appeared for deposition twice and in the face of questioning that he was able to

comprehend, he recalled and recounted information about his life and his accident. He engaged in litigation-strategy discussions with his attorneys and himself asked many questions. He organized correspondence, medical records and cases relevant to the litigation. He testified at length in open court over three days, during which time he understood the questions posed, remembered the events at issue and relayed information capably. During the course of the trial he considered and was able to “voice[] numerous concerns” about how the case was being presented and prepared. He discussed witness testimony and settlement options with his attorneys. Upset with the verdict, which was in his favor, to prosecute his rights he chose to fire K&K, seek to avoid paying the firm’s fee and hired a different attorney. All of these unrefuted facts establish beyond cavil that Mr. Gassab himself was extremely, not just adequately, capable of prosecuting his rights.

Additionally, this Court had the opportunity to observe Mr. Gassab throughout the trial first hand. Over the course of several weeks, Mr. Gassab did not show a single sign of lack of ability to adequately prosecute his rights.

Plaintiff’s counsel’s arguments are wholly misguided. Plaintiff’s attorney maintains that defense counsel characterized Mr. Gassab’s testimonial appearance at trial as having “serious deficits.” *See*, Reply, at ¶ 10. The statement was taken out of context, and in fact, nothing can be further from the truth. In reality, in opposing Mr. Gassab’s ultimately unsuccessful motion to set aside the verdict, counsel for The Russian Tea Room stated:

“Of course, the ultimate source of biased and subjective testimony came from plaintiff himself. It is important to keep in mind that, insofar as plaintiff’s evidence on the extent and permanency of his injuries relied heavily on his subjective complaints, plaintiff’s credibility was crucial for the jury to accept the veracity of his subjective complaints. In this regard, plaintiff presented himself as a meek, withdrawn individual with serious deficits in his ability to think and communicate. Yet, as this Court might remember, the testimony of plaintiff’s co-worker Vicente Ramos revealed that plaintiff scheduled and presided over a meeting of potential witnesses including Ramos. \* \* \* This portrait of plaintiff as a highly intelligent and savvy individual coordinating a secret meeting for purposes of trial is in direct contradiction to that he sought to portray at trial as an individual suffering severe cognitive deficits that interfere with his ability to think and communicate. Thus, it is entirely likely, and a fair interpretation of the evidence, that the jury did not find plaintiff credible and rejected much of his testimony and that of his doctors who relied on his subjective complaints.”

Reply, Ex. 3, at ¶ 23 (emphasis added).

There is absolutely no basis upon which to vacate the verdict or judgment or even hold a hearing about Mr. Gassab’s capacity five years ago in the face of the tremendous amount of evidence unequivocally establishing that Mr. Gassab was not “an adult incapable of adequately prosecuting or defending his rights.” CPLR 1201. The conclusions by Dr. Kuhn and Dr. Fallahpour made almost half a decade after the trial, based solely on medical records and memories and not in any way shape or form accounting for the events that actually transpired do not even warrant a hearing. The opinions are refuted by the record, which was not even considered by the psychiatric professionals. The cases cited by Mr. Gassab, moreover, are readily distinguishable since over the course of the extended trial--indeed,

over the course of all of the years of the litigation--Mr. Gassab proved himself to be perfectly capable of prosecuting his rights. *Contrast, Fischer v. Fischer*, 21 A.D.3d 554 (2d Dept. 2005) (competency hearing required because there was an open question as to whether party was capable of protecting his rights); *Vinokur v. Balzaretti*, 62 A.D.2d 990 (2d Dept. 1978) (strong allegations of senility required a competency hearing).

Much tougher than the question of whether Mr. Gassab had the capacity to adequately prosecute his action--undoubtedly he did--is the issue of whether sanctions should be imposed for making this motion, which lacks any merit. In attempting to obtain relief for his client, Mr. Gassab's counsel distorted defense counsel's statement and irresponsibly failed to have the psychiatric experts consider the litigation record and Mr. Gassab's actual conduct in assessing his ability to "adequately" prosecute this case years ago. Plaintiff's counsel furthermore made a ridiculous cross-motion for sanctions (which itself could be the basis for sanctions). Because there does not appear to have been any intent to maliciously injure the parties in making this motion, however, plaintiff's counsel barely escapes the imposition of costs and sanctions pursuant to 22 N.Y.C.R.R. 130-1.1.

Accordingly, it is

ORDERED that plaintiff's motion and cross-motion for costs and sanctions is denied;  
and it is further

ORDERED that Opponents' cross-motions for costs and sanctions are denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
January 14, 2008

ENTER



Hon. Eileen Bransten

HON. EILEEN BRANSTEN

**FILED**  
JAN 23 2008  
NEW YORK  
COUNTY CLERK'S OFFICE