

Radoncic v Velcek

2009 NY Slip Op 31387(U)

June 19, 2009

Supreme Court, New York County

Docket Number: 104403/06

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lubic

PART 6

Index Number : 104403/2006

RADONCIC, ESAD

vs
DAMIR VELCEK

Sequence Number : 004

QUASH SUBPOENA/FIX CONDITIONS

INDEX NO. _____

MOTION DATE 5/14/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 32 were read on this motion to quash

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-15</u>
<u>16-32</u>
<u>X</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 19, 2009

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ESAD RADONCIC and MAIDA RADONCIC,

Plaintiffs,

Index No. 104403/06

-against-

Decision and Order

FRANCISCA VELCEK, as Executrix of the Estate of
DAMIR VELCEK, and LENOX HILL HOSPITAL,

Defendants.

FILED
JUN 25 2009
COUNTY CLERKS OFFICE
NEW YORK

-----X
JOAN B. LOBIS, J.S.C.:

In Motion Sequence Number 004, defendants Francisca Velcek, as Executrix of the Estate of Damir Velcek, and Lenox Hill Hospital ("Lenox Hill"), collectively referred to as "defendants," move for an order, pursuant to C.P.L.R. § 2304, quashing the subpoena signed by counsel for plaintiff Esad Radoncic¹ (hereinafter referred to as "plaintiff"), directing the appearance of Francisca Velcek at a deposition in the above-captioned matter and the subpoena duces tecum calling for the production of documents; pursuant to C.P.L.R. § 3103(a), granting a protective order prohibiting the deposition of Francisca Velcek and the production of the requested documents; and, pursuant to 22 N.Y.C.R.R. § 130-1.1, sanctioning plaintiff Esad Radoncic for engaging in frivolous conduct.²

Under C.P.L.R. § 2304, "[i]f the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to

¹ Plaintiffs, who are now divorced, are represented by separate counsel. Counsel for Maida Radoncic did not submit any papers with respect to this motion.

² Defendants' reply papers were not considered because they were received after the motion was fully submitted.

quash, fix conditions or modify may thereafter be made in the supreme court.” Plaintiff’s subpoena was not returnable in a court; rather, the subpoena was returnable to plaintiff’s attorney’s office. Defendants’ motion papers fail to set forth that they made any request to plaintiff to withdraw or modify the subpoena, subsequent to the subpoena being served and prior to bringing this motion. Defendants’ request to quash the subpoena is denied for failure to comply with the statute. Anonymous v. Axelrod, 92 A.D.2d 789, 789-90 (1st Dep’t 1983) (Silverman, J., concurring). Further, a motion brought pursuant to C.P.L.R. § 2304 must be “made promptly,” which is generally interpreted to mean before the subpoena’s return date. Brunswick Hosp. Ctr., Inc. v. Hynes, 52 N.Y.2d 333, 339 (1981). The return date of the subpoena was April 24, 2009. Defendants’ motion was not filed until May 4, 2009, which was ten days after the return date of the subpoena. Defendants’ motion is untimely.

Defendants also seek a protective order under C.P.L.R. § 3103. Motions related to disclosure must be accompanied by an affirmation of good faith, pursuant to 22 N.Y.C.R.R. § 202.7. The purported affirmation of good faith is deficient because it does not describe any consultation or efforts made to resolve the instant disclosure dispute subsequent to the service of the subpoena. See 148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co., 62 A.D.3d 486 (1st Dep’t 2009). Defendants’ request for a protective order is denied for failure to comply with 22 N.Y.C.R.R. § 202.7.

Assuming, arguendo, that this motion was not procedurally defective and denied on the aforementioned grounds, neither a protective order nor an order quashing the subpoena and subpoena duces tecum would be granted. Given the statements regarding Francisca Velcek made

by decedent-defendant Damir Velcek during his deposition, and in view of the preference for broad disclosure, it cannot be said that the subpoena or subpoena duces tecum are groundless. Francisca Velcek is a defendant in this action only because she is the executrix of the estate of the defendant; but, she was also the wife and business partner of her late husband, and the subpoena and subpoena duces tecum are essentially directed to her as a non-party. It goes without saying that the deposition of Francisca Velcek is subject to the rules regarding depositions set forth in 22 N.Y.C.R.R. § 221 and Carvalho v. New Rochelle Hosp., 53 A.D.2d 635 (2d Dep't 1976), should Carvalho even apply, so defendants' request that this court direct plaintiff to narrowly tailor his deposition questions so as not to violate Carvalho and the spousal communication privilege is unnecessary. The subpoena duces tecum is narrowly tailored so that it requests documents limited to those relating to Damir Velcek's sworn deposition testimony, and does not request documents that were excluded from discovery by this court's prior orders. To the extent that plaintiff may be requesting documents that do not exist or are not in Francisca Velcek's possession, custody, or control, it is well established that a party "cannot be compelled to produce documents which do not exist or are not in his [or her] possession." Euro-Central Corp. v. Dalsimer, Inc., 22 A.D.3d 793, 794 (2d Dep't 2005). Considering that Francisca Velcek sets forth by affidavit attached to the moving papers that she has no recollection of plaintiff, that she did not treat plaintiff, and that she is not in possession of any documents relating to medical treatment in connection with the procedures performed on plaintiff, it may very well be that the requests for documents in the subpoena duces tecum will yield no results. But, at this time neither the subpoena nor the subpoena duces tecum will be quashed, nor will a protective order be issued.

Given the disposition of this motion, defendants' request, pursuant to 22 N.Y.C.R.R. § 130-1.1, for an order sanctioning plaintiff for engaging in frivolous conduct, is also denied.

This constitutes the decision and order of the court.

Dated: June 19, 2009



JOAN B. LOBIS, J.S.C.

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK