

General Vision Servs., LLC v Steinfeld

2010 NY Slip Op 30265(U)

January 28, 2010

Supreme Court, Nassau County

Docket Number: 000909-06

Judge: Timothy S. Driscoll

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-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
GENERAL VISION SERVICES, LLC,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 000909-06
Motion Seq. Nos: 2 & 3
Submission Date: 11/30/09**

NED STEINFELD, O.D.,

Defendant.

-----x

The following papers having been read on these motions:

Motion Sequence # 2

- Notice of Motion.....X**
- Affidavit in Support.....X**
- Correspondence dated January 26 and 27, 2010.....X**

Motion Sequence # 3

- Notice of Motion, Affirmation of Good Faith,**
- Memorandum of Law in Support and Exhibit.....X**
- Affidavit in Support.....X**

This matter is before the Court for decision on the two (2) motions filed by counsel for Defendant Ned Steinfeld, O.D., who is now deceased, on November 18, 2009 and submitted on November 30, 2009. For the reasons set forth below, the Court 1) grants motion sequence number two, and substitutes Nancy Steinfeld, Executrix for the Estate of Ned Steinfeld, O.D., Deceased, for Ned Steinfeld, O.D., as the named defendant in this action, and directs the Clerk of the Court to amend the caption accordingly; and 2) grants motion sequence number three and

directs Dr. Siew Chuan Sin, 49 Shore Drive, Kings Point, New York 11024 to a) appear for a deposition at the offices of Robert D. Katz, Esq. of the law firm of Cooper & Dunham, LLP, Counsel for the Defendant, 30 Rockefeller Plaza, New York, New York 10112 on **February 24, 2010 at 10:00 a.m.**; b) testify at the deposition, under oath and in a full and complete manner; and c) produce at the deposition all of the documents set forth in the Subpoena Duces Tecum served on him by Defendant's counsel, for inspection, copying and examination during the deposition.

BACKGROUND

A. Relief Sought

In the first motion ("Substitution Motion"), counsel for Defendant Ned Steinfeld, O.D. ("Dr. Steinfeld" or "Defendant") moves for an Order, 1) pursuant to CPLR § 1015(a), permitting substitution of Nancy Steinfeld, Executrix for the Estate of Ned Steinfeld, O.D., Deceased as the named defendant in this action, on the ground that the Defendant is deceased; and 2) amending all papers, pleadings and proceedings in this action accordingly.

In the second motion ("Motion to Compel"), counsel for Dr. Steinfeld moves for an Order, pursuant to CPLR § 2308(b), compelling Dr. Siew Chuan Sin ("Dr. Sin") to respond to a subpoena *duces tecum* issued by counsel for Defendant.

Counsel for Defendant affirms that Plaintiff's counsel advised him that Plaintiff does not oppose these motions (Notice of Motion at p.2; Affidavit of Plaintiff's Counsel at ¶ 11).

B. The Parties' History

In support of the Substitution Motion, counsel for Defendant provides an Affidavit in Support of Nancy Steinfeld, the widow of Dr. Steinfeld ("Wife") dated November 16, 2009. In that Affidavit in Support, Wife affirms as follows:

She is the widow of Dr. Steinfeld, who passed away on October 9, 2009. Dr. Steinfeld's Last Will and Testament ("Will") named Wife as the Executrix. The Will was probated in the Surrogate Court of New Jersey on October 30, 2009 and Wife was officially appointed Executrix of Dr. Steinfeld's estate.

Dr. Steinfeld was a licensed optometrist, and the sole shareholder in five (5) companies that operated eye care stores. Four of the stores, known as Bronx Eyecare, were located in the Bronx, New York and one was located in White Plains, New York. The Bronx stores were

located on 1) Southern Boulevard, 2) the Grand Concourse, 3) Bartow Avenue, and 4) 231st Street. Wife is familiar with the operation and organization of these stores as a result of her having assisted Dr. Steinfeld with operating those businesses for many years. Wife is also familiar with the specifics of the instant action, as a result of her having discussed the relevant issues with Dr. Steinfeld on many occasions prior to his death.

This action involves an agreement (“Agreement”) between Dr. Steinfeld and Plaintiff General Vision Services, LLC (“Plaintiff” or “GVS”), a vision plan that provides vision services to union members, health management organizations (“HMO”), businesses and other organizations. Wife explains that GVS would enter into a contract with a particular organization, pursuant to which GVS agreed to provide vision services, including eye examinations, to members of that organization, at a negotiated price. GVS, in turn, would contract with optometrists or eye care stores who would provide the actual services and products to the organization’s members. These providers are called “panel members” (Aff. in Support at ¶ 4).

The dispute in this matter involves allegations by Dr. Steinfeld that 1) GVS failed to reimburse him for services that he provided to numerous patients; and 2) GVS violated a geographical restrictive covenant (“Restrictive Covenant”) in the Agreement, which prohibits GVS from offering panel membership to any other entity within a seven (7) block radius of an existing panel member. Wife affirms, upon information and belief, that GVS granted a panel membership to a Cohen’s Fashion Optical Shore (“Cohen’s”) located across the street from Dr. Steinfeld’s store on the Grand Concourse. Wife submits that GVS’ alleged violation of the Restrictive Covenant deprived Dr. Steinfeld’s stores of patients and revenue.

With respect to the Motion to Compel, counsel for Dr. Steinfeld (“Counsel”) provides 1) an Affidavit of Counsel dated November 17, 2009, and 2) an Affirmation of Good Faith of Counsel dated November 17, 2009.

In his Affidavit, Counsel affirms as follows:

Defendant moves to compel Dr. Sin to comply with a subpoena, and give a deposition, in connection with this action, and to produce documents relating to a counterclaim that Defendant asserted. In its Complaint, GVS seeks a declaration that it did not breach a vision services agreement between GVS and Bronx Eyecare, relating to four stores that Dr. Steinfeld owned.

Dr. Steinfeld counterclaimed for breach of contract, alleging that 1) GVS failed to reimburse him for services he performed for patients who are members of the GVS Vision plan; and 2) GVS violated the Restrictive Covenants.

GVS and Cohen's, at relevant times, were owned by Dr. Robert Cohen. In the Agreement, GVS and Dr. Cohen granted Dr. Steinfeld certain areas of geographic exclusivity, which included one for his Grand Concourse store. The portion of the Agreement titled "Exclusivity" reads as follows:

Provided their [sic] shall be no Event or Default (following the expiration of any applicable cure period) hereunder, GVS shall not, during the Initial [Term] and, if applicable, any Renewal Term, (i) designate any other retail optical store as a Panel Store, and/or (ii) own or operate any retail optical store (other than for such stores owned and/or operated by GVS as of the Effective Date), (A) if such Provider Location is located in the five boroughs..., within seven (7) city blocks of each of such provider Location, or (B) if such Provider Location is located outside the five boroughs, within one-half (½) mile of each such Provider Locations.

In his counterclaim, Dr. Steinfeld alleges that Dr. Sin entered into an agreement to purchase a Cohen's store on the Ground Concourse ("Dr. Sin's Store"), across the street from a store that Dr. Steinfeld owned. Dr. Steinfeld alleges that, if GVS permitted patients who were members of the GVS plan to be treated in Dr. Sin's Store, GVS was in breach of the Agreement.

Counsel affirms that, on information and belief based in part on information that Dr. Sin provided to the late Dr. Steinfeld, Dr. Cohen offered Dr. Sin the opportunity to have his Store included as a GVS provider, allegedly in violation of the Restrictive Covenant. To avoid detection, Drs. Cohen and Sin allegedly agreed that Dr. Sin would process the GVS patients he saw at his Store through another Cohen's store that Dr. Sin owned in Flushing, Queens. This arrangement ("Arrangement") allegedly continued for approximately six (6) years, without Dr. Steinfeld's knowledge, until 2007 when Dr. Sin advised Dr. Steinfeld of it.

Counsel avers that he spoke with Dr. Sin via telephone, to confirm this information, and asked Dr. Sin to provide an affidavit or a deposition. Dr. Sin confirmed the Arrangement to Counsel over the telephone, but refused to sign an affidavit, stating that he was afraid of retribution by Dr. Cohen. Counsel believes that Dr. Sin no longer operates the Cohen's store in the Bronx or in Queens. Counsel advised Dr. Sin that he had no choice but to subpoena him.

Counsel issued a subpoena *duces tecum* ("Subpeona") to Dr. Sin that directed him to

appear at Counsel's office, and to produce certain documents. Counsel and Plaintiff's attorney subsequently agreed, via telephone, to reschedule Dr. Sin's deposition on either September 16 or September 23, 2009, to accommodate Dr. Sin who did not work on Wednesdays. Counsel left a telephone message for Dr. Sin in which he advised him of the proposed deposition dates. Dr. Sin never returned Counsel's telephone call, and never otherwise notified Counsel as to an agreeable date for his deposition. Dr. Sin failed to appear for a deposition on either September 16 or September 23, 2009 and failed to explain his absence. Dr. Sin has not returned Counsel's telephone calls. Counsel then left Dr. Sin a telephone message in which he advised him that, if Dr. Sin did not appear for a deposition on September 30, 2009 at Counsel's office, Counsel would seek an order of contempt, as well as sanctions and costs that Defendant incurred in attempting to enforce the Subpoena.

Counsel reaffirms the above in his Affirmation of Good Faith. In that Affirmation, Counsel avers that, even after service of the Subpoena and Counsel's offers to reschedule the deposition to accommodate his schedule, Dr. Sin failed to appear. Counsel affirms that Dr. Sin has not returned any of Counsel's calls, or responded to Counsel's e-mail messages, since Counsel served Dr. Sin with the Subpoena.

C. The Parties' Positions

With respect to the Substitution Motion, Wife submits that she is the appropriate person to be substituted as defendant in this action because 1) Wife is the surviving spouse of Dr. Steinfeld, and the Executrix of his Will; and 2) Wife is entitled to assume responsibility for the Agreement pursuant to ¶ 16 of the Agreement ("Assignment Clause"), which provides as follows:

Assignment and Binding Effect. This Agreement shall be binding on and shall [inure] to the benefit of the heirs, representatives, successors and assigns of GVS and the Providers. The Providers may assign their rights under this Agreement to a third party only with the prior written consent of GVS; which consent may be withheld in its sole and absolute discretion; provided, however, that, subject to each Provider's compliance with the provisions of Paragraph 24 hereof, no consent of GVS shall be required for any such assignment. In all events, each Provider may also assign this Agreement to an entity wholly-owned by Steinfeld, his wife and/or his children. Any assignee of a Provider's interest hereunder shall, as a condition to such assignment, assume, in writing, all of the obligations of such Provider under this Agreement. Any purported assignment of this Agreement by a Provider in violation of the terms hereof shall be void *ab initio*, and of no

force or effect.

With respect to the Motion to Compel, Counsel submits that the Subpoena is proper in that it seeks relevant testimony and documents regarding Plaintiff's alleged breach of the Restrictive Covenant, including the alleged Arrangement between Defendant and Dr. Sin to circumvent the terms of the Restrictive Covenant. Counsel submits, further, that knowledge regarding this information is uniquely in the possession of Dr. Sin, and Dr. Cohen, the latter of whom Defendant may depose at a later date. Moreover, in light of Dr. Sin's having voluntarily advised Dr. Steinfeld of this arrangement, Counsel submits that the Court should compel Dr. Sin to testify and produce the documents that he allegedly showed to Dr. Steinfeld when he met with him and advised him of the Arrangement.

As noted *supra*, Counsel affirms that Plaintiff does not oppose these motions. Defendant provides an Affirmation of Service reflecting that Defendant served Dr. Sin with a copy of the Motion to Compel, and Dr. Sin submitted no opposition or other response to the motion.

RULING OF THE COURT

A. Substitution of Named Defendant

CPLR § 1015, titled "Substitution upon death," provides as follows:

(a) Generally. If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.

(b) Devolution of rights or liabilities on other parties. Upon the death of one or more of the plaintiffs or defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record and the action shall proceed.

CPLR § 1021 requires a motion for substitution to be made within a reasonable time. The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has merit. *Reed v. Grossi*, 59 A.D.3d 509, 511 (2d Dept. 2009) quoting *McDonnell v. Draizin*, 24 A.D.3d 628, 628-629 (2d Dept. 2005).

In light of, *inter alia*, 1) Counsel's diligence in making this application, and 2) the absence of any showing of prejudice, as evidenced by Plaintiff's lack of opposition to the

motion, the Court grants Defendant’s motion for an order permitting the substitution of Nancy Steinfeld, Executrix for the Estate of Ned Steinfeld, O.D., Deceased as the named defendant in the above-captioned action. The Court directs the Clerk of the Court to amend the caption in this action to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----x

GENERAL VISION SERVICES, LLC,

Plaintiff,

Index No: 000909-06

-against-

**NANCY STEINFELD, Executrix for the Estate
of Ned Steinfeld, O.D., Deceased,**

Defendant.

-----x

B. The Court Grants Defendant’s Motion to Compel

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that “[t]he words ‘material and necessary’ are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Id. See also Andon v.*

302-304 Mott Street Assocs., 94 N.Y.2d 740, 746 (2000); *Spectrum Systems, supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems*, 78 N.Y.2d at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

CPLR § 3103(a) provides that “a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.” The CPLR also establishes three categories of protected materials, also supported by policy considerations: 1) privileged matter, which is immune from discovery pursuant to § CPLR 3101(b), 2) attorney's work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR § 3101(d)(2). *Spectrum Systems*, 78 N.Y.2d at 376-377. The burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. *Spectrum Systems* at 377.

The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006). The court should grant a motion to quash a subpoena duces tecum only when the materials sought are utterly irrelevant to any proper inquiry. *Id.*; *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 (1st Dept. 1999); *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341 (1st Dept. 1997). The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed. *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept. 1996).

A subpoena duces tecum on a non-party witness for production of documents must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez*, 29 A.D.3d at 109. Pursuant to CPLR § 3101(a)(4), where

disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111.

A party seeking discovery from a nonparty witness must show special circumstances. *Tannenbaum v. Tannenbaum*, 8 A.D.3d 360 (2d Dept. 2004), quoting *Lanzello v. Lakritz*, 287 A.D.2d 601 (2d Dept. 2001); *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 334 (2d Dept. 1988). A party does not establish the existence of special circumstances merely by showing that the information sought is relevant. A party can establish special circumstances by establishing that the information sought cannot be obtained through other sources. *Tannenbaum v. Tannenbaum*, *supra*, citing *Murphy v. Macarthur Holding B.*, 269 A.D.2d 507 (2d Dept. 2000). See also *Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725 (2d Dept. 2006).

Here, Defendant has established the need for the discovery sought. Defendant reasonably believes, based on statements that Dr. Sin allegedly made to the late Dr. Steinfeld and to Plaintiff's counsel, that Dr. Sin has information regarding Plaintiff's alleged Arrangement to include Dr. Sin's Store as a GVS provider, in violation of the Restrictive Covenant. Defendant has also established special circumstances by demonstrating that this information can be obtained only through Dr. Sin, and possibly Dr. Cohen, who is also not a named party in this action, and whom Defendant may depose in the future. Significantly, neither Plaintiff nor Dr. Sin opposes Defendant's motion to compel.

The Court notes that the Subpoena does not contain a notice specifically advising Dr. Sin of the circumstances or reasons the disclosure is sought or required. The Court concludes, however, that in light of Counsel's numerous conversations with Dr. Sin, as well as the specific nature of the documentation sought in the Subpoena, that Dr. Sin is on notice of the reasons that this disclosure is required.

Accordingly, it is hereby

ORDERED, that Nancy Steinfeld, Executrix for the Estate of Ned Steinfeld, O.D., Deceased is substituted as the named defendant in the above-captioned action; and it is further

ORDERED, that the Clerk of the Court is directed to amend the caption in this action to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----x

GENERAL VISION SERVICES, LLC,

Plaintiff,

Index No: 000909-06

-against-

**NANCY STEINFELD, Executrix for the Estate
of Ned Steinfeld, O.D., Deceased,**

Defendant.

-----x

and it is further

ORDERED, that Dr. Siew Chuan Sin, 49 Shore Drive, Kings Point, New York 11024
1) appear for a deposition at the offices of Robert D. Katz, Esq. of the law firm of Cooper &
Dunham, LLP, Counsel for the Defendant, 30 Rockefeller Plaza, New York, New York 10112
on **February 24, 2010 at 10:00 a.m.**; 2) testify at the deposition, under oath and in a full and
complete manner; and 3) produce at the deposition all of the documents set forth in the
Subpoena Duces Tecum for inspection, copying and examination during the deposition; and it is
further

ORDERED, that Counsel for Defendant serve a copy of this order on Dr. Siew Chuan
Sin, 49 Shore Drive, Kings Point, New York 11024 within ten (10) days of the date of this
Order, via regular and certified mail, return receipt requested; and it is further

ORDERED, that Defendant's application to impose costs of \$4,000 on Dr. Sin is denied
at this juncture, with leave to renew if Dr. Sin does not comply fully with the Court's directives.

All matters not decided herein are hereby denied.

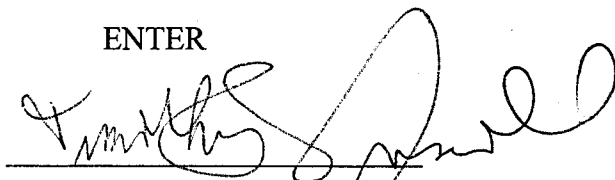
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before Referee Thomas V. Dana on February 19, 2010 at 10:00 a.m.

DATED: Mineola, NY

January 28, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

FEB 03 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**