

Koch v Sheresky, Aronson & Mayefsky, LLP

2010 NY Slip Op 31206(U)

May 13, 2010

Supreme Court, New York County

Docket Number: 112337/2007

Judge: Emily Jane Goodman

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5-15-10

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 112337/2007

KOCH, VLADIMIRA

vs

SHERESKY, ARONSON & MAYEFSKY

Sequence Number : 011

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as attached

is decided

FILED

MAY 19 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 5/13/10

[Signature]
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X
VLADIMIRA KOCH, a/k/a VLAD'KA KOCH,
MICHAL KOCH, her son, EUROPA DOCU-SEARCH,
INC., EUROVID, INC., EUROVID FKK,
HELIOS NATURA, EUROPA DOCU-SEARCH,
s.r.o., EUROVIDFKK, s.r.o.,

Plaintiffs,

-against-

Index No. 112337/07

SHERESKY, ARONSON & MAYEFISKY, LLP, DAVID
ARONSON, individually, BRAGAR, WEXLER,
EAGEL & MORGENSTERN, P.C., RAYMOND A.
BRAGAR, individually, RAGUES & MIN,
ESQS., RAYMOND RAGUES, individually,
and D'AGOSTINO & SALVI, LLP, FRANK
SALVI, individually,

Defendants.

-----X
EMILY JANE GOODMAN, J.:

Defendants Sheresky, Aronson & Mayefsky, LLP, David Aronson,
individually, Bragar, Wexler Eagel & Morgenstern, P.C., Raymond
A. Bragar, individually, Ragues & Min, Esqs., Raymond Ragues,
individually, D'Agostino & Salvi, LLP, and Frank Salvi,
individually, move, pursuant to CPLR 3110 (1), for an order
compelling plaintiff Vladimira Koch (Vladka Koch) to submit to an
in-person deposition in New York County. Plaintiff cross-moves,
pursuant to CPLR 3101, for an order directing that her
examination be by live video-conference rather than in person.

The basic facts of this legal malpractice case are set forth
in the decision of this court, dated July 7, 2009, and will not
be repeated except as necessary.

Plaintiff is a citizen and resident of the Czech Republic.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

In a Termination of Conditional Resident Status, dated 3/21/2005, plaintiff was notified by the United States Department of Justice Immigration and Naturalization Service that her conditional permanent resident status, that she had obtained through her then-spouse, Robert Koch (Robert), had been terminated as of January 6, 2004, because no joint petition had been filed by Robert and her to remove the conditional status. See Termination of Conditional Resident Status, Exhibit B to Affirmation of Jaromir Kovarik.

Defendants are seeking an order requiring plaintiff to appear for a deposition in New York State. Although it is "[t]he preferred practice" to conduct depositions of parties to a New York action in this state (*Kahn v Rodman*, 91 AD2d 910, 911 [1st Dept 1983]), that practice may be overridden "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or to the courts." CPLR 3103 (a).

Defendants contend that plaintiff has failed to establish the disadvantage or prejudice required for the entry of a protective order pursuant to CPLR 3103.

Submitting a document from the American Embassy in Prague, which appears to be in the Czech language, plaintiff's attorney, Jaromir Kovarik, asserts that, after the termination of her conditional permanent resident status in January 2004, plaintiff's application for a visa was denied, in about June

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2005, and she was excluded from the United States. Plaintiff also attaches a copy of a letter bearing the letterhead Embassy of the United States of America, dated January 14, 2005 stating "[w]e are very sorry to be forced to announce that your application for the visa to the USA has been rejected. There is no possibility to appear against this decision of the American consul" although noting that "[y]ou may apply for the visa again."

Presumably based upon the document from the American Embassy, plaintiff contends that under the Immigration and Naturalization Act (8 USC § 1182 [a] [9]), a new application for admission to the country can only be entertained toward the end of 2010. Defendants offer no proof to contest this statement.

Thus, all of the cases relied on by defendants in support of their motion to require plaintiff to submit to an examination in New York, are inapposite and in those cases travel to New York was within the power and control of the party whose deposition was sought.

Courts have often directed the deposition of a party by video-conference, where the party had difficulty obtaining, or had been denied, a visa, or because of stringent U.S. travel restrictions with respect to the country of residence of the party to be deposed. See *Doherty v City of New York*, 24 AD3d 275 (1st Dept 2005) (affirming an order to take deposition in Ireland,

where plaintiff was denied necessary visa, and directing plaintiff to pay costs of defendant's travel-related expenses); *Semenov v Semenov*, 24 Misc 3d 1241(A), 2009 NY Slip Op 51836(U) (Sup Ct, Richmond County 2009) (granting application for live video-conference deposition of plaintiff and permission to use videotape at trial, where there were restrictive travel policies and stringent visa requirements for Latvian residents); *Matter of Singh*, 22 Misc 3d 288 (Sur Ct, Bronx County 2008) (permitting deposition of petitioner and other witnesses residing in India by video-conference, where affidavit submitted by attorney indicating that visa applications were denied by U.S. Embassy); *Kirama v New York Hospital*, 13 Misc 3d 1246(A), 831 NYS2d 360, 2006 NY Slip Op 52356(U) (Sup Ct, NY County 2006) (ordering deposition by video conference in Morocco, where plaintiff could not obtain a visa and, thus, could not legally travel to the United States, despite her efforts and those of her counsel, her relatives and even the court). As in *Kirama v New York Hospital*, plaintiff did not absent herself from New York in order to evade being deposed in New York, rather, she was required to leave the state because of the change in her immigration status (here, her conditional permanent resident status had expired).

Even assuming that, at some time in the future, plaintiff can obtain a visa to enter the United States her appearance will be completely dependent on the administrative process of the

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American Embassy and/or the Attorney General, who may grant exceptions to the normal requirements of the immigration law. 8 USC § 1182 (d). Moreover, should the United States government again deny plaintiff's request for a visa, thereby precluding her appearance in New York for deposition and/or trial, her ability to proceed with this litigation could be severely hampered, despite the fact that her complaint survived defendants' motion to dismiss. Thus, it is preferable, for all parties, and for the court as well, that a reasonable process be provided to enable the oral examination of plaintiff by defendants to proceed, without the uncertainty involved in the visa application process.

In recent correspondence, counsel for plaintiff has offered to assume the costs of setting up a video-conference deposition, and to accommodate defendants' schedules, in light of the time difference between New York and Prague. Counsel for plaintiff has also offered to pay travel costs of counsel for defendants, should they agree to depose plaintiff in person in the Czech Republic. The court will offer defendants a number of alternatives, which would avoid any undue prejudice. *See Wygocki v Milford Plaza Hotel*, 38 AD3d 237 (1st Dept 2007) (because a deposition in New York would impose an undue hardship on an elderly resident of Ireland, the alternatives of a deposition on written questions, a deposition in Ireland, a deposition by telephone or video deposition, or deposition in New York 30 days

before trial avoided any undue prejudice to defendant).

Accordingly, it is hereby

ORDERED that defendants' motion for an order to compel plaintiff to appear for a deposition in the State of New York is denied; and it is further

ORDERED that plaintiff's cross motion for an order permitting plaintiff to appear for a deposition either by video-conference or by appearing personally in Prague, in the Czech Republic, is granted to the extent provided herein; and it is further

ORDERED that defendants are given the option of taking plaintiff's deposition (a) on written questions or (b) by video-conference in Prague (for which plaintiff shall pay the costs), or (c) in Prague, after completion of the depositions of all defendants (for which plaintiff shall pay the reasonable travel costs of counsel for defendants), or (d) in New York, 30 days before trial; and it is further

ORDERED that defendants shall notify plaintiff of their election within 20 days of receipt of a copy of this Decision and Order, with notice of entry.

DATED: May 13, 2010

ENTER:



EMILY JANE GOODMAN

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE