

**Gover v Savyon**

2010 NY Slip Op 33582(U)

December 20, 2010

Sup Ct, Nassau County

Docket Number: 14877-06

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 21  
NASSAU COUNTY

\_\_\_\_\_  
**MEIR G. GOVER, ESQ.,**

**Decision and Order**

**Plaintiff,**

**MOTION SUBMITTED:**

**October 14, 2010**

**-against-**

**MOTION SEQUENCE:03**

**INDEX NO. 14877-06**

**SHLOMO R. SAVYON,**

**Defendant(s).**

\_\_\_\_\_  
**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Affidavit in Opposition	2
Reply Affirmation	3

A complaint was filed in the instant action on September 5, 2006. Issue was joined on November 20, 2006 and, at that time, the Plaintiff was noticed for a deposition to be conducted on January 17, 2007 (Ex. "B" to Defendant's Motion). That deposition did not occur. Thereafter, on November 28, 2008, the parties entered into a stipulation whereby they agreed to hold pre-trial discovery procedures in abeyance pending a decision on the Defendant's motion to dismiss (Ex. "C" to Defendant's Motion). The Defendant's motion to dismiss which was converted by this court to a motion for summary judgment, was denied and the Defendant appealed. That appeal is currently pending before the Appellate Division.

On April 8, 2010, Plaintiff's former counsel, Thomas Liotti, moved, by order to show cause, to be relieved of counsel (Ex. "D" to Defendant's motion). This court heard argument on

the motion and thereafter granted former counsel's request to be relieved by order dated May 27, 2010 (Ex. "F" to Defendant's Motion). In its order, the court issued a stay of all proceedings for 45 days (Ex. "F" to Defendant's Motion). Notably, during oral argument, the court recommended that Plaintiff engage the services of another attorney because of the seriousness of the allegations against him (Ex. "E" to Defendant's Motion at pps 18, 21, and 22).<sup>1</sup>

The case was scheduled for a status conference on July 26, 2010 (Ex. "E" to Defendant's Motion). However, the Plaintiff failed to appear and the court adjourned the conference to August 31, 2010. In adjourning the conference, the court ordered as follows:

The failure of the plaintiff to appear [on August 31] may result in a default pursuant to 22 NYCRR 202.27. In addition, the defendant, by his attorney, shall be permitted to serve a notice to take deposition upon the plaintiff by "FedEx". Defendant shall also serve a copy of the within order within five days of the date hereof.

(Ex. "H" to Defendant's Motion).

Defendant served the July 26, 2010 court order upon the Plaintiff and at that time, also noticed the Plaintiff for a deposition to be conducted on August 18, 2010 (Ex. "I" to Defendant's Motion). In that same letter noticing the Plaintiff for a deposition, the Defendant informed the Plaintiff that if he failed to appear for the deposition, that the Defendant would make a motion to dismiss the Complaint (Ex. "I" to Defendant's Motion). The July 26 order and notice to take deposition were delivered to Plaintiff on July 28, 2010 (Ex. "J" to Defendant's Motion). On August 13, 2010, approximately five days before the August 18, 2010 scheduled deposition, defense counsel received a letter from a colleague of the Plaintiff, indicating that the Plaintiff would not be appearing for the August 18 deposition because the Plaintiff was "out of town" (Ex. "K" to Defendant's Motion; Affirmation in Support at ¶ 27; Ex. "F" to Plaintiff's Opposition). Indeed, the Plaintiff did not appear for the deposition scheduled on August 18, 2010 (Ex. "K" to Defendant's Motion).

Given Plaintiff's failure to appear for the deposition, the Defendant now moves this court for an order pursuant to CPLR 3126(3) dismissing the Plaintiff's complaint "as a consequence of Plaintiff's failure and refusal to appear and testify as required by the Notice of Pre-trial Deposition served upon him in compliance with the Court's order of July 26, 2010" (Defendant's

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The Court stated as follows: "I tell you my inclination would be to grant Mr. Liotti's application to withdraw from the case. I would prefer you not go forward with the deposition. I prefer you get another attorney to represent you. Okay? And in the event you would speak to an attorney prior to sitting down for a deposition, as inconvenient as it may be. The allegations being serious as they are, I think that's the most prudent thing to do." (Ex. "E" to Defendant's Motion).

Order to Show Cause).

The Plaintiff opposed the motion on the ground that the November 28, 2008 stipulation staying all discovery pending resolution of Defendant's motion to dismiss had yet to be decided by the appellate court, in the alternative, Plaintiff requested "an ample time video conference examination for myself as is customary to overseas parties and then deposing the Defendant immediately after in the Mineola Supreme Courthouse by my counsel" (Plaintiff's Opposition at ¶ 10).

### Analysis

#### *Defendant's Motion to Strike Pursuant to CPLR 3126*

The Defendant moves for an order pursuant to CPLR 3126(3) striking the Plaintiff's complaint for Plaintiff's failure to appear for a deposition on August 18, 2010. Pursuant to CPLR 3126 (3), if any party refuses to obey an order for disclosure, the court may issue an order striking a pleading or staying further proceedings until the order is obeyed. Here, the Plaintiff was served with a copy of the court's order permitting the Defendant to serve upon Plaintiff a notice to take deposition. This order, as well as a notice to take a deposition was served upon the Plaintiff on July 26, 2010, and received by Plaintiff on July 28, 2010. However, it was not until two weeks later, the week of the scheduled deposition, that a colleague of the Plaintiff faxed to Defendant a letter informing him that Plaintiff was out of town because the courts and law offices in Israel are closed during the month of August.

Despite the Plaintiff's willingness to sit for a deposition on May 27, 2010, the Defendant's motion to strike the Plaintiff's complaint is granted unless within 45 days of service of this decision and order, the Plaintiff appears for a deposition at the Nassau County Supreme Court, or at a place to be agreed upon by Defendant and Plaintiff.

#### *Plaintiff's Request for a Video or Teleconference Deposition*

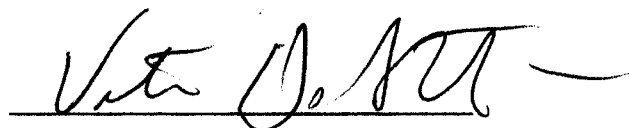
Pursuant to CPLR 3110, a deposition of a party will ordinarily be held within the county where the action is pending. "As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result" (*Farrakhan v. N.Y.P. Holdings Inc.*, 226 AD2d 133, 135 -36 [1<sup>st</sup> Dept 1996]). Accordingly, if a party to be deposed can demonstrate that requiring the deposition to proceed in the county where the action was commenced would result in a "hardship," the "parties may stipulate that a deposition be taken by telephone or other remote electronic means" (CPLR 3113[d]) or, if the parties cannot stipulate, the court is empowered to alter the standard venue provisions (CPLR 3103[a]; *Hoffman v Kraus*,

260 AD2d 435 [2d Dept 1999] [dismissal of answer not warranted where defendant sufficiently demonstrated that traveling to New York for a deposition would result in hardship, and defendant, who was a resident of Hungary and more than 70 years of age, was in failing health]).

Unlike *Rogovin v Rogovin* (3 AD3d 352 [1<sup>st</sup> Dept 2004] [video conference deposition was permitted where the defendant sought to be deposed lived in Kansas and was the sole caregiver for her ailing grandmother and defendant had a 10-year old special needs child]), *In re Estate of Singh* (22 Misc3d 288 [Sur Ct Bronx County 2008] [court allowed deposition by video conference where undue hardship precluded petitioner from pursuing his claim because petitioner, a resident of India, could not obtain a visa to travel to New York]), and *Kirama v New York Hospital* (13 Misc3d 1246[A] [Sup Ct New York County 2006] [plaintiff, who lived in Morocco, demonstrated extreme hardship that she could not travel to New York for a deposition because she could not secure a visa]), the Plaintiff at bar requests a deposition by electronic means merely as a means for convenience. Given Plaintiff's failure to establish that travel to New York would constitute a hardship, the Plaintiff's request for a deposition to be conducted by teleconference or video conference is hereby denied (*Rodriguez v Infinity Insurance Co.*, 283 AD2d 969 [4<sup>th</sup> Dept 2001]; *In re Estate of Singh*, 22 Misc3d at 288, *supra*).

This constitutes the decision and order of the court.

Dated: December 20, 2010



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

DEC 29 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**