

<b>Koch v Sheresky, Aronson &amp; Mayefsky LLP</b>
2011 NY Slip Op 33071(U)
November 21, 2011
Supreme Court, New York County
Docket Number: 112337/07
Judge: Emily Jane Goodman
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SCANNED ON 11/25/2011  
[\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

Index Number : 112337/2007  
KOCH, VLADIMIRA  
vs.  
SHERESKY, ARONSON & MAYEFSKY  
SEQUENCE NUMBER : 022  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_

upon the foregoing papers, it is ordered that this motion is

*denied per attached*

**FILED**

NOV 23 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/21/11

  
\_\_\_\_\_  
EMILY JANE GOODMAN, J.S.C.  
 NON-FINAL DISPOSITION

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
VLADIMIRA KOCH, a/k/a VLAD'KA KOCH,  
MICHAEL KOCH, EUROPA  
DOCU-SEARCH, INC., EUROVID, INC.,  
EUROVID KKK, HELIO NATURA,  
EUROPA DOCU-SEARCH, s.r.o.,  
EUROVIDFKK, s.r.o.,

Plaintiffs,

-against-

Index No.: 112337/07  
Motion Seq. No. 022

SHERESKY, ARONSON & MAYEFSKY LLP,  
DAVID ARONSON individually, BRAGAR,  
WEXLER, EAGEL & MORGENSTERN, P.C.,  
RAYMOND A. BRAGER individually,  
RAGUES & MIN, ESQ., RAYMOND RAGUES,  
individually, D'AGOSTINO & SALVI, LLP,  
FRANK J. SALVI individually,

Defendants.

**FILED**

NOV 23 2011

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

In this motion, sequence number 22, plaintiff, Vladimira Koch, moves, pursuant to CPLR 3124, to compel Vratislav Pechota, Esq. to forward her entire legal file to plaintiff's counsel within five days of the date of this order on the ground that Pechota has failed to comply with the April 20, 2011 order of this court. Plaintiff also seeks counsel fees for this and a previous motion as sanctions for Pechota's alleged wilful misconduct.

In the April 20, 2011 order, this court quashed a subpoena issued to Pechota by plaintiff's counsel, but ordered that Pechota send a copy of plaintiff's legal file materials and documents directly to her. The court ordered that Pechota send the file directly to plaintiff because Pechota

raised his concern about, among other things, the possibility of violating attorney-client privilege. In support of his opposition, Pechota pointed to plaintiff's assertion that she was not waiving attorney-client privilege concerning the documents.

While there is no dispute that Pechota sent documents to plaintiff, plaintiff contends that he did not send her entire immigration file. Plaintiff's counsel avers that he knows that parts of plaintiff's immigration file are missing because of his familiarity with the area of law. Pechota, through counsel, maintains that he has sent what he has to her, and that he has complied with this court's order.

Plaintiff's motion is denied. In order to sanction one who fails to produce documents demanded, he or she must be shown to be in possession of or have reasonable access to the documents or information (*cf. Gray v Giarrizzo*, 47 AD3d 765, 766 [2d Dept 2008] [concerning civil contempt]).<sup>1</sup> Of course, one who is not in possession of or does not have access to documents can not provide them. While plaintiff maintains that the file is missing documents or materials, the evidence submitted does not sufficiently establish that documents have been withheld; that is, that Pechota disobeyed this court's directive by failing to send the documents that he had to plaintiff. It may be simply that file documents are missing, have been destroyed or never existed. Plaintiff herself argues that Pechota's failure to maintain the file over the years would constitute a breach of duty. While this motion is not the vehicle for obtaining a remedy for any such alleged breach, the argument itself demonstrates that Pechota did not necessarily withhold documents.

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<sup>1</sup>While plaintiff has not moved for an determination that Pechota is in contempt, for a contempt finding, plaintiff would have the burden of proving the contemptuous conduct by clear and convincing evidence.

By letter to this court, Pechota's counsel states that, upon the service of a new subpoena upon Pechota, Pechota will make himself available for a non-party deposition regarding non-privileged and non-confidential matters arising out of his representation of plaintiff (*see* Weinstock letter, dated June 14, 2011, New York County Clerk File, Index No. 112337/07).<sup>2</sup> Pechota's counsel recently updated the court, by letter, that a mid-November 2001 date has been set for the deposition, and, by letter dated today, informed the court that the deposition was in fact held. At the deposition, where Pechota will be under oath, plaintiff's counsel may have, or could have, inquired about the allegedly missing file materials, which eliminates the need for a good-faith affidavit. In any event, while plaintiff argues that she is entitled to the relief she seeks because Pechota has not provided an affidavit of a good faith search, she provides no case law demonstrating that this is required under the circumstances here, where the subpoena has been quashed. Furthermore, the court did not order Pechota to provide such an affidavit.

Without reaching the issue of whether the sanctions that plaintiff seeks are appropriate, the motion is denied because plaintiff has not demonstrated any failure to comply with this court's prior order or improper conduct by Pechota regarding the subpoena. Thus, no basis is presented on this record for sanctions.

In light of the foregoing, it is

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<sup>2</sup>Pechota states that plaintiff's counsel sent him a letter dated November 22, 2010, purportedly signed by plaintiff, requesting that Pechota provide a complete copy of her legal file but also stating that plaintiff was "not waiving the attorney-client privilege" (Pechota Op., ¶ 6).

ORDERED that plaintiff's motion is denied.

Dated: November 21, 2011

**FILED**

NOV 23 2011

ENTERED

NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**