

Matter of Al Saud v New York & Presbyt. Hosp.

2018 NY Slip Op 31311(U)

June 15, 2018

Supreme Court, New York County

Docket Number: 155151/17

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of
TALAL BIN SULTAN BIN ABDUL-AZIZ AL SAUD

Petitioner

Index No. 155151/17

v

DECISION AND ORDER

THE NEW YORK AND PRESBYTERIAN HOSPITAL

Respondent.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR 3102(c) and CPLR 3102(e), the petitioner seeks leave to obtain pre-action disclosure from the respondent in order to establish his filiation in a paternity action that the petitioner seeks to file in Lebanon or elsewhere. The respondent opposes the petition. The petition is denied without prejudice.

II. BACKGROUND

The petitioner, Talal Bin Sultan Bin Abdul-Aziz Al Saud, alleges that he contemplates filing a paternity action in a Lebanese court or elsewhere in order to establish that he is the son of Sultan bin Abdul-Aziz Al Saud (the decedent), who was the Crown Prince of Saudi Arabia at the time of his death in 2011. The petitioner alleges that his mother, a Syrian national named

Hanaa Faek El Mghayzel, married the decedent in Saudi Arabia in or about December 1982, that approximately one year later, on February 10, 1984, she gave birth to the petitioner in Saudi Arabia, and that he is the biological son of the decedent. According to the petitioner, the decedent later divorced his mother, and she returned to Syria in late 1996. The petitioner asserts that he was reunited with his mother in Syria several months later, but alleges that he remained in contact with the decedent, who on occasion sent financial assistance to him.

As set forth in the petition, the decedent was diagnosed with cancer and sought treatment in New York at the New York Presbyterian Hospital (NYPH). This treatment allegedly included a surgery, during which the decedent's tissue and blood samples were taken and preserved pursuant to the business practices of NYPH. The decedent died at NYPH in or about October 2011. The petitioner now seeks to obtain the results of a U.S.-based DNA test utilizing DNA samples in the custody of NYPH before filing a paternity action "in Lebanon or elsewhere," "because paternity actions in Lebanon are expeditious." The petitioner states that he "has legitimate concern that he would likely not receive the results of the paternity test prior to the conclusion of the Lebanese proceedings if he were to commence the action in Lebanon or elsewhere prior to obtaining the results of the DNA test."

The petitioner states that he has been in contact with the

Office of the Chief Medical Examiner of the City of New York, which confirmed that they have no tissue samples of the decedent available. Thus, NYPH is the only source known to the petitioner that has a "readily available" tissue sample taken from the decedent. The petitioner alleges that, on December 2, 2016, his counsel sent a Preservation of Records letter to NYPH, and that, in a follow-up phone call regarding that letter, NYPH confirmed to the petitioner's counsel that "while it maintains tissue samples taken from Sultan bin Abdul-Aziz Al Saud, it would require a court order as part of its routine policies and procedures before granting access to the sample." The petitioner further avers that NYPH was informed of this petition for pre-action disclosure "and consented to it."

III. DISCUSSION

CPLR 3102(c) authorizes a court to permit a party to conduct pre-action disclosure to aid in bringing an action or to preserve information. See Sims v Metropolitan Transp. Auth., 123 AD3d 496, 496 (1st Dept. 2014); Walker v Sandberg & Sikorski Corp. Firestone, Inc., 102 AD3d 415 (1st Dept. 2013); Matter of Champion v Metropolitan Tr. Auth., 70 AD3d 587 (1st Dept. 2010); Holzman v Manhattan and Bronx Surface Transit Operating Authority, 271 AD2d 346 (1st Dept. 2000). A petitioner seeking leave to conduct pre-action disclosure must demonstrate that he

or she has a potentially viable cause of action against some person or entity, and that the disclosure sought is material and necessary to prove an actionable wrong and is necessary in order to frame the complaint. See Camara v Skanska, Inc., 150 AD3d 548 (1st Dept. 2017); Matter of Woodbridge Structured Funding, LLC v Pissed Consumer, 125 AD3d 508 (1st Dept. 2015); Matter of Peters v Sotheby's, Inc., 34 AD3d 29 (1st Dept. 2006); Liberty Imports v Bourguet, 146 AD2d 535 (1st Dept. 1989). The resort to pre-action disclosure, however, "is not permissible as a fishing expedition to ascertain whether a cause of action exists" in the first instance. Liberty Imports v Bourguet, supra, at 536.

CPLR 3102(e) authorizes the court to order disclosure related to an "[a]ction pending in another jurisdiction." Specifically, it provides that discovery may be ordered by a New York court where "any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction" or "whenever upon notice or agreement, it is required to take the testimony of a witness in the state." CPLR 3102(e).

In support of his request for relief pursuant to CPLR 3102(c) and (e), the petitioner submits the unverified petition, an attorney's affirmation, and an email sent by his counsel to a former associate general counsel at NYPH, purporting to memorialize the parties' "understanding and agreement pursuant to

[their prior] discussion . . . that [NYPH] consents to grant access to [the decedent's] tissue sample once the court order is issued." In its reply papers, NYPH states that it did not "consent" to the relief sought, but merely confirmed that NYPH possessed the tissue samples and agreed to preserve them. In any event, regardless of whether NYPH "consented" to comply with a future court order, the petitioner was nonetheless required to present evidence establishing his entitlement to pre-action disclosure under CPLR 3102(c), or disclosure in relation to an action pending in another jurisdiction under CPLR 3102(e). The petitioner has not met his burden under either standard.

As to CPLR 3102(c), the petitioner's assertion that he requires DNA testing in order to "establish his filiation" in an action "in Lebanon or elsewhere" is too vague to establish what cause of action the petitioner intends to bring and what elements the petitioner would be required to prove in such an action. As a consequence, the petitioner has not shown a meritorious cause of action, or that the disclosure sought is material and necessary to an actionable wrong that he is unable to formulate in the absence of the disclosure. See Sandals Resorts Intern. Ltd. v Google, Inc., 86 AD3d 32 (1st Dept. 2011).

The petitioner's invocation of the standard that the Second Department applied to a pretrial request for posthumous genetic marker testing in Matter of Poldrugavaz, 50 AD3d 117 (2nd Dept.

2008) does not affect this conclusion. In Matter of Poldrugavaz, the issue of pretrial genetic marker testing was addressed in the context of a nonmarital child's proceeding to establish inheritance rights under EPTL 4-1.2(a), which requires such child to establish by clear and convincing evidence that he or she is an heir to an applicable decedent. The petitioner makes no claim that he seeks to commence a proceeding pursuant to that provision. On the contrary, he provides no information with regard to his contemplated action other than that it will be to "establish his filiation" and that it will be commenced "in Lebanon or elsewhere." Even if the standard articulated by the Second Department were applicable to this case, the petitioner did not provide sufficient proof in his initial submissions that "the decedent openly and notoriously acknowledged" that he was the petitioner's father. See Matter of Poldrugavaz, *supra*. In fact, the only support provided for such a claim is the affirmation of the petitioner's attorney, which has no evidentiary value, and may not be the basis for granting a petition under CPLR 3102(c). See Nicol v Rotterdam, 134 AD2d 754 (3rd Dept. 1987); Matter of Henry (CSX Transp., Inc.), 43 AD3d 1445 (4th Dept. 2007).

The petitioner suggests that he believed he was not required to submit proof of his entitlement to pre-action disclosure due to NYPH's "consent" to the petition. The petitioner attempts to

address the deficiencies of his petition by submitting, with his reply, two photographs of the petitioner and the decedent, purporting to show resemblance, an affirmation of his mother, executed in Lebanon but unnotarized and without a certificate of conformity, as required pursuant to CPLR 2309, and two "legal consultations" from Lebanese attorneys averring that DNA evidence is acceptable proof in cases of lineage confirmation. He also provides an opinion that the allegations in the affirmation of the petitioner's mother, "if true, constitute sufficient evidence to justify a demand for a paternity action in Lebanon." The petitioner's submission of new evidence in his reply was improper, and the court does not consider this evidence in making its determination. See Atlantic Mut. Ins. Co. v M.H. Kane Constr. Corp., 100 AD3d 564 (1st Dept. 2012); Root v Brotmann, 41 AD3d 247 (1st Dept. 2007).

As to the petitioner's claim that he is entitled to pre-action disclosure pursuant to CPLR 3102(e), the court notes that even accepting the petitioner's argument that disclosure under CPLR 3102(e) is available before a claim has developed into a formal proceeding, each case the petitioner cites in support of his application involves a pending lawsuit and/or a mandate from a foreign court for the subject discovery. See Matter of Deloitte, Haskins & Sells, 146 Misc 2d 844 (Sup Ct, NY County 1990); Application of Levine, 116 Misc 2d 922 (Sup Ct, NY County


1982); Matter of Poldrugavaz, supra; see also Matter of Davenport, 45 AD3d 298 (1st Dept. 2007); Matter of Dier, 297 AD2d 577 (1st Dept. 2002). The petitioner has not produced evidence of any facts similar to those present in the authority he cites showing that he is entitled to discovery under this rule.

IV. CONCLUSION

In light of the foregoing, it is ORDERED that the petition is denied without prejudice to renewal upon proper papers.

This constitutes the Decision and Order of the court.

Dated: 6/15/18

ENTER: 

J.S.C.

HON. NANCY M. BANNON