

Bousquet v Chun-Yuan Chen
2020 NY Slip Op 31326(U)
May 5, 2020
Supreme Court, Kings County
Docket Number: 514559/2017
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of May 2020.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

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Michael J. Bousquet and Judith Morris,

Index No. 514559/2017

Plaintiffs,

Mot. Seq. No. 1

- against -

Richy Chun-Yuan Chen, MD, Zohirul Islam, MD,
New York Methodist Hospital,

Defendants.

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The following e-filed papers read herein:

NYSCEF No.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

10-11

Opposing Affidavits (Affirmations) _____

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Reply Affirmation and Exhibits Annexed _____

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Upon the foregoing papers, Richy Chun-Yuan, M.D., Zohirul Islam, M.D., and New York-Presbyterian Brooklyn Methodist Hospital, d/b/a New York Methodist Hospital (Methodist) (collectively, defendants), jointly move, pursuant to CPLR 3126 (2), for an order precluding Michael J. Bousquet (Bousquet) and Judith Morris (Morris) (collectively, plaintiffs) from offering any evidence related to outstanding discovery, or alternatively, pursuant to CPLR 3124, requiring them to comply with discovery demands and, pursuant to CPLR 1202, appointing a guardian ad litem for Bousquet.

Background

Plaintiffs commenced this medical malpractice action on July 27, 2017. Thereafter, defendants joined issue. Most relevant at this stage of litigation is defendants' request for the appointment of a guardian ad litem for Bousquet.

The Parties' Papers

Defendants' Motion

Defendants note that Bousquet suffers from corticobasal degeneration, a potentially incapacitating neurological disorder that affects brain function. Defendants, in support of their position, cite Bousquet's medical records at Methodist as well as his residence in an assisted living facility, as casting doubt on his mental capacity to initiate and pursue this action.

Plaintiffs' Opposition

Plaintiffs deny the need for the appointment of a guardian ad litem for Bousquet, citing a duly executed power of attorney (POA), dated Dec. 1, 2016, which he allegedly executed and delivered to Morris before the inception of this action. *See* Plaintiffs' Opposition, Ex. C.

Defendants' Reply

Defendants respond that Bousquet was already incapacitated when he allegedly executed and delivered the POA. They point out that Morris testified that Bousquet: (1) was diagnosed with corticobasal degeneration before 2015; (2) became "really unresponsive" during his Methodist admission between Nov. 23, 2016 and Dec. 7, 2016; (3) "deteriorated, he can't get out of bed, and now he's babbling" in the course of the Methodist admission; and (4) was transferred to the psychiatric unit for rehabilitation. *See* Morris tr at page 20, lines 9-18; page 115, lines 11-24; page 124, lines 21-25 to page 125, line 2; and page 105, lines 6-7, respectively. Defendants further reference a psychiatrist's note, from Methodist's records, diagnosing Bousquet with "Dementia due to Alzheimer's disease." *See* Reply Aff., Ex. B.

Discussion

“To be valid, a statutory short form power of attorney must be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.” *Matter of Delaney*, 170 A.D.3d 1008, 94 N.Y.S.3d 591 (2d Dept., 2019) (citing General Obligations Law § 5-1501B [1] [b]) (internal quotation marks and alteration omitted; emphasis added). General Obligations Law § 5-1501 (2) (c) defines “capacity” as the “ability to comprehend the nature and consequences of the act of executing and granting . . . a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.” “A party’s competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof.” *Matter of Delaney*, 170 A.D.3d 1008, 94 N.Y.S.3d 591 (2d Dept., 2019) (internal quotation marks and citations omitted). Importantly, “(t)he incapacity must be shown to exist at the time the pertinent document was executed.” *Id.*

Here, Morris’ deposition testimony and the medical documentation raise an issue of fact as to whether Bousquet had the requisite mental capacity on Dec. 1, 2016, when, during his admission to Methodist, he allegedly executed and delivered the POA to Morris. Indeed, a psychiatrist’s note entered during that admission reflected a final diagnosis of “Dementia due to Alzheimer’s disease.” Thus, a hearing is necessary to determine whether Bousquet had the requisite mental capacity on (1) Dec. 1, 2016 when he allegedly executed and delivered the POA; (2) on July 27, 2017 when this action was commenced; and (3) presently. *See Piggott v. Lifespire, Inc.*, 149 A.D.3d 785, 50 N.Y.S.3d 565 (2d Dept., 2017) (“since the plaintiff may require the assistance of a guardian ad litem to protect his interests, the [lower] court should have conducted a hearing to determine whether a guardian should be appointed for the plaintiff pursuant to CPLR 1201”); CPLR 1202 (a) and (a) (3); *Resmae Mtge. Corp. v. Jenkins*, 115

A.D.3d 926, 983 N.Y.S.3d 64 (2d Dept., 2014) (“where there is a question of fact as to whether a guardian ad litem should be appointed, a hearing must be conducted” (internal quotation marks and citation omitted)).

Conclusion

Based upon the foregoing and after oral argument, it is

ORDERED that defendants’ motion in Seq. No. 1 is *granted to the extent* that a hearing shall be held on September 11, 2020 at 9:30 a.m. in Room 775, to determine whether a guardian ad litem should be appointed for Bousquet pursuant to CPLR 1202; and the remainder of their motion is held in abeyance pending the outcome of the hearing.

This constitutes the Decision and Order of the Court.

E N T E R,

Genine D. Edwards

J. S. C.