

**Bousquet v Chen**

2020 NY Slip Op 33145(U)

September 23, 2020

Supreme Court, Kings County

Docket Number: 514559/17

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

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 23rd day of September 2020.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

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MICHAEL J. BOUSQUET and JUDITH MORRIS,

Plaintiffs,

- against -

Index No. 514559/17

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) _____	20
Reply Affirmation and Exhibits Annexed _____	24

In this medical malpractice action, defendants move, pursuant to CPLR 3126 (2), for an order precluding Michael J. Bousquet (Bousquet) and Judith Morris (Morris) (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.

Pursuant to this Court's decision, dated May 5, 2020, a virtual hearing regarding the validity of the power of attorney, was held on September 11, 2020. Defendants did not proffer any witnesses but rested on Bousquet's medical records and the deposition

testimony of Bousquet's wife, Morris. Plaintiffs' sole witness was Morris, who testified that she was not present when the power of attorney was executed but indicated that Bousquet was of sound mind.

### *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.*

Defendants, who have the burden of proof, properly pointed to Morris' deposition testimony and the medical documentation in support of their contention that Bousquet did not have the requisite mental capacity on Dec. 1, 2016, when the power of attorney was executed. The medical records demonstrate Bousquet's condition and same is bolstered by Morris' deposition testimony.

In opposition, Morris' hearing testimony lacks probative value. Indeed, Morris was not even present during the execution of the power of attorney and thus she cannot offer relevant testimony as to Bousquet's mental capacity at the time the power of attorney was signed. Although Morris alluded to the fact that her son was present as well as Bousquet's friend, who notarized the power of attorney, neither was produced at the hearing.

Regarding discovery, the deposition of Morris shall be completed on or before November 13, 2020. Plaintiffs shall fully comply with the Final Conference Part Order, dated June 25, 2019 by October 16, 2020, or plaintiffs may be precluded from offering any evidence at the trial of this matter.

***Conclusion***

Based upon the foregoing, it is

ORDERED that defendants' motion is *granted to the extent* that Judith Morris is appointed as guardian ad litem for her husband, Michael J. Bousquet. The caption is amended as follows:

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MICHAEL J. BOSQUET BY HIS GUARDIAN AD LITEM  
JUDITH MORRIS and JUDITH MORRIS, INDIVIDUALLY,

Plaintiffs,

- against -

Index No. 514559/17

RICHY CHUN-YUAN CHEN, MD,  
ZOHIRUL ISLAM, MD  
NEW YORK METHODIST HOSPITAL,

Defendants.

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This constitutes the Decision and Order of the Court.

E N T E R,  
  
J. S. C.