

Salas v New York-Presbyt. Hosp.

2022 NY Slip Op 31507(U)

May 6, 2022

Supreme Court, New York County

Docket Number: Index No. 805312/2016

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X INDEX NO. 805312/2016

CESAR SALAS MOTION DATE 02/22/2022

Plaintiff, MOTION SEQ. NO. 001

- v -

THE NEW YORK-PRESBYTERIAN HOSPITAL, **DECISION + ORDER ON
MOTION**

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISCOVERY

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3108 for the issuance of an open commission permitting him to conduct the deposition of a nonparty witness in California. The motion is granted, without opposition.

This action arises from the January 24, 2014 placement of an intra-cardiac defibrillator pacemaker at the defendant New York-Presbyterian Hospital (NYPH) by Vivek Iyer, M.D., a cardio-physiologist employed by NYPH. Although the plaintiff did not name Iyer as a party defendant, he seeks to hold NYPH vicariously liable for Iyer's negligence. Iyer presently resides in California. Generally, "[a] nonparty, nondomiciliary witness is clearly not subject to the subpoena power of the court" of New York (*Zeeck v Melina Taxi Co.*, 177 AD2d 692, 694 [2d Dept 1991]; see Judiciary Law § 2-b [1]; *Rivera v Kolsky*, 164 AD3d 626, 629 [2d Dept 2018]; *Matter of Stephen*, 239 AD2d 963, 963 [4th Dept 1997] ["a New York court may not direct the service of a New York subpoena outside the State"]; *Coombs v Rowand*, 39 AD2d 532, 532 [1st Dept 1972] [service in Pennsylvania of a New York subpoena upon nonparty Pennsylvania domiciliary is a nullity]).

California has enacted the streamlined provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA) (Cal. Civ. Proc. Code §§ 2029.100-900; *cf.* CPLR 3119), which permits a party to obtain a so-ordered subpoena from the forum-state court and simply file it in a California court, which would then issue a California subpoena. Nonetheless, a party may still avail himself of the open commission procedure. That process, codified in CPLR 3108, permits a party to: (a) secure an open commission, letters rogatory, or other permission from a New York court to conduct the deposition, and (b) commence a proceeding in the courts of the deponent's home state to compel issuance of a subpoena. There appears to be no prohibition under California law on the filing in a California court of an order granting an open commission, the open commission itself, and a proposed subpoena.

CPLR 3101(a)(4) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person [besides those identified in subsections (a)(1)-(3)], upon notice stating the circumstances or reasons such disclosure is sought or required." Such circumstances and reasons are sufficient if the party seeking such nonparty disclosure has shown that the disclosure is "material and necessary" to the prosecution or defense of the action (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]).

CPLR 3108 provides, in relevant part, that "[a] commission or letters rogatory may be issued where necessary *or convenient* for the taking of a deposition outside of the state" (emphasis added). "As long as the witness is without the State, rendering him [or her] unavailable to the service of a subpoena within the State, resort to CPLR 3108 is permissible" (*Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 235 [1st Dept 1984]).

"The commission procedure is available where the notice procedure under the circumstances of the case or the place where the deposition is to be taken may be deemed impracticable or there is some doubt as to whether the deposition may be taken. There will be occasions when the party seeking disclosure detects that the judicial imprimatur accompanying a commission will be necessary or helpful when the person he designates to conduct the deposition in accordance with CPLR 3113 seeks the assistance of the foreign court in

compelling the witness to attend the examination. In such a case, the party's application for a commission should not be dismissed because the movant is taking the precaution of having his designee formally denominated a commissioner rather than first proceeding by notice"

(*id.* at 235-236; see *Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219 [1st Dept 2009]; *Lewis v Baker*, 279 AD2d 380 [1st Dept 2001]; *Susan A. v Steven J.A.*, 141 AD2d 790, 791 [2d Dept 1988]).

The plaintiff established that the information sought to be obtained via a deposition in California is material and necessary to the prosecution of the action. He also has established that the employment of a notice procedure for conducting depositions in that state may be impractical, and that California requires a filing whether a litigant elects to employ the UIDDA or the open commission procedure for subpoenaing a California witness.

Accordingly, it is

ORDERED that the plaintiff's motion for the issuance of an open commission is granted, without opposition; and it is further,

ORDERED that a commission shall issue in this action to the Clerk of the Superior Court of the State of California, Marin County, 3501 Civic Center Drive, San Rafael, California 94903, and to any person or entity authorized by Cal. Civ. Proc. Code §§ 2029.100-.900 or any other laws of the State of California law, or any other competent person or entity, who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions of Vivek Iyer, M.D., 2 Bon Air Road, Suite 100, Larkspur, California 94939-1144, as a nonparty witness in this action, and that he or she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to the commission, with any exhibits produced and proved before him or her, to the Clerk of the Supreme Court of the State of New York, New York County, 60 Centre Street, New York, NY, 10007 by certified or registered mail, with all convenient speed; and it is further,

ORDERED that the plaintiff shall serve a paper copy of this order upon the Clerk of the court within 20 days of the entry of this order, along with a proposed open commission in proper form; and it is further,

ORDERED that the Clerk of the court shall issue the commission described herein in the proper form, as provided to him by the plaintiff, shall place the seal of the court on the commission, and shall deliver the commission to the counsel for the plaintiff.

This constitutes the Decision and Order of the court.

5/6/2022
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE