

Hegazy v Mount Sinai Hosp.
2022 NY Slip Op 32525(U)
July 26, 2022
Supreme Court, New York County
Docket Number: Index No. 805276/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART **56M**

Justice

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NEHAL Y. HEGAZY,

Plaintiff,

- v -

MOUNT SINAI HOSPITAL, BRIAN J. WAGNER M.D., and
FELIPE TUDELA, M.D.,

Defendants.

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INDEX NO. 805276/2017

MOTION DATE 06/16/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127

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 Texas. The motion is granted, without opposition.

After taking the depositions of the defendants Brian J. Wagner, M.D., and Felipe Tudela, M.D., as well as Joanne Stone, M.D., as a witness on behalf of the defendant Mount Sinai Hospital, the plaintiff's attorney learned that nonparty Ninad Patil, M.D., had drafted a document entitled "surgical pathology results," dated January 26, 2015, in connection with the plaintiff's surgery. The plaintiff's attorney also learned that Dr. Patil resides or works in Harris County, Texas.

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]). Consequently, service of a subpoena in a New York action directly upon a person or corporation located outside of New York is not permitted, and any such service is void, unauthorized, and ineffective, since the subpoena power of a New York court is limited to its territorial jurisdiction (see Judiciary Law § 2-b[1]; *Wiseman v American Motors Sales Corp.*, 103 AD2d 230 [2d Dept 1984]; *Siemens & Halske, GmbH v Gres*, 37 AD2d 768 [1st Dept 1971]).

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]).

Inasmuch as Patil resides in Texas, it is proper for the plaintiff to request this court to issue an open commission or letters rogatory to a person in Texas, who would then be authorized to secure a subpoena from the Texas courts pursuant to the specific procedures that Texas has enacted (see CPLR 3108; Tex. R. Civ. P. Rules 176, 205; Tex. Civ. Prac. & Rem. Code §§ 20.002, 30.011; *Matter of Bennett*, 502 SW3d 373 [Tex App 2016] [granting petition to effectuate letters rogatory issued by a Wyoming court, requesting that Texas courts issue subpoenas to four Texas residents to appear, in Texas, for depositions in aid of the Wyoming action]; *cf.* Tex. R. Civ. P. Rule 201.2 [authorizing Texas courts to issue letters rogatory for out-of-state depositions]).

The plaintiff established that the information sought to be obtained via a deposition in Texas is material and necessary to the prosecution of the action. The plaintiff also has established that the employment of a notice procedure for conducting depositions in that state is impractical or impermissible, and that Texas requires the issuance of an open commission to permit a person to subpoena a Texas resident and conduct his or her deposition in Texas in connection with an action commenced in states other than Texas.

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 Harris County District Clerk, Harris County District Court, 201 Caroline Street, Suite 420, Houston, Texas 77002, and to any person or entity authorized by Tex. R. Civ. P. Rules 176, 205 and Tex. Civ. Prac. & Rem. Code §§ 20.002, 30.011, or any other laws of the State of Texas, 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 Ninad Patil M.D., Texas Medical Center, 6651 Main Street Suite F455, Houston, Texas 77030, 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.

JOHN J. KELLEY, J.S.C.

7/26/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE