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

**PRESENT:** HON. ALEXANDER TISCH **PART** 18

*Justice*

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KATHRYN ROBB,

Plaintiff,

- v -

GEORGE ROBB,

Defendant.

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**INDEX NO.** 950000/2019

**MOTION DATE** N/A, 03/16/2022, 04/07/2022

**MOTION SEQ. NO.** 004 006 007

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 202, 203

were read on this motion to/for TRIAL PREFERENCE.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 201

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 204, 205, 206, 207, 208, 209

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, plaintiff moves for a trial preference and defendant cross moves to vacate the note of issue (motion sequence no. 4). In motion sequence no. 6, defendant moves to compel the further examination before trial (EBT) of non-party Clare Robb (or Mrs. Robb) and plaintiff cross moves for a protective order and sanctions. In motion sequence no. 7, defendant moves for an open commission to take the depositions of Cynthia Tavilla and Janice Levine.

Open Commission

"A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or

letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state" (CPLR 3108).

The burden is on defendant to demonstrate that a commission or letters rogatory would be "necessary or convenient" by including in his application, inter alia, "allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful" (MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC, 103 AD3d 486, 488 [1st Dept 2013], quoting Reyes v Riverside Park Community [Stage I], Inc., 59 AD3d 219, 219 [1st Dept 2009] [internal quotation marks omitted]; see Sorrentino v Fedorczuk, 85 AD3d 759, 760-61 [2d Dept 2011]). Defendant's application failed to demonstrate that a commission is "necessary or convenient" as it does not contain any proof that Levine or Tavilla would not cooperate with a subpoena and voluntarily appear, nor that "the judicial imprimatur accompanying a commission will be necessary or helpful'" (see MBIA Ins. Corp., 103 AD3d at 488). Indeed, plaintiff points out in opposition that defendant failed to even request an *Arons*-like authorization to informally speak with the treating psychotherapists.[1]

Defendants must also show that the information sought is not otherwise available (MBIA Ins. Corp., 103 AD3d at 487). In this regard, the defendant's reliance on Matter of Kapon v Koch (23 NY3d 32 [2014]) is inapposite because what defendant is asking the Court to order (an open commission) bears a different standard than a regular non-party subpoena. Further, the Court agrees with plaintiff that ordering depositions of these treating providers does not appear warranted in light of the medical records that have already been exchange (see Birro v Port Auth. of New York and New Jersey, 179 AD3d 434 [1st Dept 2020] ["Absent proof of a discrepancy between the medical records and plaintiff's testimony, defendants failed to show that the

[1] There is nothing in the record about efforts per CPLR 3119 or a related uniform interstate deposition procedure.

deposition of the physicians was material and necessary to their defense"]; Ramsey v New York Univ. Hosp. Ctr., 14 AD3d 349, 350 [1st Dept 2005] ["It is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment"]). Defendant attempts to provide some sort of explanation in reply, stating that Levine's deposition is warranted to obtain "testimony about her observations of plaintiff during their sessions and about whether plaintiff's emotional distress was the result of the incidents in the Complaint or whether it was caused by other events, such as familial problems" (NYSCEF Doc No 209 at ¶ 15). However, such contentions should not be considered as argued for the first time in reply papers (see Dannasch v Bifulco, 184 AD2d 415, 417 [1st Dept 1992]). In any event, "observations of plaintiff during their sessions" would clearly be found within the records. The remaining contentions infer that the deposition is sought on causation-related issue, which is generally impermissible (Nelson v RXR 196 Willoughby Owner LLC, 72 Misc 3d 819, 821 [Sup Ct, NY County 2021] [noting that "CPLR 3101 (d) (1) (iii) does not authorize '[f]urther disclosure' of an expert, such as his or her deposition, without a showing of 'special circumstances'"]) and also likely the reason why defendant consistently stated that he seeks their depositions, not as experts, but as fact-witnesses because of the treatment rendered.

Further EBT of Mrs. Robb & Cross-motion

Defendant claims that counsel for plaintiff, Jordan Merson, Esq. interfered with the non-party Mrs. Robb's deposition and asserted for the first time during the middle of the deposition that he represented Mrs. Robb when instructing her not to answer questions.

Of course, it would have been prudent for Mr. Merson to give advance notice if he was going to represent Mrs. Robb, but the basis for the objections were centered on relevancy (NYSCEF Doc No 164 at 38 ["I just don't see what this has to do with the lawsuit"], 42, 44, 50).

While the objections may not necessarily be within the spirit of 22 NYCRR § 221.1 (b) (see, e.g., Veloso v Scaturro Bros., Inc., 68 Misc 3d 1024, 1025-30 [Sup Ct, NY County 2020] [Lebovits, J.] [noting, for example, that "o]rdinarily," "it would not be proper to object to a question on the ground that the question has previously been asked and answered"]), there was, in fact, no question of substance that was not answered (see, e.g., NYSCEF Doc No 164 at 42:23-43:1, 44:24; 50:2 [objecting and advising the witness to answer]). After a lengthy, uninterrupted line of questioning about the family business (NYSCEF Doc No 164 at 27-38), each of the questions that defense counsel asked was answered. The only questions that were not answered related to whether Mr. Merson in fact represented Mrs. Robb. The Court finds it unnecessary to bring Mrs. Robb back for further deposition because whether or not counsel represented her does not matter — none of the relevant questions (i.e., those that had even some tangential relationship to this lawsuit) were not answered on the basis of attorney-client privilege or the like. Further deposition on those attorney-client related questions would only serve to harass her, counsel, and would be overwhelmingly unlikely to lead to further admissible evidence. Therefore, the plaintiff's cross motion for a protective order to prohibit her further EBT, as well as the EBT of counsel, is granted (see CPLR 3103 [a] ["The court may . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"]). The Court declines to award sanctions as requested by plaintiff's counsel.

Vacatur of the Note of Issue

Plaintiff filed the note of issue on May 6, 2021. Defendant timely cross-moved to vacate the note of issue because at the time it was filed discovery remained outstanding. The request for compliance with 22 NYCRR § 202.20-c should have been provided (see NYSCEF Doc No 90); but the Court finds that that issue would not, in and of itself, require vacating the note. Neither

would the Dr. Nicosia authorization issue, since plaintiff's response indicated that the doctor is now deceased but plaintiff agreed to sign an authorization if defendant found an appropriate address to request the records (see NYSCEF Doc No 93).

However, defendant also claimed that, at the time of filing the note of issue, many depositions remained outstanding. First, the defendant himself was deposed on 4/21/2021, 4/23/2021, 4/26/2021 and 4/30/2021. During that last deposition, it was stated by counsel on the record that the deposition would continue on 5/10/2021. Although it is unknown from the papers whether the deposition continued, as intended, plaintiff filed the note of issue prior to that date on 5/6/2021. Additionally, defense counsel requested the last known addresses for five (5) non-parties by demand dated 3/9/2021, and followed up by e-mail to, inter alia, coordinate efforts to schedule those non-party depositions, including the two treating psychotherapists, Tavilla and Levine, discussed above (see NYSCEF Doc Nos 89 [defense email dated 4/12/2021], 91 [defense counsel email dated 4/20/2021]; 92 [defense counsel email dated 4/29/2021]). In the last email, defense counsel noted that he would be away on vacation for about a week and would like to discuss the non-party depositions upon his return. Instead, plaintiff's counsel served a response to the outstanding 3/9/2021 demand for the non-parties' last known addresses and authorizations on 5/3/2021 (NYSCEF Doc No 93) and then filed the note of issue three days later.

In this regard, plaintiff knew of outstanding discovery yet proceeded to certify that all discovery was complete, which would normally warrant vacating the note of issue (see, e.g., Gibbon v 1515 Bedford Ave. Realty, LLC, 189 AD3d 1366, 1367-68 [2d Dept 2020]; cf. Sereda v Sounds of Cuba, Inc., 95 AD3d 651, 651-52 [1st Dept 2012] [where plaintiff's provision of a P.O. Box address for a witness would have warranted vacatur of the note of issue because it prevented defendant from properly serving a subpoena ad testificandum on the witness, but the

Court found defendant waived its right to that relief because it waited too long to pursue that discovery]; Munoz v 147 Corp., 309 AD2d 647, 647-48 [1st Dept 2003]).

However, it appears as though most of the outstanding discovery has been resolved: this decision and order now resolves the treating psychotherapists' depositions and Mrs. Robb's further deposition; and the parties papers' indicate that 3 of the 6 non-parties, for whom plaintiff provided contact information, have been deposed. At this juncture, defendant has the addresses for the remaining non-parties and is free to subpoena them if he chooses.

While defendant argues that plaintiff's belated response to the 3/9/2021 demand did not cure the deficiencies and that the outstanding discovery was material because it may "generate additional discovery requests" (Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd., 90 AD3d 499, 499-500 [1st Dept 2011]), defendant has failed to articulate or provide an example of what further discovery requests would be gained from the non-party depositions or other outstanding discovery.

Instead, if the only remaining item of discovery that has not yet been addressed here is the defendant's continued deposition, then the Court may order that such deposition take place post-note of issue, since neither side will be prejudiced by permitting that limited amount of discovery to proceed post-note before trial (see, e.g., Cuprill v Citywide Towing and Auto Repair Services, 149 AD3d 442, 442-43 [1st Dept 2017]; Cabrera v Abaev, 150 AD3d 588, 588-89 [1st Dept 2017]).

Trial Preference

Plaintiff moves for a trial preference pursuant to CPLR 3403 (a) (3), which is for "an action in which the interests of justice will be served by an early trial." Plaintiff points to defendant's alleged debilitating medical condition, arguing that he may not be able to testify at

the time of trial. The Court grants the motion but on the newly-enacted subdivision (7), which specifically references CVA cases brought pursuant to CPLR 214-g.

Accordingly, it is hereby ORDERED that plaintiff's motion for a trial preference (motion sequence no. 2) is granted pursuant to CPLR 3403 (a) (7);

ORDERED that counsel for the plaintiff shall, within 15 days from entry of this order, serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to place this case on the trial calendar at the head of said calendar except for actions in which a preference was previously granted; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J);[2] and it is further

ORDERED that the defendant's cross-motion (motion sequence no. 2) to vacate the note of issue is denied and the matter shall remain on the trial calendar; and it is further

ORDERED that the parties appear for a virtual status conference on Thursday, **September 15, 2022 at 3:00 pm** via Microsoft Teams to discuss defendant's continued deposition and any other outstanding discovery so that the Court may issue an order providing for limited post-note discovery;[3] and it is further

ORDERED that defendant's motion to compel further deposition of Mrs. Robb (motion sequence no. 6) is denied; and it is further

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[2] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.

[3] Calendar invitation containing Teams link to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov) to all parties of record on NYSCEF.

ORDERED that plaintiff's cross-motion (motion sequence no. 6) is granted only to the extent of granting a protective order, prohibiting further deposition of Mrs. Robb and the deposition of plaintiff's counsel, Mr. Merson, and is otherwise denied; and it is further

ORDERED that defendant's motion for an open commission (motion sequence no. 7) is denied.

This constitutes the decision and order of the Court.

9/7/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |