

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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TALAL BIN SULTAN BIN ABDUL-AZIZ AL SAUD

Petitioner,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Respondent.

-----X

INDEX NO. 155151/2017

MOTION DATE 11/06/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for RENEW/REARGUE

This motion is determined in accordance with the attached memorandum Decision and Order.

6/22/2020

DATE

Handwritten signature of Nancy M. Bannon

NANCY M. BANNON, J.S.C. HON. NANCY M. BANNON

CHECK ONE:

Case Disposed checkbox

CASE DISPOSED

Granted checkbox

GRANTED

Denied checkbox (checked)

DENIED

Non-final disposition checkbox (checked)

NON-FINAL DISPOSITION

Granted in part checkbox

GRANTED IN PART

Other checkbox

OTHER

APPLICATION:

Settle order checkbox

SETTLE ORDER

Submit order checkbox

SUBMIT ORDER

CHECK IF APPROPRIATE:

Includes transfer/reassign checkbox

INCLUDES TRANSFER/REASSIGN

Fiduciary appointment checkbox

FIDUCIARY APPOINTMENT

Reference checkbox

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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DECISION AND ORDER

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding for pre-action disclosure pursuant to CPLR 3102(c) and (e), the petitioner seeks leave to obtain tissue samples from the respondent in order to establish that he is the son of Sultan bin Abdul-Aziz Al Saud for use in a paternity action in Lebanon. By order dated July 15, 2019, the court granted the petition in part, ordering production of tissue samples by the respondent, subject to certain chain-of-custody and confidentiality limitations imposed by the court. The respondent now moves pursuant to CPLR 2221 to renew and reargue the petition, or alternatively, to stay the action. The petitioner opposes the motion.

II. BACKGROUND

As set forth in greater detail in the court's two previous orders, dated June 15, 2018, and July 15, 2019, the petitioner,

Talal Bin Sultan Bin Abdul-Aziz Al Saud, who is now 35 years old, alleges that he is the son of Sultan bin Abdul-Aziz Al Saud (the decedent), who was Crown Prince of Saudi Arabia when he died in October 2011 at the New York Presbyterian hospital (NYPH). The decedent underwent surgery at NYPH, during which his tissue and blood samples were preserved pursuant to the business practices of NYPH. NYPH is the only source known to the petitioner having readily available tissue samples of the decedent. The petitioner seeks to test the tissue samples from NYPH in a U.S.-based DNA test to be used as evidence in a paternity action in Lebanon.

By the order dated June 15, 2018, the court denied the petition because no paternity proceeding had yet been commenced and no other action was pending in another jurisdiction and, as such, the petitioner failed to properly submit proof of his entitlement to pre-action disclosure pursuant to CPLR 3102(e). The petitioner appealed. Meanwhile, the petitioner also moved to renew and reargue, after he filed a filiation action in Lebanon. In support of that motion, the petitioner submitted proof and new evidence including two photographs of the petitioner and the decedent purporting to show a resemblance between the two, an affirmation of the petitioner's mother, Hanaa Faek El Mghayzel, detailing her relationship with the decedent and averring that the petitioner was his son, and three affirmations from Lebanese

attorneys averring, *inter alia*, that DNA evidence is acceptable proof in cases of lineage confirmation in Lebanese court.

This court, in its July 15, 2019 order, granted the petitioner's motion to renew and, upon renewal, granted the petition to the extent of ordering, pursuant to CPLR 3102(e), production of the blood and/or tissue samples held by the respondent to an accredited testing laboratory, and for such laboratory to conduct a genetic marker testing to determine the petitioner's paternity, subject to adequate confidentiality protections.

On August 7, 2019 the Lebanese action was dismissed on the jurisdictional ground that neither the petitioner, his mother, nor the decedent were Lebanese nationals. The petitioner appealed that determination in the Lebanese action to the Court of Appeal of Mount Lebanon (Jdeideh) under file number 196/2019.

On August 19, 2019 the respondent filed the instant motion seeking leave to renew and reargue the court's July 15, 2019 order, and dismissal of the petition or, alternatively, a stay of the court-ordered disclosure. The respondent argues that the Lebanese court's dismissal of the filiation action means that there is no pending foreign proceeding, thereby vitiating any grounds for relief under CPLR 3102(e).

On September 25, 2019 the parties appeared before the court for oral argument on the respondent's motion, whereupon the petitioner represented to the court that, pursuant to the laws and code of civil procedure in Lebanon, the dismissal of the Lebanese action is without effect during the pendency of the appeal, and that the Lebanese Court of Appeal reviews the filiation claim, *de novo*, and is not limited to record that was before the lower court, but instead permitted to consider additional evidence submitted by the parties.

On November 29, 2019, the Appellate Division, First Department dismissed the petitioner's appeal of the June 15, 2018 order as moot in light of this court's July 15, 2019 order. In its decision, the First Department further noted that "the Lebanese Action was dismissed in August 2019, thus removing the prerequisite for any pending action disclosure under CPLR 3102(e)," and that "[s]hould the motion court grant respondent's motion to renew its opposition, petitioner will be permitted to appeal from that order on a more complete and accurate record." The petitioner argues that the First Department was not fully briefed on Lebanese civil procedure, and incorrectly stated in dicta that the dismissal removes the 'pending action' prerequisite for disclosure under CPLR 3102(e) and that the leave to renew and reargue should be denied.

III. DISCUSSION

A motion to renew may only be granted where a party presents "new facts not offered on the prior motion[s] that would change the prior determination[s]," or demonstrates that "there has been a change in the law that would change the prior determination[s]." CPLR 2221(e) (2), (3); see Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979). Here, leave to renew its motion is sought based upon the August 7, 2019 dismissal of the Lebanese filiation proceeding. The respondent argues that this dismissal means that there is no action pending in another jurisdiction. Thus, the respondent contends that the relief granted in this court's July 15, 2019 order is no longer warranted. As the dismissal of the Lebanese filiation action constitutes a new fact not available when the motion was made, the portion of the respondent's motion pursuant to CPLR 2221(e), seeking leave to renew is granted. However, upon renewal, the court adheres to its prior determination.

The purported dismissal of the filiation proceeding by the lower court in Lebanon is not determinative of the issue of whether there was an action still pending in another jurisdiction within the meaning of CPLR 3102(e). The petitioner submits the affirmation of Lebanese attorney Nibal Sadek, dated August 15, 2019, stating that in accordance with Article 564 of

the Lebanese Code of Civil Procedure, a judgment shall not be executed unless it has acquired executive power. Sadek further avers that in Lebanon a judgment acquires executive power on the date that it becomes definitive. According to Sadek, Article 553 of the Lebanese Code of Civil Procedure provides that a judgment is only definitive once it is no longer subject to appeal by ordinary means. Thus, the August 7, 2019 decision does not alter the fact that the proceeding remains pending, particularly as Sadek avers that, under Articles 659 and 661 of the Lebanese Code of Civil Procedure, an appeal court in Lebanon may review the law and the facts, *de novo*, and additional evidence may be submitted when filing an appeal, which effectively means that an appeal in Lebanon is the equivalent to a motion to renew in the New York courts if there is a reason to change the prior court's determination based upon new evidence.

The respondent does not dispute that the dismissal of the filiation proceeding is not final until the appeal is decided and that new evidence may be considered on appeal. Instead, it argues: 1) jurisdictional issues will prevent the Court of Appeal from reaching the merits of the filiation claim, 2) the petitioner has not explained how he would be able to submit the results of any genetic testing prior to the Court of Appeal hearing, and 3) there was no actual order or subpoena issued by the foreign court requiring production of the tissue samples.

Although the petitioner does not discuss how he intends to overcome the jurisdictional hurdles that led to the initial dismissal of the Lebanese proceeding, or how he intends to present the results of the genetic testing he seeks, this court cannot not speculate or opine on the likelihood of success of the petitioner's appeal in the Lebanese courts. Nor would any such opinion be germane to the underlying issue here of whether there is currently an action pending within the meaning of CPLR 3102(e). Critically, however, the respondent does not dispute this interpretation of Lebanese law. Thus, as an action is considered pending from its inception until the issuance of a final judgment, (see Black's Law Dictionary, 1248 [11th ed. 2019]; see also Carey v Saffold, 536 US 214 [2002] [pending defined as "in continuance" or "not yet decided" or "until the completion of"]), there has been no final judgment in the Lebanese action until there is proof submitted to this court in admissible form that the Lebanese action is finally determined and no longer pending.

The respondent incorrectly argues that that the lack of an order or subpoena issued by a foreign court affects petitioner's right to relief pursuant to CPLR 3102(e). This is nothing more than an attempt to reargue the court's July 15, 2019, order and the respondent's motion fails to demonstrate that the court misapprehended any law or facts in its prior decision. See CPLR

2221(d) (2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 (1st Dept. 1984), quoting Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979). Thus, there is no basis to grant the branch of the respondent's motion seeking reargument of this court's July 15, 2019 order.

Nor does the court find merit in the branch of respondent's motion seeking, in the alternative, a stay of the petition pursuant to CPLR 2201 pending the disposition of the appeal in Lebanon. CPLR 2201 authorizes the granting of a stay "in a proper case, upon such terms as may be just". However, the broad language of the statute has been limited by decision. Thus "it is only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented... What is required is complete identity of parties, causes of action and judgment sought" (Pierre Associates, Inc. v Citizens Casualty Co. of N.Y., 32 AD2d 495, 497 [1st Dept. 1969]; see Medical Malpractice Ass'n v Methodist Hospital of Brooklyn, 64 AD2d 558 [1st Dept. 1978]). Here, no such identity exists. The respondent merely seeks a stay of the petition in the hopes that dismissal of the Lebanese action on

jurisdictional grounds will moot the petition. Despite the respondent's posture, even were the Lebanese action dismissed on jurisdictional grounds, the relief sought in the petition would not be moot, as the petition could still be granted under CPLR 3102(c).

In that regard, the court notes that on February 26, 2020 and March 6, 2020, the court received letters from counsel for the respondent purporting to attach a decision disposing of the appeal on jurisdictional grounds. According to the purported translation of the decision and unsworn letter from its counsel, on February 26, 2020, the Court of Appeal of Mount Lebanon denied the petitioner's appeal entirely on jurisdictional grounds stating:

"Whereas regarding the current case, it appears there are no correlating elements pointing to the jurisdiction of the Lebanese courts, the relevant parties in the present case being all non-Lebanese, the subject of the case having no relation with Lebanon and not being associated to any interests existing in Lebanon, which means that the correlating elements to the jurisdiction of the Lebanese courts are totally inexistent in this case, since it relates to Saudi personal data of a person declaring he is a Saudi national and that his father is a Saudi national and his mother of the Syrian nationality, which means that the jurisdiction in this respect, is ipso jure interrelated to the Saudi courts."

The respondent also attaches to his letter an affidavit from Alexandre Sakr, a senior partner of the ElKhoury Law Firm

and professor of civil procedure and legal terminology at the Saint Joseph University Law School in Beirut. In his affidavit Sakr avers that following the Court of Appeals in Lebanon dismissing the petitioner's filiation case, the judgment is final and enforceable, but is subject to a recourse proceeding before the Court of Cassation in Lebanon, which would review the legal basis for the determination of the Court of Appeals in Lebanon, and were it to quash the challenged judgment, would have the authority to examine the merits of the case and consider additional evidence that may be submitted.

However, a letter from the respondent's counsel does not constitute a basis to deny the petition upon the granting of the renewal as it violates the court's rules against both the submission of letters to the court in further support of motions and against supplemental submissions concerning motions without court approval. Thus, the respondent has not satisfied its burden to dissuade the court from adhering to its prior ruling granting the relief sought in the petition.

Additionally, ignoring these defects in the respondent's unauthorized submission, the petitioner's counsel submits its own letter in response stating that the petitioner intends to appeal the decision to the Lebanese Court of Cassation, within 60 days of the notice of judgment if the Court of Cassation

permits it to do so. The petitioner's letter further corroborates the Sakr affidavit inasmuch as it notes that the Court of Cassation likewise has the authority to consider evidence not submitted to the lower court in the same fashion as the prior Lebanese appeals court. Although the petitioner's letter is also an impermissible submission, it further supports the granting of his petition. As discussed above, even if the decision of the lower courts in Lebanon are on appeal, it appears to this court that they are still pending within the meaning of CPLR 3102(e).

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the branch of the motion by the respondent, New York Presbyterian Hospital, which seeks leave to renew its opposition to the petition is granted, and upon renewal the court adheres to its prior determination, and it is further

ORDERED that the branch of the motion by the respondent, New York Presbyterian Hospital, which seeks to reargue its opposition to the petition, or in the alternative, a stay of this proceeding pending the determination of the petitioner's appeal in the Court of Appeal in Lebanon is denied.

This constitutes the Decision and Order of the court.

Dated: June 22, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON