

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
5 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY
6 TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE
7 ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT
8 STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR
9 PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

10 At a stated term of the United States Court of
11 Appeals for the Second Circuit, held at the Thurgood
12 Marshall United States Courthouse, Foley Square, in the
13 City of New York, on the 14th day of February, two
14 thousand six.

15 PRESENT: HON. DENNIS JACOBS,
16 HON. PIERRE N. LEVAL,
17 HON. CHESTER J. STRAUB,

18
19 _____ Circuit Judges.

20 - - - - -X
21 GEORGE KOURKOUNAKIS,

22 Plaintiff-Appellant,

23 -v.-

05-2927-cv

24 JOSEPH DELLO RUSSO,

25 Defendant-Appellee.

26 - - - - -X
27 APPEARING FOR APPELLANT: VICTOR M. SERBY (Catherine M.
28 Conrad on the brief),
29 Woodmere, NY for Plaintiff-
30 Appellant.
31

1 **APPEARING FOR APPELLEE:** JOHN TOMASZEWSKI, Marulli &
2 Associates P.C., for
3 Defendant-Appellee.

4 Appeal from a Judgment of the United States District
5 Court for the Southern District of New York (Rakoff, J.)
6 entered May 3, 2005, granting defendant's motion for
7 summary judgment. Also, appeal from an order of the
8 district court conditioning a time extension on the
9 payment of \$1,000 to the clerk's office.

10 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**
11 **ADJUDGED AND DECREED** that the judgment and order of the
12 district court be **AFFIRMED.**

13 In this diversity suit, George Kourkounakis
14 ("Kourkounakis") asserts state claims arising out of
15 injuries allegedly suffered after undergoing LASIK
16 surgery: (a) that Dr. Joseph Dello Russo ("Dello Russo")
17 failed to elicit informed consent and (b) that Dello
18 Russo deviated from accepted medical practice in the
19 surgery. This Court reviews a grant of summary judgment
20 de novo. Santos v. Murdock, 243 F.3d 681, 683 (2d Cir.
21 2001). Kourkounakis also challenges an order of the
22 district court conditioning a time extension for filing
23 expert reports on the payment of a \$1,000 sanction to the
24 clerk's office. This court reviews the imposition of
25 Rule 37 sanctions for abuse of discretion. Daval Steel
26 Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir.
27 1991). We assume familiarity with the facts, the
28 procedural history, and the issues on appeal.

29 1. New York law requires a medical malpractice
30 plaintiff to establish (inter alia) "a deviation or
31 departure from accepted practice." Amsler v. Verrilli,
32 119 A.D.2d 786, 786 (N.Y. App. Div. 2d Dep't 1986).
33 Plaintiff attempted to adduce evidence as to this element
34 by producing the supposedly expert opinion of one Bruce
35 Randolph Tizes, M.D., J.D.. The district court rejected
36 Tizes' qualifications to render an expert opinion on the
37 LASIK procedure in view of the fact that he had not
38 practiced medicine since the mid-1990s, did not appear to
39 have a valid medical license, never trained in that
40 methodology, never performed or was accredited in LASIK,
41 and never examined the plaintiff. For summary judgment
42 appeals where "contested evidence is essential . . . and

1 the trial court has excluded the evidence, we may decide
2 the appeal . . . on the basis of the soundness of the
3 evidentiary ruling." Raskin v. Wyatt Co., 125 F.3d 55,
4 67 (2d. Cir. 1997). We affirm, because the district
5 court did not abuse its discretion in concluding that Dr.
6 Tizes lacked the necessary qualifications to establish an
7 issue of material fact as to the adequacy of the
8 procedures Dello Russo followed. See Daubert v. Merrell
9 Dow Pharmaceuticals, 509 U.S. 579, 589 (1993).

10 Plaintiff also failed to produce competent expert
11 evidence for his claim of lack of informed consent.
12 Under New York law, a patient making this claim must
13 "adduce expert medical testimony in support of the
14 alleged qualitative insufficiency of the consent." N.Y.
15 Civ. Prac. L. & R. § 4401-a (McKinney 2005). See also,
16 LaMarque v. North Shore Univ. Hosp., 227 A.D.2d 594, 594
17 (N.Y. App. Div. 1996) ("An expert witness must possess
18 the requisite skill, training, knowledge, or experience
19 to ensure that an opinion rendered is reliable."). Based
20 on the same concerns with Dr. Tizes's qualifications
21 discussed above, the district court did not abuse its
22 discretion in finding the testimony of Dr. Tizes
23 incompetent to sustain the plaintiff's claim of lack of
24 informed consent.

25 2. Under Rule 37(b), a district court may order any
26 "just" sanction for failure to comply with a discovery
27 order. Fed. R. Civ. P. 37(b)(2). Under Rule 37, the
28 district court has "broad" discretion to curb "abusive
29 litigation practices." Friends of Animals v. United
30 States Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997).
31 The district court's case management plan called for
32 Kourkounakis's expert report to be filed by October 20,
33 2004; Korukounakis only sought an extension of time for
34 the first time at a December 15 conference. The district
35 court found that this delinquency was part of "a practice
36 . . . of disregarding orders and deadlines set by the
37 Court," and did not abuse its discretion in imposing a
38 \$1,000 sanction under Rule 37.

39 For the foregoing reasons, we AFFIRM the judgment and
40 order of the district court.

41 FOR THE COURT:
42 ROSEANN B. MACKECHNIE, CLERK
43 By:

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Lucille Carr, Deputy Clerk