

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4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL  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; Kourkounakis 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