

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18216
Y/kmg

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Submitted - January 2, 2008

A. GAIL PRUDENTI, P.J.
PETER B. SKELOS
HOWARD MILLER
JOSEPH COVELLO
WILLIAM E. McCARTHY, JJ.

2007-05021

DECISION & ORDER

Jennifer Duncan, respondent, v 605 Third Avenue,
LLC, et al., defendants third-party plaintiffs,
Vaughan Carpet, Inc., defendant-appellant;
John Wiley & Sons, Inc., third-party defendant-
appellant.

(Index Nos. 21222/03, 75556/04)

Segal McCambridge Singer & Mahoney, Ltd., New York, N.Y. (Dwight A. Kern of
counsel), for defendant-appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York, N.Y. (Stephen J. Donahue of
counsel), for third-party defendant-appellant.

Torgan & Cooper, P.C., New York, N.Y. (Angelicque M. Moreno of counsel), for
respondent.

In an action to recover damages for personal injuries, the defendant Vaughan Carpet,
Inc., and the third-party defendant, John Wiley & Sons, Inc., separately appeal from an order of the
Supreme Court, Kings County (Kramer, J.), dated April 13, 2007, which denied their respective
motions to vacate so much of a prior order of the same court dated December 15, 2006, as directed
them to continue the plaintiff's deposition upon written interrogatories.

March 4, 2008

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ORDERED that the order is reversed, on the facts and in the exercise of discretion, with one bill of costs, the motions to vacate are granted, so much of the order dated December 15, 2006, as directed the appellants to continue the plaintiff's deposition upon written interrogatories is vacated; and it is further,

ORDERED that within 90 days after the date of this decision and order, the plaintiff's deposition shall be completed by such means to which the parties may agree or, in the event that the parties are unable to agree upon such means, by means of live video conferencing, with the plaintiff testifying from her home; provided that, in the event that the plaintiff shall submit to the Supreme Court, Kings County, a certification by a court-designated physician that her participation in an oral deposition, including one conducted by means of live video conferencing, would be harmful to her health, the plaintiff shall not be orally deposed, and the appellants shall instead obtain disclosure from the plaintiff through written interrogatories.

Due to the plaintiff's medical condition, her deposition was conducted on various dates at her Brooklyn apartment, and each session was of limited duration. At the fourth such session, the court reporter refused to proceed with the transcription of the plaintiff's testimony, due to the allegedly unsanitary condition of the apartment. Shortly thereafter, at a conference before the Supreme Court, the appellants requested an order directing that the plaintiff's deposition be completed at a neutral site approved by her doctors. In an order dated December 15, 2006, the Supreme Court, inter alia, directed instead that the appellants "continue [the] deposition of plaintiff via written interrogatories, as opposed to oral deposition."

The appellants separately moved to vacate so much of the order dated December 15, 2006, as required them to resort to written interrogatories. The plaintiff opposed the motions on the ground that she was unable to travel outside of her home due to her medical condition. During the pendency of the motions, the plaintiff relocated to Sullivan County. In the order appealed from, the Supreme Court denied the appellants' motions.

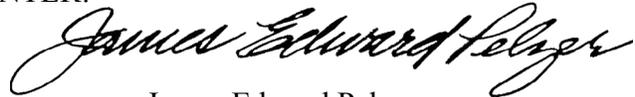
Although the plaintiff submitted an unsigned report by a physician indicating that her medical condition requires her to avoid travel outside her home and exposure to other individuals, there is no evidence in the record demonstrating that an oral examination, particularly one conducted via live video conferencing and not requiring the plaintiff to leave her home, "would be so harmful as to seriously endanger [the plaintiff's] physical condition" (*Equitable Lumber Corp. v Northeastern Const. Corp.*, 43 AD2d 845). The appellants "should not be required to examine the witness by written interrogatories in the absence of a certification by a court-designated physician that oral examination would be harmful to her health" (*Randall v Schwartz*, 84 AD2d 525; see *Equitable Lumber Corp. v Northeastern Const. Corp.*, 43 AD2d at 845).

Accordingly, the Supreme Court should have granted the appellants' respective motions to vacate so much of the order dated December 15, 2006, as limited their disclosure from the plaintiff to written interrogatories. The appellants are entitled to depose the plaintiff, to the extent indicated herein. In the event that the plaintiff is able to show that such an examination would endanger her health, she may move in the Supreme Court for a protective order, which may be

granted if supported by the certification of a court-designated physician establishing that an oral examination, including one conducted by means of live video conferencing, would be harmful to the plaintiff's health.

PRUDENTI, P.J., SKELOS, MILLER, COVELLO and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".

James Edward Pelzer
Clerk of the Court