

**Besimer v Wood**

2007 NY Slip Op 31693(U)

June 18, 2007

Supreme Court, Ulster County

Docket Number: 0042566/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

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DONNA BESIMER,

Plaintiff,

-against-

JANE WOOD and GREGG WOOD,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJ: 55-06-00389 Index No. 04-2566

Appearances: Finkelstein & Partners, LLP  
Attorneys For Plaintiff  
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Newburgh, NY 12550

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Middletown, NY 10941

### **DECISION/ORDER**

George B. Ceresia, Jr., Justice

The defendant has made a motion pursuant to CPLR § 3126 to dismiss plaintiff's complaint by reason of plaintiff's alleged willful failure to comply with the Court's discovery stipulation and order dated April 11, 2006. The order required plaintiff to submit to an independent medical examination ("IME") by a physician designated by the defendants

within sixty days of the completion of examinations before trial. When defendants scheduled two IMEs, one with an orthopedist and one with a neurologist, plaintiff objected. Supreme Court Justice Vincent G. Bradley subsequently directed that plaintiff submit to both IMEs. Defendants indicate that plaintiff failed to appear at the neurological IME scheduled for September 25, 2006. It was rescheduled for October 20, 2006. Plaintiff's attorney subsequently telephoned to cancel the appointment. The IME was then rescheduled for November 9, 2006. It is indicated that plaintiff failed to appear. With respect to the orthopedic IME, it was initially scheduled for October 25, 2006. According to defendants, plaintiff's attorney subsequently telephoned to cancel that appointment, which was then rescheduled for November 15, 2006. Plaintiff again, failed to appear.

Plaintiff, in opposition to the motion, maintains that defendants did not provide plaintiff with at least twenty days notice, as required under CPLR § 3121 (a). It is indicated by her attorney that plaintiff did not attend the IMEs scheduled in November 2006 by reason that plaintiff's father-in-law had passed away at the beginning of November. Plaintiff requests an additional opportunity to complete the IMEs. Notably, plaintiff did not submit her own affidavit in opposition to the motion, to provide her own explanation with regard to her inability to attend the IMEs.

With regard to the lack of adequate notice, while some of the IMEs were not scheduled a full twenty days in advance of the IME as required under CPLR 3121, there is no evidence that plaintiff ever voiced any objection to the notices which she received. Nor

has plaintiff presented evidence with regard to how she was prejudiced by the lack of a full twenty day notice.

Under all of the circumstances the Court finds that the motion for relief under CPLR 3126 should be granted. The Court will direct that plaintiff be precluded from presenting evidence in support of her complaint unless, within sixty days, she submits to the IMEs directed by Justice Bradley. The Court will direct that the IMEs be re-noticed by the defendants, and direct that the plaintiff be given a full twenty days notice thereof. The Court will further direct that plaintiff pay any expense incurred by the defendants in connection with the cancelled IMEs.

Accordingly, it is

**ORDERED**, that defendants' motion is granted to the extent set forth above; and it is further

**ORDERED**, that plaintiff be and hereby is precluded from presenting evidence in support of her complaint unless, within sixty (60) days, she submits to the IMEs directed by Justice Bradley; and it is further

**ORDERED**, that the defendants re-notice the IMEs and in so doing provide a minimum of twenty (20) days written notice of the scheduled IME to the plaintiff; and it is further


**ORDERED**, that within twenty (20) days defendants submit to the plaintiff evidence of the costs, if any, incurred by defendants in connection with the cancelled IMEs; and it is

further

**ORDERED**, that within twenty (20) days after receipt of such evidence plaintiff reimburse defendants for the expenses incurred by the defendants in connection with the IMEs which were cancelled.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the defendants, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: June 18, 2007  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated February 8, 2007, Supporting Papers and Exhibits
2. Affirmation of Kristine M. Cahill, Esq., dated February 28, 2007