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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TERESA BLASI, by her Guardian Ad Litem, REGINA BLASI and REGINA BLASI, individually,

Plaintiff,

-against-

MICHAEL McKEOUGH, SHEILA McKEOUGH and 1026 PARK BOULEVARD, INC., d/b/a MARY'S PIZZA AND PASTA,

Defendants.

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TRIAL PART: 47

INDEX NO.:9377/08

MOTION DATE:11-30-09
SUBMIT DATE:11-30-09
SEQ. NUMBER - 003

The following papers have been read on this motion:

Notice of Motion, dated 10-29-09 1
Affirmation in Opposition, dated 11-20-09.....2
Reply Affirmation, dated 11-25-09.....3

This motion by the defendants Michael McKeough and Sheila McKeough to renew and reargue the application for certain discovery made by plaintiff, which application was resolved by letter ruling of the Court dated August 17, 2009, is granted to the extent that renewal is granted and upon renewal the parties are directed to proceed as set forth in this order. Reargument is denied.

In its ruling of August 17, 2009 the Court agreed with the plaintiff that upon a

neuropsychological examination by an expert chosen by the McKeough defendants a copy of the tests given and resulting raw data obtained should be disclosed directly to the plaintiff's attorneys. This ruling was issued after arguments were made by way of letters to the Court. In the letter transmitting the ruling, additional time was given to the defendants to retain another expert in view of the refusal of the first one hired to release the tests and data as directed. This motion followed.

Initially, the Court disagrees with the plaintiff that so much of the motion that is for reargument is untimely because the motion was made on October 29, 2009. As noted, the underlying discovery dispute was resolved by way of a letter transmitting the undersigned's ruling, but that letter was not an order and was signed by the Court's Law Secretary. The letter, though containing the direction of the Court, therefore lacked the legal force of an order and does not constitute law of the case (*Gasparre v St. Joseph's Med. Ctr.*, 186 AD2d 453 [1st Dept. 1992]), and was not an appealable paper. *Soule v Lozada,* 240 AD2d 897 (3d Dept. 1997). [1] Accordingly, the time to move to reargue, which is coextensive with the time to take an appeal (*see, Haughton v F.W.D. Corp.*, 193 AD2d 781 [2d Dept. 1993]), never began to run. Moreover, the Court enjoys jurisdiction to consider untimely reargument motions in cases where the order was not a final disposition of the case but rather was interlocutory in nature. *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15 (1986); *cf., Johnson v*

[1] This Court frequently has made use of letter rulings as an expeditious means of resolving single-issue discovery disputes, but this depends, to a large extent, on the willingness of counsel to accept such a ruling as they might a verbal ruling from the Court during an off-the-record conference or in some other informal setting. Had the Court known that the loser might wish to make a formal record for purposes of motion practice or an appeal, this technique would not have been utilized.

Incorporated Village of Freeport, 303 AD2d 640 (2d Dept. 2003). That was the case here.

Nevertheless, reargument is denied. The Court does not find that it overlooked any matters of fact or law on the initial application. The moving papers contain little more than a history of the issue at bar, and present the affidavit of the newly retained expert defendants wish to use to conduct the neuropsychological examination of the plaintiff. As this does not constitute a showing that the Court misapprehended the facts or the law on the initial application, there is no basis for granting reargument. *See generally, Foley v Roche,* 68 AD2d 558, 567-568 (1st Dept. 1979).

However, renewal is granted. Renewal is appropriate where it is based on new facts not offered in the prior motion that would change the prior determination. Renewal should be denied in the absence of a reasonable justification for not submitting the additional facts upon the original application. CPLR 2221(e). *See, Kwang Bok Yi v. Ahn,* 278 AD2d 372 (2nd Dept. 2000); *Wavecrest Apartments Corp.* v. *Jarmain*, 183 AD2d 711 (2nd Dept. 1991). Examples of what constitutes reasonable justification include the locating of a witness (*Szentmiklosy v. County Neon Sign Corp.,* 276 AD2d 406 [1st Dept. 2000]); *Tesa v. NYCTA*, 184 AD2d 421 [1st Dept. 1992]) or the appearance of a further medical report. *Puntino v. Chin*, 288 AD2d 202 (2nd Dept. 2001). Here, the new facts are contained in the affidavit of the expert, Stuart Rothman, Ph.D. According to counsel for the defendants, this neuropsychologist was engaged after the expert originally retained by prior counsel for defendants declined to conduct the examination because of this Court's ruling on the tests and raw data, citing ethical considerations.

Because the new expert, apparently retained by new counsel after August 17, 2009, also declines to release the tests and raw data to plaintiff's attorney, the Court has before it a good-faith attempt by defendants to comply with the ruling, which directed them to retain another expert so that the disclosure could be obtained. The refusal of this second expert after the initial ruling constitutes a basis for renewal.

Dr. Rothman states in his affidavit that, in his opinion, psychological test instruments and accompanying test protocols are protected by copyright law. However, he is not an attorney and no authority is offered in support of his position, either by him or defendants' attorney. Even assuming they were so protected, there is no explanation offered as to how the use of the same in the current litigation would constitute a violation of copyright. Accordingly, this contention is insufficient as a reason to deny plaintiff's attorney these test instruments and protocols.

Dr.Rothman also cites ethical constraints in releasing raw data to the general public, and offers instead to release such data to a psychologist of plaintiff's choosing, or the Court. Unlike the assertion regarding copyright, however, the Court cannot say this is without foundation. This is the second expert that has raised this constraint, without any contrary evidence from the plaintiff, and a court "cannot fault [a medical services provider] for asserting its right to refrain from engaging in conduct which it considered unethical." *Grace Plaza of Great Neck, Inc. v Elbaum,* 183 AD2d 10, 17 (2d Dept. 1992).

Finally, while the Court is mindful of the right of plaintiff's attorneys to obtain the disclosure previously directed, it will not interfere with how defendants' expert chooses to

conduct his testing.

In view of the foregoing, and the statement from defendants' attorney in reply that "defendants are not trying to deny plaintiff disclosure of the testing material and raw data" (Casale Reply Aff., at ¶ 13) the Court orders as follows:

Notwithstanding this Court's certification order, the neuropsychological testing will go forward and will be conducted as desired by the defendants' expert. The test materials and protocols are to be produced to plaintiff's attorneys directly.

The raw data shall be turned over to the Court, which will in turn release all such information to plaintiff's attorney under an injunction not to further release such information to any third party outside counsel's office, excepting a licensed psychologist or psychiatrist of plaintiff's choosing, and not to permit any copies thereof to be placed in the public court file. Should this injunction against further dissemination render the initial production to the Court unnecessary in the view of Dr. Rothman, he may provide the data directly to plaintiff's attorneys, who will remain subject to this direction.

The report of defendants' expert shall be produced directly to plaintiff's attorneys.

Rulings on admissibility at trial are referred to the trial judge.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 3, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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