

Friedman v MTA Long Island Railroad

2011 NY Slip Op 33812(U)

August 15, 2011

Sup Ct, Queens County

Docket Number: 3512/2009

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

MARILYN FRIEDMAN, Index No.: 3512/2009
Plaintiff, Motion Date: 06/23/11
- against - Motion No.: 11
MTA LONG ISLAND RAILROAD and Motion Seq.: 1
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by the defendants for an order compelling the plaintiff to appear for an independent medical examination and directing the plaintiff to provide certain HIPPA compliant authorizations:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 9
Reply affirmation.....10 - 12

This is an action for damages for personal injuries sustained by the plaintiff on October 17, 2008 at the Long Island Railroad train station in Inwood when she fell while attempting to exit a train.

The action was commenced by the filing of a summons and verified complaint on February 13, 2009. Issue was joined by service of defendant's verified answer on March 10, 2009. On July 28, 2009, the plaintiff served a bill of particulars alleging that as a result of the accident she sustained a fractured right leg which required an open reduction and internal fixation surgery with extensive hardware.

The preliminary conference was held on August 19, 2009. The order, signed by this Court required, inter alia, that plaintiff provide medical authorizations within 30 days and required that the IME of the plaintiff take place within 45 days of the plaintiff's EBT. Plaintiff's EBT was scheduled for December 2, 2009.

On March 31, 2010, the parties entered into a compliance conference order before Justice Ritholtz. The order provided that the Note of Issue was to be filed on or before October 29, 2010, and that outstanding authorizations were to be supplied by the plaintiff within 20 days of the date of the order. The plaintiff was also directed to provide, "HIPPA authorizations to those doctors and facilities that examined or treated the plaintiff for those conditions that caused her to be using a cane on the day of the accident in issue within 30 days." The order also stated that the plaintiff's deposition would take place on June 7, 2010, and that a designation of a physician for an IME would be made by the defendant in writing within 5 days of completion of the plaintiff's EBT. The order stated that the failure to make such a designation would be deemed a waiver of the right to schedule the examination.

The plaintiff's deposition took place on June 10, 2010. Defendants' counsel contends that on May 27, 2010, counsel requested that prior to scheduling the IME, defendants required an authorization for the prior treating physicians who the plaintiff was seeing for conditions related to her use of a cane on the date of the accident including Dr. Howard Rosenfeld. Counsel contends that they did not learn until January, 2011 that the plaintiff sustained a prior hip fracture requiring a partial right hip replacement in 2001. Counsel states that they did not schedule the IME as it was their intention to obtain the authorizations and the records and to provide them to the physician who would conduct the physical examination of the plaintiff. Counsel contends that to date they have still not received the HIPPA compliant authorizations for said records.

The plaintiff filed a Note of Issue on October 28, 2010 in which they stated that the defendants waived their right to a physical examination of the plaintiff. The court notes that the trial is now scheduled for September 21, 2011.

Defendants' counsel submits that they have not waived their right to conduct an IME. Counsel states he did not move to vacate the Note of Issue but elected to take the matter up with Referee Florio in March 2011. Counsel contends that at the conference before the Referee, plaintiff's counsel refused to agree to

produce plaintiff for an IME or to provide the requested authorizations.

Defendant's counsel now moves to compel an IME while the case remains on the trial calendar stating that there will be no prejudice to the plaintiff. Counsel cites several cases from the Appellate Division, Second Judicial Department, stating that where a defendant has failed to move to vacate the note of issue and under certain circumstances where the defendant has provided a reasonable excuse and absent a showing of prejudice to the plaintiff, the court may in the interest of justice exercise its discretion to relieve a party of a waiver of the right to conduct a physical examination (citing Spano v Omni Eng'g, LLC, 69 AD 3d 922 [2d Dept. 2010]; Jones v. Grand Opal Constr. Corp., 64 AD3d 543 [2d Dept. 2009]; Narine v. Hussain, 19 AD3d 665 [2d Dept. 2005]; Williams v Long Island College Hosp., 147 AD2d 558 [2d Dept. 1989]).

In opposition, plaintiff's counsel states that by failing to designate a physician to conduct the IME within the time set forth in the compliance order and by failing to set forth unusual or extenuating circumstances subsequent to the filing of the note of issue, the defendants waived their right to conduct the physical examination (citing Rodriguez v Sau Wo Lau, 298 AD2d 376 [2d Dept. 2002]; Thevening v Jian Young Ye, 297 AD2d 731 [2d Dept. 2002]; Gill v UPS, 249 AD2d 265 [2d Dept. 1998]; Mayo v Lincoln Triangle Assocs., 248 AD2d 362 [2d Dept. 1998]).

Upon review and consideration of defendants' motion, plaintiff's affirmation in opposition and defendants' reply thereto, this Court finds that although the defendants waived their right to a physical examination of the plaintiff by their failure to designate a physician to conduct the examination by the date set forth in the compliance conference order, based upon the circumstances of this case, the defendants shall be relieved of their waiver as there has been no showing of any prejudice to the plaintiff. Here, the defendants attempted to schedule an IME in March 2011 before the Referee but plaintiff refused at that time. Further, no prejudice to the plaintiff will occur as this case will remain on the trial calendar while the IME is held {see Spano v Omni Eng'g, LLC, 69 AD 3d 922 [2d Dept. 2010]; Jones v. Grand Opal Constr. Corp., 64 AD3d 543 [2d Dept. 2009]; Barbosa v Capolarello, 52 AD 629 [2d Dept. 2008]; Cespuglio v SA Bros. Taxi Corp., 44 AD3d 697 [2d Dept. 2007];, Narine v. Hussain, 19 AD3d 665 [2d Dept. 2005]; Williams v Long Island College Hosp., 147 AD2d 558 [2d Dept. 1989]).

Accordingly, for all of the above stated reasons, the defendants' motion for an order directing the plaintiff to execute certain authorizations and for an order compelling plaintiff to appear for an independent medical examination is granted to the extent that the plaintiff shall execute all outstanding authorizations forthwith and submit to an IME to be conducted by defendant's designated physician prior to September 9, 2011.

Dated: Long Island City, N.Y.
August 15, 2011

ROBERT J. MCDONALD
J.S.C.