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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: IA PART 11

YVONNE RIOS,

Plaintiff,

Index No. 306747-09

- against -

DECISION AND ORDER

1146 OGDEN LLC, CYA MANAGEMENT LLC,
NEW CITY MANAGEMENT LLC, and
CYA MANAGEMENT LLC.,

Defendants.

HON. LAURA G. DOUGLAS:

Defendants 1146 Ogden LLC and New City Management LLC (collectively, "1146 Ogden") have moved pursuant to CPLR §3121 and 22 NYCRR §202.21 for an order compelling the plaintiff to submit to an additional physical examination on the grounds that unusual or unanticipated circumstances have developed subsequent to the filing of a note of issue which require additional pretrial proceedings to prevent substantial prejudice. The motion is denied in its entirety.

The plaintiff seeks monetary damages for personal injuries purportedly sustained when she slipped on a broken bathroom tile that fell from the wall while she was showering. On May 19, 2011, 1146 Ogden designated Dr. Michael J. Katz to conduct a physical examination of the plaintiff. Dr. Katz examined the plaintiff on February 8, 2011, and issued a report of his findings on March 24, 2011. The plaintiff filed a note of issue and certificate of readiness on June 27, 2013. The instant motion was filed on July 23, 2013. This action appears on the Pre-Trial Part's calendar for October 30, 2014.

The "unusual or unanticipated circumstances" which the movants contend necessitate a further physical examination concern Dr. Katz, who was the subject of a

hearing before Justice Duane A. Hart in the Supreme Court of Queens County in a case entitled *Bermejo v. Amsterdam & 76th Associates.* A copy of the transcript of that hearing, which was conducted on July 1, 2013, is annexed to the moving papers. In the transcript provided to the Court, Justice Hart set forth his reasons for directing a mistrial of that case, and stated that Dr. Katz had perjured himself by testifying that his examination of plaintiff Bermejo lasted "ten to twenty" minutes, when the examination actually lasted less than two minutes. The Court reached this conclusion based on its review of a secret audiotape of the examination made by a paralegal employed by plaintiff's counsel. Justice. Hart commented that he would refer this matter to the Queens County District Attorney, as well as to the Administrative Judge of Queens County.

The movants contend that this incident amounts to an unusual and unanticipated circumstance which, through no fault of their own, precludes them from using Dr. Katz as an expert witness at trial. They argue that he is beyond rehabilitation as a witness, and that if they were to call him to testify at trial, they would be deprived of a fair trial. In addition, they argue that this scenario would subvert the truth-seeking function of the Court.

In the wake of the hearing before Justice Hart concerning Dr. Katz, identical applications have been considered by at least two Courts in published decisions. In *Lorentty v. Muniz*, 2013 WL 7806421 [Sup Ct, Queens Cty 2013], the Court noted that there was no evidence that Dr. Katz had been arrested, suspended from practice or subjected to other professional discipline, nor evidence that there had been a referral to the District Attorney's office. The Court concluded that the mere possibility that Dr. Katz might be subject to vigorous cross-examination and impeachment was insufficient to compel a further physical examination. The Court in *Atchison v. Metropolitan Enterprises*

Inc., 43 Misc3d 1207(A) [Sup Ct, Kings Cty 2014] reached the same conclusion, holding that the "defendants' fear that jurors will be more concerned with the integrity or credibility of Dr. Katz than with the truth of plaintiff's injury allegations is not a sufficient reason for this court to order plaintiff to submit to an additional IME..."

While CPLR §3121 contains no restriction on the number of examinations to which a plaintiff may be subjected, an additional examination is warranted only when the party seeking the extra examination demonstrates the need for it. Moreover, where a note of issue has been filed, the party seeking the additional examination must demonstrate that unusual or unanticipated circumstances have arisen subsequent to the filing that would cause substantial prejudice if the request is denied (*see* 22 NYCRR 202.21).

The Courts in *Lorentty* and *Atchison* found that they were constrained by the appellate holding in *Carrington v. Truck-Rite Dist. Systems Corp.*, 103 AD3d 606 [2nd Dept 2013]). In *Carrington*, the factors favoring a second examination were much stronger, in that the examining physician had been arrested and compelled to surrender his medical license. Nonetheless, the opportunities for impeachment that these extraordinary events presented did not justify a further physical examination. The Court cited the matters of *Schissler v. Brookdale Hospital Ctr.*, 289 AD2d 469 [2nd Dept 2001] and *Futersak v. Brinen*, 265 AD2d 452 [2nd Dept 1999], both of which concerned examining physicians subjected to disciplinary proceedings on unrelated matters after having conducting a physical examination of the plaintiff. In each instance, the Court found that the likelihood that these events would subject the experts to impeachment did not warrant a further physical examination. If anything, the circumstances concerning Dr. Katz are less compelling that

those in *Carrington.*

Accordingly, the motion is denied.

This constitutes the decision and order of this Court.

Dated: 7-1-14

LAURA G. DOUGLAS
J.S.C.