

Kelly v Seeley
2014 NY Slip Op 32817(U)
March 17, 2014
Supreme Court, Westchester County
Docket Number: 60414/12
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
WILLIAM H. KELLY, IV,

Plaintiff,

DECISION & ORDER

-against-

Index No. 60414/12

Motion Date: Mar. 17, 2014

ROBERT E. SEELEY and
HENRY C. ALDERS WHOLESALE FLORIST, INC.,

Seq. No. 2

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on Order to Show Cause by defendants for an order, pursuant to CPLR 3121 and 3124, compelling plaintiff to submit to appear for a neuropsychological examination.

Order to Show Cause - Affirmation in Support - Exhibits A-J
Affirmation in Opposition - Exhibits 1-2

Upon the foregoing papers and the proceedings held on March 17, 2014, it is ordered that the motion is decided as follows:

In this action, plaintiff seeks to recover damages for personal injuries allegedly sustained when the motor vehicle he was driving was hit by a van owned and operated by defendants. In his verified bill of particulars, plaintiff alleged numerous physical injuries, including "Traumatic Brain Injury Axonal Injury which has caused the Plaintiff to experience double-vision, headaches, and memory loss," as well as "altered level of consciousness."

Plaintiff appeared for a deposition on February 28, 2013, wherein he testified that the symptoms from his brain injury were headache, loss of memory and problems with vision in his left eye. When asked if he was currently treating with any doctor for symptoms related to his brain injury, plaintiff testified that he had seen a neurologist at the time of the accident who recommended he see another doctor, but he was going to physical therapy five days a week so he didn't have time to go to another doctor (Ex. E, Deposition Transcript at 25-26). He denied being treated by any other doctor for his brain injury or related symptoms (*id.* at 26).

By letter dated September 19, 2013, defendants gave plaintiff notice of a psychiatry and neurology examination with Dr. William Head on November 26, 2013.

Plaintiff served a supplemental verified bill of particulars dated November 15, 2013. The supplemental bill of particulars alleged, inter alia, various brain hemorrhages, cognitive impairment, impairment of executive function with evidence of failure to self-correct with impulsivity, confusion, forgetfulness, personality changes, poor comprehension and need for cognitive therapy. The supplemental bill of particulars also alleged an "exacerbation of all symptoms."

By letter dated November 21, 2013, defendants rejected the supplemental bill of particulars on the ground that it did not contain the required verification. In the letter, defendants also demanded authorizations for additional claims, conditions or injuries alleged, including but not limited to cognitive rehabilitation, lack of impulse control, anxiety and depression. Defendants also demanded that plaintiff specify what conditions were allegedly exacerbated and provide authorizations for any pre-accident treatment of those conditions. Finally, defendants demanded a further deposition and further independent medical examinations for, inter alia, psychological evaluation and vocational rehabilitation evaluation. Plaintiff has objected to any further examinations.

On November 26, 2013, plaintiff appeared for an examination by Dr. Head, who is certified in neurology and neuropsychiatry. Dr. Head summarized his findings in a report dated January 7, 2014. Therein, Dr. Head noted that plaintiff complained of, inter alia, headaches, neck pain, low back pain, dizziness when standing up, blurred vision in the left eye, bilateral hearing impairment, anxiety, memory and concentration impairment, difficulty talking and impairment of comprehension. Dr. Head also summarized his neurological and psychiatric examinations and findings, including his findings that plaintiff attempted to simulate cognitive impairment and pathology on calculation and sensory testing, that plaintiff showed no objective signs of neurological or psychiatric condition, his ability to concentrate was intact, and his recent and remote memory was intact. Dr. Head noted in the report that plaintiff denied a prior history of similar symptoms, including headaches, impairment of memory, concentration or comprehension. Dr. Head acknowledged reviewing certain records in preparing his report, including the following: (1) hospital records indicating a loss of consciousness and a CT scan of the head revealed hemorrhages; (2) the hospital discharge summary contained a recommendation for acute cognitive rehabilitation; (3) the bill of particulars which alleged traumatic brain injury axonal injury, which caused double-vision, headaches, and memory loss; (4) report of Dr. Jin Li, dated July 10, 2012, which acknowledged that plaintiff reported having a learning disability, noted a decreased recent memory, contained a finding of traumatic brain injury with axonal injury based upon an MRI scan and a recommendation of cognitive rehabilitation; (5) report of Dr. Weintraub, dated October 23, 2013, which noted an abnormal impression from an EEG study of cerebral irritability, reversal of significant brain injuries, but noted that long term effects might still be present. Dr. Head acknowledged in the report that he had not reviewed the MRI films, brain CT scans or relevant reports.

By letter dated January 7, 2014, Dr. Head noted the review of additional documents, including plaintiff's school records, including prior psychological evaluation and statements, as well as additional reports of Dr. Weintraub. Therein, Dr. Head noted that he had not been told at

plaintiff's examination that plaintiff had a history of learning disability and revised his statement about plaintiff simulating cognitive impairment. Dr. Head further opined that plaintiff's claimed inability to perform calculation testing is consistent with his reported learning disabilities, and that his cognitive impairment was not caused by the accident, but resulted from a preexisting learning disorder.

Moving defendants now seek a neuropsychological examination of plaintiff based upon the new allegations in the supplemental bill of particulars, including cognitive impairment, impairment of executive function, confusion, personality changes, poor comprehension and need for cognitive therapy. Defendants contend that, at the time they noticed the examination by Dr. Head, the limits of plaintiff's neurological injuries were confirmed by plaintiff's deposition testimony that symptoms from his brain injury were limited to headaches, loss of memory, and vision problems with in his left eye. Defendants further rely upon plaintiff's deposition testimony that he received virtually no treatment for those symptoms. Defendants contend that they are entitled to an examination with respect to the newly alleged injuries in order to prepare their defense. Defendants further contend that a neuropsychological examination is necessary in light of plaintiff's diagnosis prior to the accident as having significant cognitive deficits and learning disabilities, as established in his academic files. Finally, defendants contend that Dr. Head is not the appropriate professional to ascertain plaintiff's "measure of damages with respect to cognitive deficits." In support of this contention, defendants submit the affidavit of Dr. John Sidtis, a neuropsychologist, who avers that the examination conducted by a neuropsychologist differs from that of a neurologist or a neuropsychiatrist, who are unable to quantify cognitive deficits and are not trained or experienced to evaluate cognitive abilities in depth like a neuropsychologist. Dr. Sidtis further avers that neurologists and neuropsychiatrists are not suited to examining patients with educational level or developmental issues.

Plaintiff opposes the motion on the basis that plaintiff has already been examined by Dr. Head, who is certified in psychiatry and neurology. Plaintiff contends that Dr. Head performed both a neurological evaluation and psychiatric evaluation, which included testing plaintiff's memory, and did not require or recommend further psychiatric or neuropsychological work up. Plaintiff further asserts that defendants' counsel was aware of the claim of traumatic brain injury from the original bill of particulars and was served with the supplemental bill of particulars prior to the examination by Dr. Head. Plaintiff, however, admits that Dr. Head's report indicates that he did not read the supplemental bill of particulars prior to the examination, but notes that Dr. Head read the Westchester County Medical Center records which recommended "acute cognitive rehab following discharge." Plaintiff also contends that defendants are only seeking another examination since they are unhappy with Dr. Head's first report, which found that plaintiff attempted to simulate cognitive impairment and pathology on calculation and sensory testing. In light of the foregoing, plaintiff contends that defendants are not entitled to a further examination.

There is no restriction in CPLR 3121(a) on the number of examinations to which a party may be subjected. However, once an examination has been conducted, an additional examination shall be permitted only where the party seeking the examination demonstrates that it is necessary (*Giordano v Zhen*, 103 AD3d 774, 775 [2d Dept 2013]; *Carrington v Truck-Rite Dist. Sys. Corp.*, 103 AD3d 606, 607 [2d Dept 2013]; *Rinaldi v Evenflo Co.*, 62 AD2d 856 [2d Dept 2009]; *Schissler v Brookdale Hospital Center*, 289 AD2d 469 [2d Dept 2001]).

In the present case, moving defendants have demonstrated that a neuropsychological examination of plaintiff is necessary in light of the new injuries and conditions alleged in the supplemental bill of particulars, including the allegation of cognitive impairment, which was served after defendants noticed the examination by Dr. Head, a neurologist and neuropsychiatrist. Although Dr. Head performed both a neurological evaluation and psychiatric evaluation of plaintiff, defendants have demonstrated through the affidavit of a neuropsychologist that Dr. Head was not qualified to quantify and properly evaluate plaintiff's alleged cognitive impairments which are now alleged. Plaintiff failed to refute this evidence. Moreover, as acknowledged by plaintiff, Dr. Head did not review the supplemental bill of particulars prior to plaintiff's examination and was unaware of the claims of cognitive impairment. Accordingly, in the interests of fairness, defendants are entitled to an examination of plaintiff by a neuropsychologist as to his cognitive abilities.

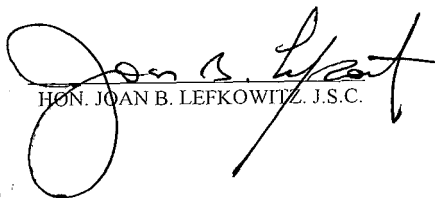
In view of the foregoing, it is

ORDERED that the motion is granted, and plaintiff shall appear for an examination by a neuropsychologist selected by defendants on or before April 24, 2014; and it is further

ORDERED that counsel for all parties shall appear for a conference in the Compliance Part, Courtroom 800, on April 25, 2014 at 9:30 A.M.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 10 days of entry.

Dated: White Plains, New York
March 17, 2014



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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