Luciano v Kennedy
2015 NY Slip Op 32016(U)
July 2, 2015
Supreme Court, Westchester County
Docket Number: 69514/12
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

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CARI LUCIANO and ANNA LANE,

Plaintiffs,

-against-

DOUGLAS KENNEDY,

Defendant.

---x

DECISION & ORDER

Index No. 69514/12
Motion Date: Feb. 9, 2015

Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order (1) compelling defendant to serve a supplemental response fully responsive to each and every demand contained in plaintiffs' Notice for Discovery and Inspection dated October 30, 2014, and waiving his "purported privilege" with respect to the demanded documents and information; and (2) striking defendant's Supplemental Bill of Particulars regarding his affirmative defenses dated November 24, 2014.

Order to Show Cause - Affidavit in Support of Elliot H. Taub, Esq.
- Exhibits A-AA
Affirmation in Opposition of Rebecca G. Newman, Esq. - Exhibits A-O
Defendant's Privilege Log - Documents for In Camera Review

Upon the foregoing papers and the proceedings held on February 9, 2015, it is ordered that the motion is decided as follows:

FACTUAL AND PROCEDURAL BACKGROUND

In the present action, plaintiffs allege, inter alia, claims for negligence, assault and battery, defamation, slander and libel. Plaintiffs, who were nurses at Northern Westchester Hospital (hereinafter "the Hospital") at the time of the alleged incident, allege that they sustained personal injuries as the result of an altercation which occurred at the Hospital on January 2, 2012, when defendant Douglas Kennedy attempted to leave the maternity ward of the Hospital with his newborn baby against plaintiffs' requests.

Certain discovery has taken place in this action, including six Independent Medical Examinations ("IMEs") of plaintiffs on behalf of defendant in July, 2014. Two of the IME

examiners found either no evidence of injury or no causal relationship with the subject incident. The remaining four IME examiners issued IME reports which found plaintiffs sustained an injury and found either a causal relationship to the subject incident or did not issue an opinion as to causation. Thereafter, those IME examiners issued addendums to their original IME reports modifying their opinions and diagnoses based upon the review of additional information and documents which were provided by defendant's counsel after they examined plaintiffs. According to the addendums, the additional information included plaintiffs' additional medical records, the decision of the court in defendant's criminal case involving the subject incident, and plaintiffs' deposition transcripts. In one of his addendums, the IME examiner referred to a meeting with defense counsel and defendant at which he was provided with additional documents.

I. IME Providers' Reports and Addendums

Dr. Richard DeBenedetto, a psychologist, examined plaintiff Lane on behalf of defendant on July 2, 2014. Dr. DeBenedetto's IME report (Plaintiffs' Ex. T) listed the medical records reviewed regarding treatment of plaintiff Lane's physical condition between January 7, 2012 and September 17, 2012, and listed a diagnosis of Adjustment Disorder with Anxiety. The report further stated the following: "Based on my psychological examination of Ms. Lane, Ms. Lane's statement regarding the incident in question and my review of the available records, it is my opinion that the reported symptoms of anxiety, disturbed sleep and decrease[d] efficiency at work are related to the emotional trauma associated with her having been assaulted at work on 01/07/12" (*Id.*, Dr. DeBenedetto's IME report at 3).

Thereafter, Dr. DeBenedetto issued an undated addendum to his IME report (hereinafter "Addendum report"). Therein, he stated that "further information and documents have been forwarded to me for review that [were] not available to me at the time of my evaluation of Ms. Lane" (Plaintiffs' Ex. T, Dr. DeBenedetto's Addendum report at 1). In the Addendum report Dr. DeBenedetto, listed the additional records reviewed and modified his opinion. The additional records listed in the Addendum report are as follows: (1) plaintiff Lane's deposition testimony (page 23 of transcript) regarding her "non-use of medication since the event"; (2) video surveillance tape; (3) Neurology IME Report dated 07/04/14 by Elliot Gross, M.D.; (4) plaintiff Lane's deposition testimony (page 14 of transcript) regarding unchanged work load since the event; (5) Judge's Decision *People v Kennedy* dated 11/20/12; (6) deposition testimony (pages 284-286) regarding appearance on the Today Show; and (7) Treatment Notes dated 07/12/13 - 01/10/13 of Michael Stern, Ph. D.

In the Addendum report, Dr. DeBenedetto stated, inter alia, that the review of the additional records and information raised "several concerns regarding the veracity of the statements Ms. Lane made to me during her examination regarding the events leading up to her reported state of anxious distress," including her description of the incident as an assault (*Id.*, Dr. DeBenedetto Addendum report at 2*)*. Dr. DeBenedetto asserted therein that a "[r]eview of the video of the incident as well as the findings of the judge in the [criminal] case suggest that while there was clearly a confrontation between Ms. Lane and Mr. Kennedy the issue of it being an

'assault' is questionable" (*Id.)*. Dr. DeBenedetto also noted that plaintiff Lane's statement to him that since the incident she has emotional difficulty in returning to work and, as a result has taken on a light work load, conflicted with her deposition testimony that "would imply no change in her work status as a result of the incident in question and no change in her work load or numbers of hours worked" (*Id.*). Dr. DeBenedetto further found inconsistencies in the Initial Intake Report and PTSD Symptom Questionnaire by Dr. Stern. Theses inconsistencies included the fact that plaintiff Lane exhibited "a full blown symptom picture of PTSD" only four or five days after the incident, although many of the symptoms "typically take weeks to arise and become fixed" (*Id.*). Finally, Dr. DeBenedetto found as follows: "Ms. Lane's endorsement of levels of concern for her safety, personal integrity and future which far exceed that which could reasonably be accounted for on the basis of the actual event which occurred. It is difficult to conceive, especially after reviewing the testimony and the video of the event, how Ms. Lane could realistically be in fear of her life (the essential component in a diagnosis of PTSD)" (*Id.*). Dr. DeBenedetto then gave his opinion as follows: "Given the above facts and the concerns with respect to the likely veracity of some of the information provided to me by Ms. Lane regarding the events which presumably underlie her then state of psychological distress, I cannot state with a reasonable degree of clinical certainty that the initial diagnosis of Adjustment Disorder with Anxiety is true in the present case" (*Id.*). Therein, Dr. DeBenedetto also changed his diagnosis to "R/O Adjustment Disorder with Anxiety, 309.24" and "R/O Malingering-Symptom Magnification, V65.2" (*Id.*).

Victoria L. Londin, a clinical psychologist, conducted an IME of plaintiff Luciano on behalf of defendant on July 21, 2014. She issued an IME report wherein she diagnosed Post-traumatic Stress Disorder and opined that there are "causally-related psychological symptoms present at this time" (Plaintiff's Ex. T, Dr. Londin's IME report at 4). Approximately two months later, after receiving additional documents and information, she issued an addendum to her IME report dated September 14, 2014. The additional documents and information included the following: (1) decision in defendant's criminal case, wherein the trial judge found no evidence of an actual physical injury, and which decision Dr. Londin determined called into question plaintiff Luciano's credibility; (2) plaintiff Luciano's deposition testimony wherein she testified regarding a history of poor sleep, as well as a history of DWI, which Dr. Londin determined indicated alcohol abuse; and (3) information that plaintiff Luciano appeared on The Today Show shortly after the incident. In view of the foregoing additional documents and information, Dr. Londin opined in her addendum that she could not conclude that "the issues related to me are casually related to the incident," and she questioned plaintiff Luciano's credibility and motives (*Id.*, Dr. Londin's Addendum report).

Although, Dr. David H. Elfenbein, an orthopedist, who examined plaintiff Lane on behalf of defendant on July 2, 2014, did not change his diagnosis of left cubital tunnel syndrome after receiving additional information on multiple occasions and meeting with defense counsel and defendant, he did change his opinion regarding causation. In his initial IME report, Dr. Elfenbein diagnosed plaintiff Lane with left cubital tunnel syndrome, but stated that he was unable to confirm a causal relationship between the twisting injury about which plaintiff Lane related to

him and the subsequent development of cubital tunnel syndrome without plaintiff Lane's medical records. Dr. Elfenbein further stated that "it would be unusual for a twisting injury as described by the examinee to cause cubital tunnel syndrome, but it is possible" (Plaintiff's Ex. T, Dr. Elfenbein IME report as to plaintiff Lane at 4).

Dr. Elfenbein issued an addendum to his initial IME report dated July 8, 2014 stating that he had received additional records regarding plaintiff Lane, but that the additional records did not change his opinions.

Dr. Elfenbein then issued a second addendum on August 20, 2014, wherein he stated that he reviewed, inter alia, the records of plaintiff Lane's treating orthopedic-surgeon, EMG report and MRI reports. In his second addendum, Dr. Elfenbein again lists his diagnosis as "Left cubital tunnel syndrome" and states that there was a direct causal relationship between the twisting injury to the left forearm and wrist of January 7, 2012 and the development of the symptoms and signs of cubital syndrome.

In a third addendum dated October 10, 2014, Dr. Elfenbein states that, after reviewing additional medical records, the transcript of plaintiff Lane's deposition, and the judge's decision from the criminal proceedings which "documents a video report showing no evidence of a twisting injury during this event, it is exceedingly unlikely that there is a direct casual relationship between the alleged incident of January 7, 2012 and Ms. Lane's development of a clinical cubital tunnel syndrome" (*Id.*, Dr . Elfenbein Addendum as to plaintiff Lane dated 10-10-14 at 4). In the third addendum, Dr. Elfenbein states that he met with defense counsel, his legal assistant and defendant on October 7, 2014 at his office. At the meeting, Dr. Elfenbein was provided with additional records, including the court's decision in defendant's criminal case, IME reports, the transcript of plaintiff Lane's transcript, and further medical records. Dr. Elfenbein further states that defense counsel reviewed some "key aspects of them" (*Id.* at 1). Dr. Elfenbein also states in his addendum that defense counsel asked him to review the additional records and "readdress my conclusions regarding causation in my Independent Medical Examination" (*Id.*). Dr. Elfenbein also notes that the judge in defendant's criminal case found the video of the incident did not show plaintiff Lane's arm being twisted by defendant.

Dr. Elfenbein also examined plaintiff Luciano on behalf of defendant. By IME report dated July 23, 2014, Dr. Elfenbein opined that the trauma of January 7, 2012 was the direct cause of the development of her left shoulder strain and impingement which required subsequent surgery.

Dr. Elfenbein then issued an addendum to his IME report dated October 10, 2014, wherein he states that additional medical and legal records were made available to him at a meeting with defense counsel. Dr. Elfenbein further stated that he met with defense counsel, his legal assistant and defendant on October 7, 2014 at his office. Dr. Elfenbein recited the additional records as including certain medical records, IME reports from Dr. Silverman (neurologic examination) and Dr. Londin (psychological examination), the transcript of plaintiff

Luciano's deposition, and the court's decision in defendant's criminal case. Dr. Elfenbein noted that, in the decision, the criminal court found no evidence that plaintiff Luciano was kicked by defendant, but rather found that her fall to the floor was caused by a defensive maneuver by defendant to prevent plaintiff Luciano from removing the baby from his arms. Dr. Elfenbein also noted that Dr. Londin, in her IME report, found plaintiff Luciano not to be credible based upon the criminal court's finding of no actual physical injury, and that plaintiff Luciano's appearance on the Today Show called into question plaintiff Luciano's degree of emotional distress which she had reported. Dr. Elfenbein also reviewed the transcript of plaintiff Luciano's deposition, wherein she testified, inter alia, that she had occasional pains in both shoulders and neck prior to the subject incident, and had injured her neck down to her left shoulder at work in 2004. Dr. Elfenbein further notes in the addendum that defense counsel pointed out the "History and Physical" before her surgery noted "left shoulder pain x several years" (*Id.*, Dr. Elfenbein Addendum as to plaintiff Luciano dated 10-10-14 at 6). In view of the additional records, Dr. Elfenbein stated in the addendum that his opinion had changed and that he no longer found a significant causal relationship between the alleged trauma on January 7, 2012 and plaintiff Luciano's left shoulder strain and impingement as there were medical records of impingement syndrome present since 2004. Dr. Elfenbein further opined in the addendum that plaintiff Luciano's fall, at the most, represented a temporary exacerbation of her preexisting condition and was not a major cause for her subsequent need for surgery.

II. Defendant's Deposition

During his deposition, defendant testified, inter alia, that he and defense counsel met with Dr. Elfenbein at the doctor's office for just over half an hour. Defendant further testified that, at one point, he participated at the meeting by denying twisting plaintiff Lane's arm and asked Dr. Elfenbein to review the criminal court's decision and the hospital's video. He also testified that additional records were provided to the doctor and the doctor agreed to review them. Defendant denied that defense counsel had asked the doctor to render another report (Plaintiff's Ex. T, Dr. Elfenbein Addendum as to plaintiff Luciano dated 10-10-2014).

III. Notice for Discovery and Inspection

After the IME examiners issued the addendums to their original IME reports, plaintiffs served a Notice for Discovery and Inspection dated October 30, 2014, which demanded the following: (1) expert exchange pursuant to CPLR 3101 for each healthcare provider designated by defendant who performed an IME of plaintiffs in July, 2014 (demand 1); (2) copies of all written correspondence, emails, and text messages between and/or among defendant, defense counsel, and each and every IME provider (demands 2 and 4); (3) copies of all written notes and oral statements reduced to writing between and/or among defendant, defense counsel, and each and every IME provider (demand 3); (4) copies of the IME providers' "raw" notes regarding plaintiffs' IMEs (demand 5); (5) copies of notes made during telephone calls and "in person meetings" between and/or among defendant, his counsel, including Gary Douglas, Esq., and each and every IME provider (demands 6 and 7); and (6) copies of each and every IME

[* 6]

providers' annotated medical records, including but not limited to paper and electronic documents and "any and all notes made while each such healthcare provider who conducted an IME reviewed medical records before, during, and after each such IME" (demand 8).

By Compliance Part Conference Order dated November 3, 2014, this court directed defendant to respond by November 24, 2014 to plaintiffs' discovery demands.

IV. Defendant's Response to Notice for Discovery and Inspection

Defendant served a response to plaintiffs' Notice for Discovery and Inspection dated November 24, 2014.

In response to demand no. 1, defendant responded that he had not yet determined which, if any, of the IME healthcare providers would testify at trial, and defendant would supplement the response with a CPLR 3101(d) expert exchange once such a determination was made. Defendant further asserted that IME reports for each provider had been provided, and any testimony by these providers would be consistent with the opinions expressed in their IME reports.

As to the remaining demands, defendant objected to the demands, in relevant part, on the basis of work product privilege and/or on the ground that the materials were prepared for litigation pursuant to CPLR 3101 (c), (d). Nevertheless, in response to demand nos. 2 and 4, defendant asserted that he provided, without waiving the objections, copies of all written correspondence, emails, email attachments and text messages between and/or among defendant, his counsel, and each and every IME healthcare provider, which are not subject to the claimed privileges. Copies of correspondence of defense counsel with Dr. Elfenbein was produced.

In response to demand no. 3, defendant responded that he was not in the possession of written notes and/or oral statements reduced to writing which are not the subject of privilege, other than the IME reports and addendums which have been provided.

In response to demand no. 5, defendant responded that the "raw notes" of the IME providers are subject to the privilege of attorney work product or as prepared in anticipation of litigation, and was not in the possession of any IME providers' "raw" notes which are not subject to the claimed privileges (demand no. 5).

In response to demand nos. 6 and 7, defendant responded that he was not in possession of any notes made during telephone calls or in person meetings among defendant, defense counsel, and each and every IME provider, which are not subject to the claimed privileges.

In response to demand no. 8, defendant responded that he was not in the possession of the annotated medical records of the IME providers.

PLAINTIFFS' MOTION

I. Relief Sought and Plaintiffs' Contentions

Plaintiffs now seek an order compelling defendant to provide a supplemental response to each and every demand contained in plaintiffs' Notice for Discovery and Inspection dated October 30, 2014, and seek to compel defendant to waive any purported privileges asserted in his prior response. Plaintiffs specifically seek a supplemental response to the demand for expert exchange and the production of the demanded discovery to which defendant asserted a privilege. Plaintiffs contend that the response was "limited" and failed to provide a response to the majority of the demands claiming attorney work product privilege. Plaintiffs assert that the documents to which defendant has claimed an attorney work product privilege are actually subject to the qualified privilege as material prepared in anticipation of litigation and should be disclosed as plaintiffs have demonstrated a substantial need for the documents in light of defense counsel's conduct towards the IME examiners.

Plaintiffs contend that defense counsel's conduct with respect to the IME examiners gives the "overwhelming appearance of impropriety by an attorney overreaching and attempting to unduly influence and cause a change, modification, or alteration to a previous report for the purposes of obtaining an opinion most helpful to the defense of the case" (Affirmation in Support of Elliot H. Taub at 21). Plaintiffs contend that defense counsel's actions are analogous to witness tampering. Plaintiffs further contend, inter alia, that defense counsel improperly provided the IME examiners with the findings and decision of the court in *People v Douglas Kennedy*, the criminal action brought against defendant as a result of the same incident for which plaintiffs are seeking damages in the present action, was improperly provided to the IME examiners by defense counsel. Plaintiffs assert that the decision in defendant's criminal action "is irrelevant hearsay offered only to exert undue influence over [Dr. DeBenedetto]" and the other IME providers (*Id.* at 20, 28, 30).

Moreover, plaintiffs seek an order striking defendant's supplemental bill of particulars regarding his fifteenth affirmative defense on the ground it is improper and inflammatory.

Additionally, although not requested in the Order to Show Cause, plaintiffs in their papers in support of the motion, also seek the disqualification of defense counsel on the grounds that he is now a witness, as well as the imposition of sanctions against defendant and/or defense counsel based upon their conduct with respect to the IME examiners.

With respect to Dr. Londin, plaintiffs assert that defense counsel "coerced her to change her opinion by furnishing her the clearly inadmissible hearsay criminal decision ... and other misleading information [which] was an obvious attempt to influence this examiner's opinion" (*Id.* at 28-29). Plaintiffs contend that Dr. Londin misinterpreted some of the records and changed her diagnosis. Plaintiffs assert that plaintiff Luciano never appeared on the Today Show, despite

Dr. Londin's reference to her appearance on the Today Show, and had only submitted to a taped interview with a reporter from WNBC-TV's, a portion of which was aired on the Today Show.

As to Dr. Elfenbein, plaintiffs contend that defense counsel continued to provide additional information and met with the doctor until the doctor issued addendums wherein he changed his opinion as to causation. Plaintiffs assert that defense counsel improperly met with Dr. Elfenbein and improperly provided him with the criminal court's decision and other IME reports. Plaintiffs also assert that Dr. Elfenbein never requested images or films of any diagnostic tests performed on plaintiff Luciano. With respect to plaintiff Lane, plaintiffs contend that Dr. Elfenbein modified his opinion based upon the inadmissible criminal court's decision, which "documents a video report showing no evidence of a twisting injury during this event ... ." Plaintiffs contend that the videotape did not capture what occurred in the stairwell, and "its obvious that some type of trauma occurred during the course of the altercation to cause some type of injury to Plaintiff's left upper extremity" (*Id.* at 25).

II. Defendant's Opposition

Defendant opposes all branches of the motion. Defendant contends that he properly withheld demanded documents since they are protected by the attorney work product privilege and are not discoverable. Defendant also contends that the Supplemental Bill of Particulars properly amplifies the two affirmative defenses set forth therein. As to the branches of the motion seeking sanctions and the disqualification of counsel, defendant contends that those branches are procedurally defective and should, in any event, be denied. Defendant asserts that it was proper for defense counsel to go over the case with the IME examiners and provide them with further documentation or evidence beyond that which was considered at the time of the physical examination, including additional medical records pertaining to plaintiffs and new information to which the IME examiners were not privy to at the time of their initial IME reports.

III. Oral Argument

At oral argument, plaintiffs' counsel argued that the demanded materials should be disclosed in light of the apparent undue influence of defense counsel over the IME examiners, which resulted in four out of six of defendant's IME examiners issuing one or more addendums to their initial IME reports. Moreover, although defense counsel asserted in opposition papers that plaintiffs could obtain the substantial equivalent of the demanded materials since they are "free to examine the IME doctors, as well as defendant regarding any of the correspondence," defense counsel refused to agree to allow plaintiffs to depose defendant's IME examiners.

After oral argument, this court directed defense counsel to provide documents which defendant withheld as privileged in response to plaintiffs' demands no. 2 through 7 of plaintiffs' Notice for Discovery and Inspection for in camera review with a privilege log.

IV. Privilege Log and Documents for In Camera Review

Defendant has now provided this court with a privilege log and the documents which he withheld from plaintiffs for in camera review. In the privilege log, defendant asserts that all the documents produced for in camera review are subject to the attorney work product privilege. The documents provided for in camera review consist exclusively of email correspondence between defense counsel and defendant's IME examiners with some attachments, including correspondence between defense counsel and the IME examiners. Accordingly, the withheld documents which have been provided for in camera review are responsive to demands nos. 2 and 4 of the Notice for Discovery and Inspection, which seek, inter alia, correspondence, emails and email attachments between and among defense counsel, defendant and the IME examiners.

ANALYSIS

I. Supplemental Response to Plaintiffs' Notice for Discovery and Inspection: Expert Exchange Pursuant to CPLR 3101 (d)

Plaintiffs contend that defendant has not provided the required CPLR 3101 expert exchange in response to demand no. 1. Specifically, plaintiffs contend that defendant has not provided the names, addresses and credentials of the IME examiners. Plaintiffs concede that defendant's experts' names, addresses and curriculum vitae have been provided with the IME reports, but argues that no expert exchange was served by defendant. Plaintiffs further contend that defendant has not provided a succinct recitation as to what materials, other than the documents recited in the IME reports, were relied upon by the IME examiners in rendering their opinions, such as correspondence, telephone calls, emails and in person conversations with defense counsel and defendant.

Defendant contends that it properly responded that he had not yet determined which, if any, of the IME examiners will testify at trial, and a supplemental response with a 3101(d) expert exchange would be made once a determination was made.

At this point of the litigation, defendant's response to the demand for an expert exchange with respect to the IME examiners was appropriate. Once defendant has designated which experts will testify at trial, then defendant is required to provide the expert exchange. Accordingly, that branch of plaintiffs' motion seeking a supplemental response to demand no. 1 of its Notice for Discovery and Inspection which seeks an expert exchange is denied at this time.

II. Supplemental Response to Notice for Discovery and Inspection: Document Discovery

Plaintiffs also seek a further response to the remaining demands in the Notice for Discovery and Inspection, which seek document discovery. However, in support of the motion, plaintiffs only assert that there has been no disclosure as to what telephone calls, emails, correspondence and/or in person meetings took place to cause the IME examiners to change their

opinions. Plaintiffs assert that the demanded discovery is relevant since defense counsel and defendant contacted the IME examiners after their initial IME reports were issued and attempted to influence the IME examiners to change their reports by providing additional medical records, the hospital's videotape, other IME providers' reports, and the decision of the court in defendant's criminal case. As noted earlier, plaintiffs contend that defense counsel's conduct improperly attempted to influence the IME examiners' reports.

Plaintiffs specifically contend that the demanded correspondence, emails and notes regarding telephone calls and in person conversations between defense counsel, defendant and the IME examiners are not attorney's work product and should be discoverable. Plaintiffs contend that those documents are only subject to a qualified privilege as material prepared in anticipation of litigation, and plaintiffs have shown a substantial need for the documents in view of the apparent overreaching, undue influence, and apparent pressure tactics employed by defendant to control the content and limit the damages in the IME reports.

Plaintiffs rely upon CPLR 3101(d)(2) which provides that materials otherwise discoverable and prepared in anticipation of litigation by or for another party, or by or for that other party's representative, including an attorney or consultant, may be obtained upon a showing that the party seeking discovery has a substantial need of the materials and is unable without due hardship to obtain the substantial equivalent of the materials by other means. Plaintiffs contend that they have demonstrated a substantial need for the material based upon the apparent "interactive and coercive relationship between defendant, defendant's counsel and the IME doctors, [which] at the very least, hints at collusion and undue influence" (Affirmation in Support of Elliot H. Taub at 39). Plaintiffs further assert that the demanded documents are necessary to provide "a stark insight into the degree of influence the Defendant has on the professional opinions of purportedly independent medical examiners" (*Id.* at 39). Plaintiffs also argue that defendant and defense counsel have opened the door "as to their specious influence over IME doctors" (*Id.*). Plaintiffs assert that defendant has given "the appearance of impropriety by attempting to have four of the six IME reports modified or changed by selectively and separately releasing additional medical records, providing the doctor with the criminal court decision which is obviously hearsay and irrelevant to the action, exchanging reports of other IME examiners, providing false information about Plaintiff[ ] [Luciano's] purported alcohol use and appearance on the Today Show, and having an in person meeting with an IME examiner and the defendant" (*Id.* at 39-40).

Defendant opposes that branch of plaintiffs' motion which seeks to compel discovery regarding communications between defense counsel, defendant and the IME examiners, as well as counsel's notes and the IME examiners' notes regarding their communications. Defendant asserts that it was proper for defense counsel to go over the case with the IME examiners and provide them with further documentation or evidence beyond that which was considered at the time of the physical examination, including additional medical records pertaining to plaintiffs and new information to which the IME examiners were not privy to at the time of their initial IME reports. Moreover, defendant contends that where the addendum reports were issued based

upon the consideration of new information or documentation, the new information or documentation was outlined in the addendum. Defendant also contends that plaintiffs will have the opportunity to cross-examine the IME examiners at trial regarding the process by which their opinions were formed. Defendant notes that plaintiffs do not argue that it is improper for counsel to provide documentation to the IME examiners. With respect to plaintiffs' contention that defendant improperly provided the IME examiners with the court's decision in defendant's criminal case, defendant contends that plaintiffs fail to cite any law for the proposition that an expert's opinion must be formed only on the basis of admissible materials. Defendant asserts that experts routinely rely on inadmissible documents in forming their opinions.

Defendant further contends that while the IME examiners' notes and annotated medical records are discoverable and no privilege has been claimed, counsel's notes are not discoverable as they are protected as attorney's work product and absolutely immune from discovery. Defendant asserts that counsel's notes commemorates his thoughts, impressions and legal analysis regarding the case and his discussions with the doctor. Therefore, defendant argues that counsel's notes are not discoverable.

As to the correspondence between defense counsel and the IME examiners, defendant contends that the correspondence is also protected from disclosure under the attorney's work product doctrine as they also reflect counsel's impressions, conclusions, opinions or legal theories regarding the case. Defendant further contends that the attorney's work product privilege applies to both written and oral communications. Defendant asserts that the correspondence between defense counsel and IME examiners that did not contain defense counsel's legal analysis of the case was already produced in response to plaintiffs' Notice of Discover and Inspection.

Defendant contends that plaintiffs failed to address his claim that the demanded material is attorney work product. Defendant also contends that plaintiffs only assert that they are entitled to the documents as prepared in anticipation of litigation since they cannot obtain the substantial equivalent of the materials. Defendant argues that, even if the material was classified as material prepared in anticipation of litigation, plaintiffs have failed to establish an inability to obtain the substantial equivalent of the demanded material since plaintiffs can examine the IME examiners. Defendant notes that plaintiffs have already deposed defendant regarding conversations between defense counsel and Dr. Elfenbein, one of the IME examiners, and defendant testified that defense counsel expressed his opinion on the case and his analysis of the medical records given to Dr. Elfenbein.

Defendant further contends that plaintiffs are free to present their conspiracy theories at trial, if permitted by the trial court. The cross examination of the IME examiners, defendant contends, can include questions about why the IME examiner would need to look at a deposition transcript.

In view of the foregoing, defendant contends that the court need not decide the issue of substantial need under CPLR 3101 (d) (2), which sets forth the privilege for material prepared in

anticipation of litigation. Defendant first asserts that the demanded material is attorney work product which is absolutely immune from discovery. Second, defendant asserts that even if it were material prepared in anticipation of litigation, CPLR 3101 (d) (2) provides that even when the court orders disclosure of material prepared in anticipation of litigation, the court shall protect from disclosure the "impressions, conclusions, opinions or legal theories of an attorney or other representative of the party concerning the litigation." Accordingly, defendants argue that regardless of plaintiffs substantial need for the demanded material, the material is immune from discovery.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Matter of Kapon v Koch*, 23 NY3d 32 [2014]). All discovery, however, is subject to protection from discovery if the proponent of a privilege establishes the applicability of a privilege, such as materials prepared solely in anticipation of litigation (CPLR 3101[d][2]; *Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007]). The burden of establishing that certain documents are privileged and protected from discovery is on the party asserting the privilege (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). The burden cannot be satisfied by counsel's conclusory assertions of privilege and competent evidence establishing the privilege must be set forth by the party asserting the privilege (*Claverack Coop. Ins. Co. v Nielson*, 296 AD2d 789 [2002]; *Agovino v Taco Bell 5083*, 225 AD2d 569, 571 [2d Dept 1996]; *Martino v Kalbacher*, 225 AD2d 862 [3d Dept 1996]; *Smith v Ford Foundation*, 231 AD2d 456 [1st Dept 1996]). Whether a particular document is or is not protected by a privilege is necessarily a fact-specific determination, usually requiring an in camera review (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 378; *Rossi v Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588, 592-593 [1989]).

CPLR 3101 (c) provides that "[t]he work product of an attorney shall not be obtainable." The attorney's work product privilege applies only to documents prepared by counsel, as an attorney, which reflect counsel's learning and professional skills, including legal research, analysis, conclusions, legal theory and strategy (*Geffner v Mercy Med. Ctr.*, 125 AD3d 802 [2d Dept 2015]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005]). Therefore, "an item will not even begin to qualify as 'work product' merely upon a showing that a lawyer drew it or did it; it must be shown to be something that only a lawyer could draw or do" (Siegel, New York Practice [5th ed.] § 347 at 576). Materials which could have been prepared by a layperson are not privileged from disclosure as attorney's work product (*Salzer v Farm Family Life Ins. Co.*, 280 AD2d 844 [3d Dept 2001]). Since the attorney's work product privilege affords the material absolute immunity from disclosure, the courts have narrowly construed the work product of an attorney to include only those materials prepared by an attorney which contain his analysis and trial strategy (*Zimmerman v Nassau Hosp.*, 76 AD2d

921 [2d Dept 1980]; *Kenford Co., Inc. v Erie County*, 55 AD2d 466 [4th Dept 1977]; *Doe v Poe*, 244 AD2d 450, 451 [2d Dept 1997]). The work product privilege affords protection to interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs that were held, prepared or conducted by the attorney (*Hickman v Taylor*, 329 US 495 [1947]; *Central Buffalo Project Corp. v Rainbow Salads, Inc.*, 140 AD2d 943 [4th Dept 1988]).

"With reference to an attorney's dealing with an expert, it is only the information and observations disclosed by the attorney and conveyed to the expert which are subject to exclusion" (*Zimmerman v Nassau Hosp.*, 76 AD2d at 921, *citing People v Edney*, 39 NY2d 620, 625 [1976][the Court, in dicta, noted that where an attorney consults with a psychiatrist to obtain advice regarding an insanity plea or trial strategy, the facts and observations of the attorney conveyed to the expert are protected by the work product doctrine]; *see Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 168 [1st Dept 2012]). To that end, the courts have held that communications and correspondence between an attorney and expert is protected from disclosure as attorney's work product with respect to the information and observations of the attorney that are conveyed to the expert (*Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 168 [1st Dept 2012]; *Zimmerman v Nassau Hosp.*, 76 AD2d at 921; *compare Holmes v Weisman*, 251 AD2d 1078 [4th Dept 1998] [trial court erred in directing plaintiff to provide defendant with a letter written by plaintiff's counsel to plaintiff's medical expert as letter was protected by the work product privilege; no discussion of contents of letter]).

As to materials prepared in anticipation of litigation, CPLR 3101 (d) (2) provides that "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101 (d) (2), however, as asserted by defendant, also provides that when ordering discovery of material prepared in anticipation of litigation, the court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." To sustain the burden of demonstrating that demanded material was prepared solely in anticipation of litigation, the party asserting the privilege must identify the particular material with respect to which the privilege is asserted and establish with specificity that the material was prepared exclusively in anticipation of litigation (*New York Schools Ins. Reciprocal v Milburn Sales Co.*, 105 AD3d 716, 718 [2d Dept 2013]; *Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 566 [2d Dept 2012]).

Initially, the court notes that the documents provided by defendant to the court for in camera review consist solely of emails between defense counsel and the IME examiners with attachments which include correspondence between defense counsel and the IME examiners. Accordingly, the documents provided for in camera review would be responsive only to demands 2 and 4 of plaintiffs' Notice for Discovery and Inspection. After an in camera review of the documents, this court determines that the majority of emails between defense counsel and the

IME examiners are not protected by the attorney's work product privilege. The majority of the emails are administrative in nature as they, inter alia, state that unspecified documents are annexed or had been received, discuss the timing of reports or addendums, and discuss a meeting date and time. Notably, the emails themselves could have been prepared by a lay person and do not contain any information or observations of defense attorney. Although certain emails state that documents are being forwarded to the IME examiners, the documents are not identified in the emails and there is no commentary by defense counsel regarding those documents. Accordingly, only the documents containing information which defense counsel sent to the IME examiners for review falls within the privilege of attorney work product. The emails which merely state that documents are being forwarded, without identifying the documents, does not qualify as attorney's work product. Notably, it is the actual information conveyed to an expert by an attorney for review which is classified as attorney's work product, not an attorney's act of forwarding such information to an expert. To the extent, however, that the attachments to the emails contain information and the observations of defense counsel, those attachments are privileged as attorney's work product.

The court notes that defendant only asserted the privilege of attorney work product in his privilege log. Moreover, at oral argument and in his opposition papers, defense counsel specifically argued that the withheld documents were privileged from disclosure as attorney work product and not as material prepared in anticipation of litigation. In any event, even if defendant had asserted that the withheld documents were privileged as material prepared in anticipation of litigation, such a privilege is qualified and plaintiffs have established a substantial need for the documents which this court has determined are not privileged as attorney work product.

Accordingly, the court determines that the emails contained in the following documents, as numbered on defendant's privilege log, are not subject to a privilege as attorney's work product and shall be provided by defendant in response to demands no. 2 and 4 of plaintiffs' Notice for Discovery and Inspection: nos. 1-11; nos. 12-13 only the emails dated October 13 and 14, 2014; nos. 15-16 only the emails dated October 20, 2014; nos. 19-26 only the emails dated September 3 and 9, 2014; and nos. 27-34. To the extent that defendant has been directed to produce only certain emails contained within a document identified by defendant in the privilege log, the remaining emails contained in the document shall be redacted by defendant before being produced to plaintiffs. Defendants may also redact any telephone numbers contained in the emails which defendant has been directed to produce.

The court, however, determines that documents no. 14 and 18 are privileged from disclosure as attorney's work product since both the emails and attachments in those documents qualify as attorney's work product. Those documents, therefore, need not be produced by defendant and plaintiffs' motion is denied with respect to those documents.

Moreover, the court determines that the email attachments contained in documents nos. 1-11, 17, 27-28 and 30 are privileged as attorney's work product as they contain information or observations of defense counsel, and defendant is not required to produce those attachments.

The email attachment in document no. 34, however, is not privileged from disclosure since it is an IME examiners' addendum which has already been produced to plaintiffs. Notably, defendant did not assert in the privilege log that this addendum was a "non-finalized draft," as was asserted by defendant with respect to other attachments.

With respect to demand no. 3, which demands written notes and/or oral statements reduced to writing between and among defendant, defense counsel and the IME examiners, defendant does not need to provide a supplemental response. Defendant correctly contends that any notes taken during conversations between defendant, defense counsel and an IME examiner by defense counsel or counsel's agent, including notes regarding statements made during the conversations, would be protected from discovery as attorney's work product (*Siemens Solar Indus. v Atlantic Richfield Co.*, 246 AD2d 476 [1st Dept 1998] [notes and memoranda made in connection with lawyer's interview of witness during course of litigation constitutes attorney's work product which is exempt from discovery]; *Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443 [1st Dept 1989] [attorney's interview of defendant's accountant and any notes taken during the interview were attorney work product]). That branch of plaintiffs' motion seeking to compel a supplemental response, therefore, is denied with respect to demand no. 3.

Defendant responded to demand no. 5, which seeks the "raw notes" of the IME examiners, that such notes were not in his possession, which are not subject to a privilege. Also, no such notes were contained in the privilege log or provided to the court for in camera review. Accordingly, it appears that no "raw notes" of the IME examiners are in defense counsel's possession. However, since the response was qualified by the language "which are not subject to a privilege," plaintiffs' motion is granted to the extent that defendant shall serve an affirmation of defense counsel stating that no such "raw notes" are in defense counsel's possession.

As to demand nos. 6 and 7, which demands notes made during telephone calls and "in person" meetings between defense counsel, defendant and IME examiners, defendant does not need to provide a supplemental response. As noted earlier, any notes taken by defense counsel or defense counsel's agent would be protected from discovery as attorney's work product as such notes would clearly contain observations of defense counsel or defense counsel's agent.

Although not specifically discussed by plaintiffs on the present motion, the court finds that defendant's responses to demands no. 8, which sought the annotated medical records of the IME examiners, was sufficient. Defendant responded that he was not in the possession of such documents. Accordingly, the branch of plaintiffs' motion seeking to compel defendant to serve a supplemental response to each and every demand in plaintiff's Notice for Discovery and Inspection is denied with respect to demand no. 8.

III. Striking of Defendant's Supplemental Bill of Particulars

By Supplemental Bill of Particulars dated November 24, 2014, defendant modified his fifteenth and seventeenth affirmative defenses. The fifteenth affirmative defense to plaintiffs' defamation claims asserts the doctrine of truth and/or qualified privilege. The affirmative

defense further alleges that plaintiffs engaged in the following conduct: (1) exaggerated and/or fabricated their physical and/or emotional injuries to the Mount Kisco Police Department and/or Westchester County District Attorney's Office; (2) perjured themselves at defendant's criminal trial; (3) falsely stated on the Today Show that defendant kicked plaintiff Luciano and/or twisted the arm of plaintiff Lane; (4) with their counsel, disseminated HIPAA protected materials to further their misrepresentations, including the hospital surveillance videotape; (5) attempted to extort defendant, a public figure; and (6) conspired with their attorney to engage in a civil racket to extort money from defendant, a public figure. The seventeenth affirmative defense to plaintiffs' claim for negligence, assault, battery and/or emotional distress alleges the defense of fraud based upon the same allegations set forth in the fifteenth affirmative defense.

Plaintiffs seek an order striking defendant's Supplemental Bill of Particulars which supplements their fifteenth and seventeenth affirmative defenses on the ground it is improper and inflammatory. Plaintiffs contend that the Supplemental Bill of Particulars should be stricken since it contains scandalous, prejudicial and libelous statements unnecessary to prove the merit of the affirmative defenses and intended only to harm plaintiffs and plaintiffs' counsel. Plaintiffs assert that defendant's Supplemental Bill of Particulars goes beyond citing facts in defense. Plaintiffs contend that defendant's affirmative defenses accuse plaintiffs and plaintiffs' counsel without any foundation in any fact of engaging in a conspiracy to extort a public figure, falsifying claims to the Mount Kisco Police Department and the Westchester County District Attorney's Office, violating HIPAA regulations, and perjury in defendant's criminal case. Plaintiffs contend that such accusations would not be permitted at trial as their prejudicial value outweighs their probative value, which plaintiffs contend is non-existent, and should be stricken. Plaintiffs also argue that the claim of a qualified privilege in the fifteenth defense is not supported by the facts since although defendant has a professional history as a reporter, none of the statements made by defendant were made in defendant's capacity as a news reporter. Plaintiffs assert that the seventeenth affirmative defense of fraud does not merely contain a recitation of facts to prove the elements of fraud, but instead includes statements that constitute libel per se and the inclusion of these claims in the affirmative defense are palpably improper. Finally, plaintiffs contend that striking "the scandalous and prejudicial affirmative defenses" would not prejudice defendant since if such an evidentiary matter becomes relevant at trial, it can be proved without being specifically averred in the Supplemental Bill of Particulars.

Defendant opposes that branch of the motion seeking to strike defendant's Supplemental Verified Bill of Particulars. Defendant contends that the pleading properly amplifies the two affirmative defenses set forth in the Supplemental Verified Bill of Particulars. Defendant contends that the Supplemental Bill of Particulars as to the two affirmative defenses was served in response to plaintiffs' demand for the one and the court directed service of the same. Defendant further argues that the allegations in the Supplemental Bill of Particulars are not only relevant to his defense, "but are also necessary, critical and material for Defendant's right to a full and vigorous defense to be preserve" (Affirmation in Opposition of Rebecca Newman at 19). Defendant contends that the fifteenth affirmative defense of truth fleshes out his defense to plaintiffs' defamation claims wherein plaintiffs allege that defendant defamed them by calling them "liars." Defendant asserts that his statements in the fifteenth affirmative defense are true

and he particularizes each instance of untruth to illustrate the basis for his defense of truth. Similarly, defendant contends that the allegations alleged in support of the seventeenth affirmative defense of fraud set forth the underlying conduct of plaintiffs, including plaintiffs' exaggeration and/or fabrication of physical and emotional injuries to the Mount Kisco Police Department and Westchester County District Attorney's Office. Defendant further contends that the fraudulent conduct "was extended through the recitation of lies, misrepresentation and/or false allegations throughout 2012, including but not limited to ... The NBC Today Show appearance, the account to the Mount Kisco Police Department and at the criminal trial against Douglas Kennedy"(*Id.* at 21).

CPLR 3024 (b) provides that a "party may move to strike any scandalous or prejudicial matter unnecessarily inserted into a pleading."

Although plaintiffs vehemently disagree with defendant's characterization of their statements to the Mount Kisco Police Department, the Westchester County District Attorney's Office, at defendant's criminal trial and on television as false, these allegations support defendant's fifteenth affirmative defense to claims of defamation of "truth" and cannot be said to be "unnecessarily inserted" into that affirmative defense. Defendant's allegations in support of the fifteenth affirmative defense regarding the alleged improper dissemination of HIPAA information, the alleged extortion of defendant and alleged conspiracy to extort, however, are not relevant to defendant's affirmative defense of "truth" with respect to the defamation claim. Accordingly, since those allegations were unnecessarily inserted into the affirmative defense, they are stricken from defendant's fifteenth affirmative defense.

With respect to the seventeenth affirmative defense to plaintiffs' claim of fraud, all of the allegations, with the exception of the allegation of a HIPAA violation, whether true or false, support the affirmative defense and cannot be said to be unnecessarily inserted. Although clearly prejudicial if the allegations are false, the veracity of such allegations is for the trier of fact. Therefore, plaintiffs are only entitled to the striking of the allegation regarding the HIPAA violation in the seventeenth affirmative defense.

IV. Disqualification of Defense Counsel

Plaintiffs also accuse defense counsel of ethical violations and purport to seek disqualification of defense counsel in the supporting papers on the ground that defense counsel is now a necessary witness. This relief, however, is not properly before this court for determination. The relief was not requested in the Order to Show Cause nor provided for in the briefing schedule for the present motion. Moreover, plaintiffs have sought this relief in a separate motion which is now pending before Justice William J. Giacomo, the assigned I.A.S. Justice. Accordingly, this court has not considered plaintiffs' request to disqualify defense counsel.

V. Sanctions

Plaintiffs also seek the imposition of sanctions against defendant and/or defense counsel. Plaintiffs contend that defendant defied instructions at the hospital and caused the events and damages to plaintiffs. Plaintiffs further contend that defense counsel, Gary Douglas, Esq., has constantly and consistently exhibited behavior unbecoming an attorney during every deposition and with respect to the IME examiners and attempts to influence the IME reports.

Defendant contends that the branch of plaintiffs' motion seeking sanctions is procedurally defective since the Briefing Schedule for the present motion does not provide for such relief and the relief is not sought in the Order to Show Cause. Moreover, defendant denies any inappropriate behavior on the party of either defendant or defense counsel. Finally, defendant argues that plaintiffs fail to cite any authority in support of their contention that sanctions are appropriate under the circumstances.

That branch of plaintiffs' motion seeking an award of sanctions against defendant and defense counsel is denied. Plaintiffs did not seek sanctions in their Order to Show Cause. Moreover, defendant's alleged conduct at the hospital is the subject of this action and for a trier of fact to determine if his actions warrant an award of monetary damages. Accordingly, sanctions for his alleged conduct which has yet to be determined is not appropriate. With respect to defense counsel, this court warned counsel at oral argument of this motion to avoid unprofessional conduct and declines to sanction defense counsel at this time for his conduct. Notably, defense counsel's conduct with respect to the IME examiners is the subject of plaintiffs' motion to disqualify defense counsel and is pending before the assigned I.A.S. Part.

In view of the foregoing, it is

ORDERED that the branch of the motion seeking to compel defendant to serve a supplemental response to plaintiffs Notice for Discovery and Inspection dated October 30, 2014, and waiving his "purported privilege" with respect to the demanded documents and information is granted only to the extent that defendant shall serve a supplemental response as to demands no. 2, 4 and 5, within 20 days of the date of this decision and order. The supplemental responses shall include the following:

(1) Demands nos. 2 and 4:

(a) The emails contained in the documents submitted for in camera review, as numbered in defendant's privilege log, nos. 1-11, 12-13 (only emails dated 10-13-14 and 10-14-14), 15-16 (only emails dated 10-20-14), 19-26 (only emails dated 9-3-14) and 27-34; and

(b) The email attachment contained in document no. 34; and

(2) Demand no. 5: An affirmation of defense counsel stating that no "raw notes" of the IME examiners are in counsel's possession; and it is further

ORDERED that to the extent that defendant has been directed to produce only certain emails contained within a document, the remaining emails contained in the document shall be redacted by defendant before being produced to plaintiffs. Defendants may also redact any telephone numbers contained in the emails which defendant has been directed to produce; and it is further

ORDERED that the branch of the motion seeking to compel defendant to serve a supplemental response to plaintiffs' Notice for Discovery and Inspection dated October 30, 2014 is denied with respect to demands nos. 1, 3, 6, 7 and 8; and it is further

ORDERED that the branch of plaintiffs' motion seeking an order striking defendant's Supplemental Bill of Particulars is granted only to the extent that: (1) the allegations in support of both affirmative defenses regarding a HIPAA violation are stricken; (2) the allegations in support of the fifteenth affirmative defense of alleged extortion of defendant and alleged conspiracy to extort are also stricken; and (3) defendant is directed to file an amended supplemental bill of particulars with the foregoing allegations stricken therefrom within 20 days of the date of this decision and order; and it is further

ORDERED that plaintiffs' request for the disqualification of defense counsel, which was sought only in the supporting papers, is not properly before this court on the present motion and the request for such relief has not been considered; and it is further

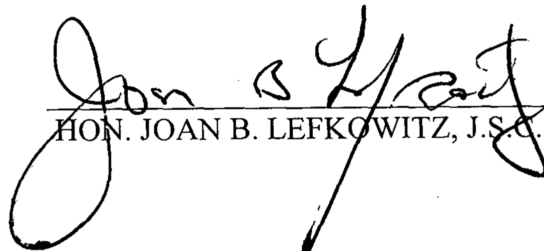
ORDERED that the branch of plaintiffs' motion seeking an award of sanctions against defendant and defense counsel is denied at this time; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on July 31, 2015 at 9:30 A.M.; and it is further

ORDERED that defense counsel shall upload to the NYSCEF website the Privilege Log submitted to this court for consideration, and shall pick up the documents submitted to this court for in camera review from the "Pick Up" box located in the office of the Compliance Part Clerk, Room 809; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order on defendant within 7 days of entry.

Dated: White Plains, New York
July 2, 2015



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

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