

Ferrell v Doe
2016 NY Slip Op 31370(U)
June 21, 2016
Supreme Court, Bronx County
Docket Number: 307234/13
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

MONICA FERRELL, x

Index No.: 307234/13

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

"JOHN DOE", the name "JOHN DOE" being fictitious and intended to designate the person operating the automobile of said CUTLER BROS BOX BROS at the time and place herein alleged, CUTLER BROS BOX BROS, RABINDRAN DHANIRAMI, and STERLING VALET CORP.,

Defendants.

_____ x

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion and cross-motion to compel certain discovery and/or preclude certain testimony:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendant Cutler Brothers Box & Lumber Co. s/h/a Cutler Bros Box Bros, Affirmation of Paul Goodovitch, Esq. dated March 9, 2016 in Support of Motion, and Exhibits ("A" through "H").....	1
Notice of Cross-Motion by Defendants Rabindran Dhanirami and Sterling Valet Corp. and Affirmation of David S. Kritzer, Esq. dated March 15, 2016 in Support of Cross-Motion.....	2
Affirmation of Joseph P. Stoduto, Esq. dated March 23, 2016 in Opposition to Motion and Cross-Motion and Exhibits ("1" through "6").....	3
Reply Affirmation of Paul Goodovitch, Esq. dated April 15, 2016.....	4

This motion and cross-motion are consolidated for purposes of decision and order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

The defendants seek an order compelling Jamal Aaron ("Aaron") and Shawn Jerrick ("Jerrick") to appear for depositions or be precluded from testifying at trial or submitting an affidavit in support of, or in opposition to, any motion. The motion and cross-motion are granted

solely as ordered below, and are denied in all other respects.

The facts relevant to this matter appear to be undisputed. Plaintiff's counsel retained an entity known as "IME Watchdog" to provide observers, Aaron and Jerrick in this case, to accompany the plaintiff to the physical examination(s) conducted on the defendants' behalf. The plaintiff then served a witness disclosure stating that she reserved the right to rely upon the testimony of Aaron and Jerrick in this action "as to their observation of the defendants' physical examination". Defendant Cutler Bros Box Bros served subpoenas to testify upon Aaron and Jerrick, but neither appeared on the scheduled date. As the movants concede, relief in the form of contempt cannot be granted since the appropriate application was not made. The defendants now seek to compel the plaintiff to produce Aaron and Jerrick for deposition.

In this case, the court is not faced with a request to either approve or deny the presence of such observers at a physical examination. It appears that the plaintiff did not first seek the court's endorsement of the observers' presence and role at the examination, and that the selected physician(s) conducted the examination(s) in the observers' presence. Under these circumstances, the Court does not reach the issue of whether the presence of such observers is permissible generally or in this particular case.

The plaintiff argues that Aaron and Jerrick are neither parties to this action, nor agents, servants, and/or employees of plaintiff's counsel. Since they lack the power to produce these witnesses for deposition, the plaintiff and her attorney insist that the defendants must seek relief directly against Aaron and Jerrick to compel their appearance. The plaintiff does not allege that Aaron and Jerrick were retained as expert witnesses or that their testimony and notes are shielded from discovery by the attorney work product privilege.

CPLR §3101(a)(1) provides for disclosure from a party's agent. Agency is a fiduciary relationship formed by one person's consent to another that the latter will act on the former's behalf and under his control and direction (*see Pensee Associates, Ltd. v. Quon Industries, Ltd.*, 241 AD2d 354 [1st Dept 1997]). The agent acts on behalf of the principal with the principal's authority. Under the circumstances presented here, Aaron and Jerrick can be considered agents of the plaintiff and/or plaintiff's attorney. There was no incapacity that prevented the plaintiff from observing and documenting the conduct of the examination(s) and relating her version at trial, if needed. Plaintiff's attorney certainly could have attended the examination(s) and performed a role similar to that of

Aaron and Jerrick (*see Ramsey v. New York University Hospital Center* 14 AD3d 349 [1st Dept 2005] and *Jakubowski v. Lengen*, 86 AD2d 398 [4th Dept 1982]). Instead, the plaintiff appears to have hired and substituted Aaron and Jerrick to act in her place or her attorney's place.

The plaintiff's witness disclosure makes clear that the purpose behind retaining Aaron and Jerrick was to have them observe the examination(s) performed by the defendants' physician(s) and to be available to testify in this action regarding their observations. To the extent that Aaron and Jerrick observed and recorded the physical examination(s) for use as testimony at trial, they functioned as unofficial stenographers. Had the plaintiff desired a record of what transpired at the examination(s) for use at trial, she could have sought leave of court to have a stenographer present at the examination(s) (*see Mertz v. Bradford*, 152 AD2d 962 [4th Dept 1989]). Of course, the plaintiff would then be obligated to furnish a transcript of the proceeding(s) (*see Murray v. Specialty Chemicals Co.*, 100 Misc2d 658 [Sup Ct, Queens Cty 1979] and *Milam v. Mitchell*, 51 Misc2d 948 [Sup Ct, Niagara Cty. 1966]). Alternatively, the plaintiff could have sought leave to record the examination(s) by audio or video tape. In that case, the plaintiff would have needed prior approval from the court, and the recording would have been disclosed to opposing counsel before trial (*see Bermejo v. New York City Health and Hospitals Corporation*, 135 AD3d 116 [2nd Dept 2015] and *Grange v. Sweet*, 4 Misc3d 470 [Sup Ct, Ulster Cty 2004]) (where the plaintiff was required to provide the defendant with a copy of an audio recording made by the plaintiff's mother, who had accompanied the plaintiff to the examination). Discovery of the recording would include transcripts or memoranda thereof (*see CPLR 3101(I)*).

In *Bermejo*, the Court found that the recording should have been disclosed since plaintiff's counsel considered using the recording at trial to challenge the validity and effectiveness of the examination. Here, Aaron and Jerrick serve the same purpose. In addition, the Court in *Bermejo* held that the failure to disclose the recording violated the spirit of New York's open disclosure policy, which seeks to substitute honesty and forthrightness for gamesmanship. Here, the attempt to insert witnesses into the litigation only to disavow any control over them beyond providing opposing counsel with their names and addresses, leaving opposing counsel to secure their appearance and cooperation directly, runs afoul of this policy.

It would be inconsistent to require a party to furnish disclosure of objective, court-sanctioned observation of a party's physical examination, such as a certified stenographic transcript or a video

recording, yet allow a party to create witness(es) to a critical event in the litigation without any duty to disclose their findings. Even the presence of plaintiff's attorney at such examinations is subject to the parameters set by the court (*see A. W. v. County of Oneida*, 34 AD3d 1236 [4th Dept 2006]). There would be no need for a party to go through the trouble of seeking court approval for an objective recording of an examination when the party could simply recruit an observer to memorialize the proceeding and withhold his findings until the time of trial, if needed. Without disclosure of the observations made and/or documented by Aaron and Jerrick, there is no assurance that their observations were complete and accurate. Accordingly, the defendants in this case should be provided with a record of the observations made by Aaron and Jerrick, through deposition or exchange of any reports and/or notes of their observations.

Accordingly, it is hereby

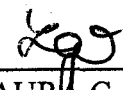
ORDERED, that the plaintiff shall either produce Jamal Aaron for a deposition or provide the defendants with Aaron's sworn report setting forth his observations of any physical examination of the plaintiff that he witnessed no later than 45 days following service of a copy of this order with notice of entry; and it is further

ORDERED, that the plaintiff shall produce Shawn Jerrick for a deposition or provide the defendants with Jerrick's sworn report setting forth his observations of any physical examination of the plaintiff that he witnessed no later than 45 days following service of a copy of this order with notice of entry; and it is further

ORDERED, that Jamal Aaron and/or Shawn Jerrick cannot testify at the trial of this action and/or submit affidavit(s) in support of, or in opposition to, a dispositive motion unless he has appeared for deposition or his sworn report has been exchanged as ordered herein.

This constitutes the Decision and Order of this Court.

Bronx, New York
June 21, 2016



HON. LAURA G. DOUGLAS
J.S.C.