

<b>Gelvez v Tower 111, LLC</b>
2017 NY Slip Op 30071(U)
January 12, 2017
Supreme Court, New York County
Docket Number: 159225/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

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EDUARDO GELVEZ and DANIELA CISNERO,  
Individually and as husband and wife,

Index No. 159225/12  
Mot. Seq. 004

Plaintiffs,

**DECISION & ORDER**

-against-

TOWER 111, LLC, et al.,

Defendants  
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**SHERRY KLEIN HEITLER, J.:**

In this personal injury action, defendants Tower 111, LLC, 885 Avenue of the Americas Management Co., LLC, and Stonehenge Properties, LLC (collectively, “Defendants”) move pursuant to CPLR 3121(a)<sup>1</sup> for an order directing new independent medical examinations (“IME”) of plaintiff Eduardo Gelvez (“Plaintiff”) outside the presence of a so-called “IME Watchdog”. Defendants also move for an order precluding anyone associated with Plaintiff from obstructing such new IME’s and for an award of costs associated with Plaintiff’s previous IME’s. In the alternative Defendants seek the production of any documents created by Plaintiff’s representatives during or as the result of Plaintiff’s previous IME’s. Annexed to Defendants’ moving papers is a website printout for IME Watchdog, Inc., a company which advertises services relating to independent medical examinations.<sup>2</sup> According to the printout, IME

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<sup>1</sup> CPLR 3121(a) provides in relevant part that “[a]fter commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control.”

<sup>2</sup> [www.watchdog.com/services](http://www.watchdog.com/services)

Watchdog, Inc. will, among other things, accompany clients to their IME's, take detailed notes of the intake questions asked by the examiner and the tests performed thereby, and prepare a report describing what took place during the examination.

Plaintiff alleges that he was injured on October 8, 2012 when he fell from a scaffold on a construction site. Plaintiff's October 19, 2013 supplemental verified bill of particulars alleges that as a result of the fall he required surgeries to repair injuries to his right ankle and back.<sup>3</sup>

Plaintiff appeared for an orthopedic IME on May 25, 2016 before Dr. William Walsh. He was accompanied by an interpreter and by an IME Watchdog retained by Plaintiff's counsel.

Defendants claim that during the examination the IME Watchdog advised Plaintiff not to complete a questionnaire which requested medical and "background" information.<sup>4</sup> Dr. Walsh later prepared a report of his examination<sup>5</sup> which in relevant part sets forth the following (Walsh Report, p.1):

Please note the claimant did not wish to complete the claimant's questionnaire as per the advice of his attorney. Therefore, the accident history and information pertaining to the history was obtained from the medical records provided for my review and interview with the claimant.

Annexed to the Walsh Report is the questionnaire at issue. Plaintiff filled in some background information, such as his name, date of birth, height, eye color, and weight, but left blank most of the remaining three pages which sought information regarding his medical history. A notation at the bottom of the first page explains that Plaintiff "did not fill out as per attorney advice".

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<sup>3</sup> Defendants' exhibit A.

<sup>4</sup> Affirmation of Jenna L. Mastroddi dated July 18, 2016, ¶ 27.

<sup>5</sup> Defendants' exhibit D ("Walsh Report").

\* 3]

On June 6, 2016 Plaintiff appeared for a neurological IME before Dr. Douglas S. Cohen. Again, Plaintiff was accompanied by an interpreter and a representative from Plaintiff's counsel's office who purportedly "refused to allow plaintiff to answer questions about his prior medical history . . . and refused to allow plaintiff to answer whether he sustained any subsequent injuries to the affected body parts."<sup>6</sup> Dr. Cohen's report of his examination<sup>7</sup> provides, in relevant part (Cohen Report, p. 2):

When asked whether or not he had any prior history of back or leg pain, his attorney's representative refused to allow him to answer that question. He also refused to allow him to answer the question as to whether or not he had any accidents since the one mentioned herein \*\*\*\* The attorney's representative refused to allow him to answer any questions concerning any prior medical or surgical history.

Defendants argue that the actions of the IME Watchdog and Plaintiff's counsel's representative prevented Dr. Walsh and Dr. Cohen from conducting complete examinations. Plaintiff responds that both doctors had access to Plaintiff's medical history from the records provided to them prior to their respective examinations.

CPLR 3121 neither provides nor prohibits the presence of a plaintiff's attorney at his/her IME. Nevertheless, the law is settled that a party is entitled to have a representative present during a physical examination provided that the representative does not interfere with the conduct of the examination. *Ramsey v N.Y. Univ. Hosp. Ctr.*, 14 AD3d 349, 350 (1st Dept 2005); *Bermejo v New York City Health & Hosps. Corp.*, 135 AD3d 116, 143 (2d Dept 2015); *Ponce v Health Ins. Plan*, 100 AD2d 963, 964 (2d Dept 1984); *see also Lamendola v Slocum*, 148 AD2d 781, 782 (3d Dept 1989) (trial court abused its discretion in compelling plaintiff's

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<sup>6</sup> Mastroddi Affirmation, ¶ 13.

<sup>7</sup> Defendants' exhibit D also contains a copy of Dr. Cohen's report ("Cohen Report").

\* 4]

medical examination in the absence of her attorney); *Jakubowski v Lengen*, 86 AD2d 398, 401 (4th Dept 1982) (quoting *Sharff v Superior Ct. of City & County of San Francisco*, 44 Cal 2d 508, 510 [1955]) (“Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination.”) Thus, a defendant’s motion to compel the plaintiff to appear for a second round of IME’s is dependant upon the defendant’s ability to show that the plaintiff’s conduct during the first round of IME’s “deprived defendants of the ability to conduct meaningful examinations.” *Guerra v McBean*, 127 AD3d 462, 462 (1st Dept 2015); see also *Tucker v Bay Shore Stor. Warehouse, Inc.*, 69 AD3d 609, 610 (2d Dept 2010).

In this case, neither Dr. Walsh’s nor Dr. Cohen’s examinations appear to have been hampered as a result of the IME Watchdog and Plaintiff’s counsel’s representative. Importantly, neither doctor stated that an informed medical conclusion could not be reached or that their reports were incomplete because of the IME Watchdog’s presence, advise, or instructions.

The Walsh Report indicates that while Plaintiff did not complete his questionnaire, Dr. Walsh was able to obtain not only Plaintiff’s medical history but all other information that he needed from the medical records provided for his review and from his interview of the Plaintiff. Dr. Walsh did not couch his conclusions as being based on an incomplete record. It also appears from the language of his Report and from the partially completed questionnaire that Plaintiff’s refusal to fully complete the questionnaire was the result of advice from his attorney, not the IME Watchdog. Dr. Cohen similarly appears to have knowledgeably completed his examination of

the Plaintiff and reached an informed medical conclusion despite the presence of Plaintiff's counsel's representative.

This is not to say that the court condones such conduct. Actions strikingly similar to those taken by Plaintiff's counsel in this case were met with strong disapproval by the Second Department in *Tucker*, 69 AD3d at 610. This court's decision merely declines to compel the Plaintiff to undergo additional IME's since there is no indication in either the Walsh or the Cohen Reports that their examinations were hindered. *Id.* Accordingly, Defendants' motion for an order directing new IME's of the Plaintiff and Defendants' request for costs arising from Plaintiff's first round of IME's are both denied.

Defendants' alternative request for an order compelling Plaintiff to provide discovery is granted in part. Prior to this motion, Defendants served Plaintiff's counsel with a Notice for Discovery and Inspection which requests the "name and address of any person who accompanied plaintiff to the independent medical examination and who may be called as a fact witness" and "[c]opies of any handwritten notes, written report and video recordings and/or audio recordings regarding the independent medical examination".<sup>8</sup> Plaintiff did not respond thereto or move for a protective order. On this motion, Plaintiff's entire argument in such regard is that "any correspondence between my office and IME Watch Dog, who is an agent of this office, is material prepared for litigation and not discoverable."<sup>9</sup>

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. . . ." The

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<sup>8</sup> Defendants' June 29, 2016 discovery notice is submitted herein as Defendants' exhibit E.

<sup>9</sup> Affirmation of Dario Perez, Esq. dated September 26, 2016, ¶ 31.

\* 6]

words “material” and “necessary” have been “interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006). Although New York’s case law regarding the specific issue of discovery from IME Watchdogs is scant, one judge ordered two IME Watchdogs to submit to examinations before trial, holding that it would be improper for a court to “allow a party to create witness(es) to a critical event in the litigation without any duty to disclose their findings.” *Ferrell v Doe*, 2016 NY Misc. LEXIS 2656, \*5 (Sup. Ct. Bronx Co. June 21, 2016, Douglas, J.). Otherwise, there would be “no assurance that their observations were complete and accurate.” *Id.* The facts and circumstances of this case dictate a similar result with respect to the IME Watchdog who accompanied Plaintiff to Dr. Walsh’s examination. It is unclear if the person who accompanied the Plaintiff to Dr. Cohen’s examination was also an IME Watchdog.

CPLR 3101(d)(2) sets forth in relevant part that “materials otherwise discoverable . . . and prepared in anticipation of litigation . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain a substantial equivalent of the materials by other means . . . .” The “burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege.” *Anonymous v High School for Env’tl. Studies*, 32 AD3d 353, 359 (1st Dept 2006); *see also Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 (2d Dept 2004) (party claiming privilege bears the burden of “identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was

prepared exclusively in anticipation of litigation.”). In this case, I find that Plaintiff’s conclusory and unsupported assertion regarding Plaintiff’s counsel’s relationship with IME Watchdog, Inc., and its claim of work product privilege as to the materials prepared thereunder, are plainly not enough to meet this burden.

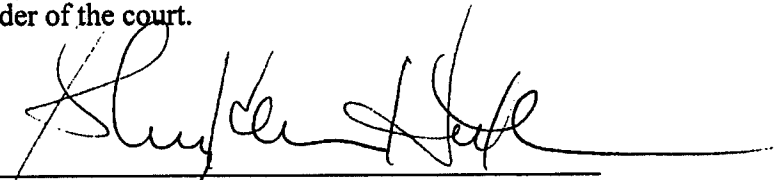
Accordingly, it is hereby

ORDERED that Defendants are directed to serve Plaintiff with an amended Notice of Discovery and Inspection consistent with this decision and order within 20 days from the date of entry hereof, including a request for Plaintiff to identify the person who accompanied Plaintiff to Dr. Cohen’s examination; and it is further

ORDERED that Plaintiff is directed to respond thereto within 20 days of such service; and it is further

ORDERED that, in all other respects, Defendants’ motion is denied.

This constitutes the decision and order of the court.

DATED: *January 12, 2017*   
SHERRY KLEIN HEITLER, J.S.C.