

<b>Alcantara-Pena v Shanahan</b>
2017 NY Slip Op 32959(U)
October 24, 2017
Supreme Court, Bronx County
Docket Number: 302075/2012
Judge: Laura G. Douglas
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 11

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X

**PENA,CINTHIA ALCANTARA**

Index No. **0302075/2012**

-against-

Hon. **LAURA DOUGLAS,**

**SHANAHAN,CHRISTINE**

Justice Supreme Court

-----X

The following papers numbered 1 to 5 Read on this motion, **PRECLUDE** and *CROSS-MOTION TO QUASH*  
Noticed on **August 04 2017** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 10/24/17

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	(1)	
Answering Affidavit and Exhibits	(2), (4)	
Replying Affidavit and Exhibits	(5)	
<i>Notice of Cross-Motion</i> Affidavits and Exhibits	(3)	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

*motion by defendants  
The City of New York  
and Welsbach Electric Corp.  
and cross-motion by plaintiff  
are joined for purposes  
of Decision/Order and are  
decided in accordance with  
the attached memorandum  
Decision/Order.*

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 10, 24, 17

Hon. *LJD*  
**LAURA DOUGLAS, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
PART 11

\_\_\_\_\_x  
CINTHIA ALCANTARA-PENA,

Index No.: 302075/2012

Plaintiff,

**DECISION/ORDER**

-against-

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

CHRISTINE SHANAHAN, THE CITY OF NEW YORK,  
and WELSBACH ELECTRIC 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 to compel production of certain discovery:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion by Defendants The City of New York and Welsbach Electric Corp., Good Faith Affidavit of Amy M. Kramer, Esq. dated July 7, 2017, Affidavit of Amy M. Kramer, Esq. dated July 7, 2017 in Support of Motion, and Exhibits (“A” through “M”).....</b>	<b>1</b>
<b>Affirmation of Brian C. Mardon, Esq. dated August 10, 2017 in Opposition to Motion and Exhibits (“A” through “J”).....</b>	<b>2</b>
<b>Plaintiff’s Notice of Cross-Motion, Affirmation of Brian C. Mardon, Esq. dated August 10, 2017 in Support of Cross-Motion, and Exhibit (“A”).....</b>	<b>3</b>
<b>Affidavit of Amy M. Kramer, Esq. dated October 2, 2017 in Reply and in Opposition to Plaintiff’s Cross-Motion and Exhibits (“A” and “B”).....</b>	<b>4</b>
<b>Reply Affirmation of Brian C. Mardon, Esq. dated October 4, 2017 and Exhibits (“A” through “D”).....</b>	<b>5</b>

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

Defendants The City of New York and Welsbach Electric Corp. (collectively, “Welsbach”) seek an order precluding the plaintiff’s vocational rehabilitation expert and economists from

testifying at trial and precluding evidence regarding the plaintiff's lost earnings claim as a penalty for inadequate expert witness disclosure or, alternatively, compelling the plaintiff to provide supplemental expert witness disclosure and to appear for an examination by Welsbach's vocational rehabilitation expert. The motion is denied in its entirety.

The plaintiff cross-moves for an order quashing the subpoena dated July 20, 2017 served by Welsbach upon Richard Schuster ("Schuster"), the plaintiff's designated vocational rehabilitation expert, precluding the defendants from making further attempts to obtain records from plaintiff's expert, and awarding sanctions against counsel for Welsbach. The cross-motion is granted solely as ordered below and is otherwise denied.

The plaintiff filed a note of issue on or about March 21, 2017. Thereafter, the plaintiff served an expert exchange regarding her economists (on or about May 9, 2017) and her vocational rehabilitation expert (on or about May 10, 2017). Under CPLR § 3101(d)(1)(I), the plaintiff was bound to disclose in reasonable detail "the substance of the facts and opinions on which each expert is expected to testify". The Court finds that the expert exchanges here meet that burden. In essence, the plaintiff's expert disclosure is identical to that found to be adequate in *Keita v. Zahava Services Corp.*, 139 AD3d 610 [1<sup>st</sup> Dept 2016].

The plaintiff has properly refused to submit to an examination by Welsbach's vocational rehabilitation expert. No unanticipated or unusual circumstances have arisen since the filing of the note of issue to have triggered such an examination only at this time. If it believed that such an examination was necessary to defend against the claims brought in this action, Welsbach did not have to wait until the plaintiff's exchange to notice its own examination by a vocational rehabilitation expert (*see Freni v. Eastbridge Landing Associates LP*, 309 AD2d 700 [1<sup>st</sup> Dept 2003] and *Keita v. Zahava Services Corp.*, 139 AD3d 610 [1<sup>st</sup> Dept 2016]). The Court notes that the plaintiff disclosed at her deposition of October 9, 2014 that she did not intend to return to work because her injuries prevent her from doing so (*see Alcantara-Pena deposition transcript*, pages 49-50).

It appears that during the pendency of the instant motions, Welsbach served a subpoena upon Schuster seeking his report, among other things. Since Welsbach is not entitled to the expert's reports (*see Keita v. Zahava Services Corp.*, 139 AD3d 610 [1<sup>st</sup> Dept 2016]), the subpoena must be quashed. However, Welsbach's actions in this regard do not rise to the level of frivolous or other

disfavored practice sufficient to warrant an award of sanctions. The plaintiff has not incurred any actionable prejudice, since no further disclosure is required.

Accordingly, it is hereby

ORDERED, that the subpoena issued by defendants The City of New York and Welsbach Electric Corp. to Richard Schuster and dated July 20, 2017 is quashed in its entirety.

This constitutes the Decision and Order of this Court.

Bronx, New York  
October 24, 2017

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