

Rossi v Johnston
2019 NY Slip Op 33254(U)
October 29, 2019
Supreme Court, New York County
Docket Number: 154491/2017
Judge: Kathryn E. Freed
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PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

INDEX NO. 154491/2017

MOTION SEQ. NO. 004

Plaintiff,

- v -

KERRI-ANN JOHNSTON.

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69, 70, 71

were read on this motion to/for

ORDER OF PROTECTION

In this action for punitive damages based on allegations of the malicious prosecution of a criminal action (Doc. 1), defendant moves, pursuant to CPLR 3103 (a), for a protective order prohibiting plaintiff from attending defendant's deposition (Doc. 54-57). Plaintiff opposes the motion and cross-moves for, *inter alia*, an order declaring that the affidavit of defendant's therapist submitted in support of her motion waived the physician-patient privilege (Doc. 59). After a review of the parties' papers and the relevant statutes and caselaw, the motions are decided as follows.

FACTUAL AND PROCEDURAL HISTORY:

Plaintiff and defendant, who divorced in 2012, have two children (Doc. 1 at 4). As relevant here, a restraining order was issued in 2015 in favor of defendant and against plaintiff by a California court (Doc. 1 at 4). Defendant filed a criminal complaint in February 2017, alleging that plaintiff had violated the existing order of protection on February 16, 2017 by

approaching her and mouthing the words “arrest me” (Doc. 1 at 6-7). Plaintiff was arrested and charged with criminal contempt in the second degree (Penal Law § 215.50 [3]); however, the District Attorney’s office dismissed the case after video surveillance established that he had not violated the order of protection (Doc. 1 at 7-8). Thereafter, plaintiff initiated the instant action by filing a summons and complaint against defendant for malicious prosecution and seeking compensatory and punitive damages and attorneys’ fees (Doc. 1).

In support of her motion, defendant submits, *inter alia*, the affidavit of her therapist Edison de Mello (Doc. 55). De Mello, who has treated defendant since 2016, averred that defendant suffers from post-traumatic stress disorder (“PTSD”) due to a history of being subject to domestic violence (Doc. 55 at 1). He opined, *inter alia*, that plaintiff’s presence at defendant’s deposition would “impose a heavy psychological toll on her and will significantly impede her progress in treatment and recovery” (Doc. 55 at 2). De Mello also insisted that plaintiff’s presence would “impair her performance at the deposition” (Doc. 55 at 2). Defendant argues that there are “unusual circumstances” that warrant plaintiff’s exclusion, including a history of physical and psychological abuse and multiple restraining orders issued in California (Doc. 57 at 5-6). She requests that plaintiff be allowed to participate by telephone, listening to the testimony and having a full opportunity to communicate with his counsel (Doc. 57 at 6).

In opposition to defendant’s motion, plaintiff submits, *inter alia*, his own affidavit (Doc. 60). Specifically, plaintiff argues, *inter alia*, that the parties have been in each other’s presence numerous times, including at previous depositions, and that there is no “compelling necessity” warranting his exclusion from defendant’s deposition (Doc. 63). Furthermore, plaintiff contends that defendant waived any physician-client privilege by relying on De Mello’s affidavit in her

motion for a protective order and requests that this Court so-order the accompanying subpoenas seeking disclosure of all records relating to her diagnosis and treatment (Doc. 62).

LEGAL CONCLSUION:

A party in a civil action has a right to be present at an examination before trial (see CPLR 3113 [c]; *Perez v Time Moving & Storage*, 28 AD3d 326, 328 [1st Dept 2006], *lv dismissed* 7 NY3d 862 [2006]). However, this right is not absolute and a court may, in its discretion and under appropriate circumstances, exclude a party from a deposition (see CPLR 3103 [a]; *Jones v Maples*, 257 AD2d 53, 56-57 [1st Dept 1999]; *Troutman v Washburn*, 197 AD2d 876, 876 [4th Dept 1993]).

This Court grants defendant's motion. Since a California court issued a protective order against plaintiff and De Mello opined that defendant will be negatively impacted by plaintiff's presence at her deposition, this Court, in its discretion, directs plaintiff to participate in defendant's deposition by phone. Insofar as this Court's determination will afford plaintiff the opportunity to confer with his own counsel during defendant's deposition, this Court finds no harm in excluding plaintiff from defendant's deposition (see CPLR 3103 [a]; *Troutman v Washburn*, 197 AD2d at 876; *Jones v Maples*, 257 AD2d at 56 [1st Dept 1999]; *Perez v Time Moving & Stor.*, 28 AD3d at 329-330).

This Court also denies plaintiff's cross motion. It is well-settled law that the physician-patient privilege is not waived merely because "a party defends an action in which his mental or physical condition is in controversy" but rather where "a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff" (*Koump v. Smith*, 25 NY2d 287, 294 [1969]; see *Dillenbeck v Hess*, 73 NY2d 278, 287-288

[1989]). Here, the privilege was not waived. In this action seeking money damages, defendant's PTSD is not the subject of a counterclaim. Nor does defendant attempt to use her diagnosis to defend against plaintiff's allegations. Moreover, the only case plaintiff proffers in support of his motion, *Green v Montgomery*, is inapposite because defendant's PTSD is raised in the context of a discovery dispute and does not concern a substantive issue in this litigation (*compare Green v Montgomery*, 95 NY2d 693, 700-701 [2001]) (Doc. 63 at 6). Thus, plaintiff's motion is denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the forgoing, it is hereby:

ORDERED that defendant's motion for a protective order pursuant to CPLR 3103 (a) prohibiting plaintiff from being physically present at her deposition is granted; and it is further

ORDERED that plaintiff and his attorney may participate in defendant's deposition by telephone, and plaintiff may confer with his attorney during said deposition; and it is further

ORDERED that defendant's deposition be conducted within 30 days after service of this order with notice of entry; and it is further

ORDERED that defendant's counsel shall serve a copy of this order with notice of entry upon plaintiff within 30 days of entry; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a compliance conference before this Court on February 4, 2020 at 2:15 PM in Room 280 of the courthouse at 80 Centre Street, New York, New York, and it is further

ORDERED that this constitutes the decision of the Court.

10/29/2019

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

SETTLE ORDER

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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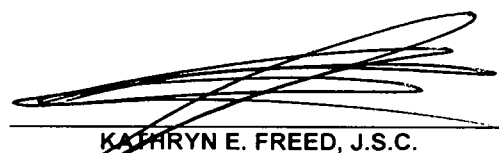
OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


KATHRYN E. FREED, J.S.C.