

Reyes v City of New York
2020 NY Slip Op 32609(U)
June 24, 2020
Supreme Court, Bronx County
Docket Number: 303084/2015
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 11

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Jason Reyes,

Plaintiff,

DECISION and ORDER
Index No. 303084/2015

-against-

The City of New York et al.,

Defendants.

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Defendants Portabella Group, LLC., and Porta Bella Group, LLC., (hereinafter Portabella) move pursuant to CPLR §3126 for an order dismissing the complaint¹ or precluding plaintiff from offering evidence regarding his physical injuries, for failure to appear at numerous scheduled physical exams. Co-defendant New Cingular Wireless PCS, LLC., cross-moves seeking the same relief. By separate motion, defendants City of New York, New York City Transit Authority, Metropolitan Transit Authority, Cemusa Inc., and Dynaserv Industries, Inc., (hereinafter City) also move to strike the complaint for plaintiff's unexplained failure to appear at the scheduled physical exams. Plaintiff opposes the motions. The motions are hereby consolidated for purposes of disposition and are granted solely to the extent below:

Plaintiff commenced this personal injury action on or about July 16, 2015 as a result of a slip and fall on ice. After issue was joined, a preliminary conference Order dated September 13, 2016 set a timeline for the parties to exchange discovery. Plaintiff appeared at his deposition on June 27, 2017. The parties next appeared at a compliance conference² on September 26, 2017

¹ Defendants also move to direct plaintiff to make payment for the no-show charges on his three missed scheduled physical exams; however, as per order dated March 4, 2019, which directed plaintiff to pay the sum of \$1,070 for no-show charges, the issue is rendered moot.

² The parties initially appeared in the City Part for the preliminary conference, but since the City is now represented by private counsel, the case has been transferred to Part 11-Differentiated Case Management Part- to continue with the discovery schedule.

where again the parties were directed to comply with certain outstanding discovery including plaintiff's physical exams.

Pursuant to the September 26, 2017 compliance conference order, on November 29, 2017, defendants designated Arnold Wilson to conduct an orthopedic physical exam of plaintiff on December 14, 2017. Plaintiff required a Spanish interpreter for the physical exam and defendants requested that an interpreter be present at said exam. However, plaintiff failed to appear without explanation. The exam was then rescheduled to January 31, 2018. Plaintiff contacted the orthopedist to reschedule as he was unavailable. The exam was again rescheduled, on consent, to February 22, 2018. On said date, plaintiff failed to appear, and no excuse was provided.

By so-ordered stipulation dated July 23, 2018, plaintiff agreed to be responsible for all related costs if he failed to appear at the next scheduled orthopedic physical exam which was to be re-designated within forty-five days of the order. Defendants designated the orthopedic exam for August 23, 2018 and again the plaintiff failed to appear without explanation.

Thereafter, on November 29, 2018, defendants made the instant motion to strike plaintiff's complaint for his non-appearance at the physical exams and for payment of the no-show charges for defendant's physicians and interpreter's fees. In his opposition, plaintiff's counsel states that they made attempts to contact plaintiff regarding the physical exams but were not able to reach him. Plaintiff's counsel learned that plaintiff is currently incarcerated at Clinton Correctional Facility in Dannemora, New York since March 15, 2018 with a sentence of ten years. Clinton Correctional Facility is located approximately 320 miles away from New York City.

The instant motions to dismiss have been adjourned on multiple occasions either to produce the plaintiff in New York City to appear for his physical exam or to settle the instant matter, neither of which were successful. Plaintiff's counsel has indicated that the prison facility will not allow plaintiff to be transported outside the facility due to cost. On March 4, 2019, an interim Order was issued by this Court which directed plaintiff to pay no-show fees in the sum of \$1,070 for his failure to appear at the physical exams. This court reserved decision on the remainder of motion. Defendants have contacted the designated orthopedist who has agreed to perform the physical exam at the prison facility. Defendants seek reimbursement by plaintiff of all costs related to said exam. Plaintiff's counsel requests that the cost incurred in examining the plaintiff at the prison facility be shared equally by the parties.

As per their email to plaintiff's counsel, defendants have indicated that Dr. Wilson, the designated orthopedist, will charge \$18,000.00 to conduct the physical exam at Clinton Correctional facility. Dr. Wilson's usual charge for trial testimony is \$12,000 per day and the "same daily rate would apply here as the travel will require his absence from the office". Defendants explained that Dr. Wilson estimates his time away from the office will be 1.5 days. The exam charges do not include travel expenses. Defendants argue that these charges should not be shared equally by the parties since plaintiff failed to appear at the numerous examinations which had been scheduled prior to his incarceration. Further, defendants will not agree to having a local Dannemora orthopedist conduct the physical exam since defendants would be then forced to incur the additional cost of bringing said witness to New York City to render testimony at a trial of this action.

Pursuant to CPLR 3126, this Court can, in its discretion, sanction plaintiff for his failure to comply with discovery. However, in order to be entitled to the drastic relief of striking

plaintiff's complaint, defendants must conclusively demonstrate that plaintiff's failure to attend the scheduled IMEs was willful, contumacious, or due to bad faith. (*Harris v City of New York*, 117 AD3d 790 [2nd Dept 2014]; *JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehs.*, 119 AD3d 903 [2nd Dept 2014]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (*Siegman v Rosen*, 270 AD2d 14 [1st Dept 2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [2nd Dept 1998]; *Frias v Fortini*, 240 AD2d 467 [2nd Dept 1997]). Here for the most part, plaintiff complied with the Orders except for his non-appearance at his scheduled physical exams, which he admittedly ignored prior to his incarceration. Strong public policy favors resolution of cases on their merits. Since plaintiff has expressed his willingness to appear at the exam and his lack of intention to abandon the action warrants granting him another opportunity to comply with the discovery order. Future failures to comply may not result in such a forgiving determination and the Court expects prompt and timely compliance with its orders.

In addition, defendants are entitled to retain a physician of their choosing to examine the plaintiff, as "the defense must be able to retain a doctor in whom they have confidence to not only perform the examination, but to be in a position to testify as well." (*Chen v Zhi*, 109 AD3d 815 [2nd Dept 2013], quoting *Chong v New York Downtown Hosp.*, 2012 WL 6139908, 2012 NY Slip Op 32877[U] [Sup Ct, New York County]). "The designation of the doctor who will conduct the independent medical examination of the plaintiff shall not be limited or circumscribed by the plaintiff." (*Id.* at 817). As such, defendants are entitled to designate Dr. Wilson as the orthopedist to conduct plaintiff's physical exam at Clinton Correctional Facility. With regard to the cost for said exam, this court agrees with defendants that plaintiff is

responsible for covering the expenses related to the physical exam less the cost of the examinations which defendants would have paid had said examinations been conducted in New York City. In *Deonarine v Montefiore*, 2015 WL 725419, Hon. Sharon A. Aarons found that the defendant was entitled to have a physician of defendant's choice examine the plaintiff, who was deported to Trinidad and Tobago, at plaintiff's expense.


Accordingly, it is hereby ORDERED that defendants schedule the physical examination of plaintiff with the Clinton Correctional facility as soon as practicable and in accordance with any governmental health guidelines that may be in place as a result of the current health pandemic.

It is further ORDERED that defendants provide an affidavit from Dr. Wilson detailing his rate and his proposed reasonable calculated travel expenses to plaintiff within forty-five days of service of a copy of this order with notice of entry. Upon receipt of said affidavit, plaintiff shall post a bond in an amount sufficient to secure the physical exam expenses less the cost which defendants would have incurred had said examinations been conducted in New York City. After the examination has been held, upon application by either party, this Court will schedule a hearing to determine what amount, if any defendants are entitled to.

Defendants shall serve a copy of this Order on the plaintiff with notice of entry thereon.

This constitutes the decision and order of the court.

Dated: 6-24-20
Bronx, New York



Hon. Laura G. Douglas, J.S.C.