

**Powell v JP Morgan Chase & Co.**

2020 NY Slip Op 34543(U)

January 14, 2020

Supreme Court, Queens County

Docket Number: 701077/2017

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

[\* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS  
Justice

IA Part 30

FILED  
JAN 22 2020  
COUNTY CLERK  
QUEENS COUNTY

ZENA POWELL,

Index Number 701077/2017

Plaintiff,

Motion Date January 8, 2020

-against-

Motion Seq. No. 8

JP MORGAN CHASE & CO. and FALIDAS  
ASSOCIATES,

Motion Calendar No.: 48

Defendants.

The following e-file papers 150-172 submitted and considered on this motion by defendants JPMorgan Chase Bank, N.A. (s/h/a JPMorgan Chase & Co., hereinafter "Chase") and Falidas Associates (hereinafter "Falidas") seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3124 and 3126 dismissing plaintiff Zena Powell's (hereinafter "Powell") complaint for failure to appear at her IME twice with orthopedic spinal surgeon, Dr. Andrew Hecht, or in the alternative; precluding Powell from offering any evidence or testimony at the time of trial as to alleged injuries to her cervical and lumbar spine, or in the alternative; compelling Powell to pay the \$5,000.00 rescheduling fee and appear for an IME with Dr. Andrew Hecht.

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits ..... EF 150-168  
Affirmation in Opposition-Affidavits – Exhibits ..... EF 169-171  
Reply Affirmation-Affidavits-Exhibits..... EF 172

Chase and Falidas seeking an Order pursuant to CPLR 3124 and 3126 dismissing Powell's complaint for failure to appear at her IME twice with orthopedic spinal surgeon, Dr. Andrew Hecht, or in the alternative; precluding Powell from offering any evidence or testimony at the time of trial as to alleged injuries to her cervical and lumbar spine, or in the alternative; compelling Powell to pay the \$5,000.00 rescheduling fee and appear for an Independent Medical Examination (hereinafter "IME") with Dr. Andrew Hecht.

This is a premises liability action which was commenced by Powell on or about January 24, 2017. Powell alleged that she sustained injuries on September 7, 2016 due to a purported defective condition at the Chase branch located at 25-15 Queens Plaza North in Long Island City, specifically a mis-leveled rug. As a result of the accident, Powell claimed in her verified bill of particulars that she sustained injuries to her knee, neck and back. Chase and Falidas joined issue in the action with the filing of verified answers on February 7, 2017 and May 16, 2017 respectively. Powell filed a Note of Issue on July 17, 2018, although discovery was not complete. On August 29, 2018 the matter was stayed, and the stay was vacated on August 28, 2019 by So-Ordered Stipulation of Hon. Maureen A. Healy. In the Stipulation, the parties agreed to exchange or conduct outstanding discovery, including an IME of Powell on or before September 9, 2019.

According to movants, Powell has failed to comply with the August 28, 2019 Court Order. The IME was rescheduled from September 9, 2019 at Chase and Falidas' doctor's request to September 16, 2019, allegedly with Powell's counsel's consent. The IME did not go forward, according to movants, because Powell was one hour and forty-five minutes late. Movants counsel sent correspondence to Powell's attorney on September 24, 2019, advising him that Powell did not appear for her IME in a timely fashion and that any financial consequences for the failure to timely appear would be borne by him or Powell. Powell's counsel did not offer any explanation for why Powell was late. The IME was rescheduled for October 28, 2019 and Powell again failed to appear. The IME physician, Dr. Hecht advised defense counsel that in order to reschedule the IME he would need a \$5,000.00 rescheduling fee. Thereafter, on November 1, 2019, defense counsel advised Powell's that they would need to satisfy the \$5,000.00 fee or judicial intervention would be required. Chase and Falidas argue that if the IME were rescheduled there is no guarantee that Powell would show up for a third scheduled appointment with Dr. Hecht and that they should not have to pay Dr. Hecht's rescheduling fee.

In opposition, Powell asserted that her failure to attend the IME was not willful or contumacious. Due to the fact that Powell sustained serious injuries in this accident, she requires special assistance to travel and has employed a home health care aid to assist her. The fees sought by Dr. Hecht are unreasonable, because there is no showing that Powell's failure to appear impeded or damaged the spinal surgeon, Dr. Hecht in an amount of \$5,000.00, which is burdensome. Her attendance at the appointment was impeded by scheduling and health constraints, and she is ready, willing and able to appear for her IME. Powell stated that assessing the \$5000.00 against her is not permissible under 22 NYCRR §130-1.1(a) which states in part that an award of costs in the form of reimbursement for actual expenses incurred, reasonable attorneys' fees resulting from frivolous conduct to any party or attorney is permissible since there is no showing of willful or contumacious conduct on her part.

In reply, Chase and Falidas' believe that if the Court gives Powell another chance to appear for her IME, it should not be subject to Dr. Hecht's rescheduling fee, which is due solely to Powell's failure to appear for two appointments, not advising Dr. Hecht or defense counsel that she would be late or would not be able to attend the rescheduled IME. Dr. Hecht is the Chief of Spine Surgery at Mount Sinai Hospital, and any argument that the reschedule fee is too high

given that he had to make time in his busy calendar to schedule the Powell IME and that his time was wasted, and movants would be unduly burdened and prejudiced if they were made to pay the reschedule fee for Dr. Hecht. Powell nor her counsel ever advised defense counsel of Powell's difficulty in appearing at the IME's. Moreover, movants are entitled to retain a specialist to examine Powell relative to the serious injuries which she has claimed in this lawsuit. Dr. Hecht is entitled to the amount he seeks as a reschedule fee. Therefore, plaintiff's complaint should be dismissed or she should be precluded from offering any evidence or testimony at the time as to the injuries she claimed to her cervical and lumbar spine or in the alternative, Powell should pay the \$5000 rescheduling fee and appear at an IME by a date certain or be precluded if she does not.

### DISCUSSION

"Litigation cannot be conducted efficiently if deadlines are not taken seriously...disregard of deadlines should not and will not be tolerated" (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514 [2005]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 124 [1999]). CPLR 3101(a) requires, in relevant part, "full disclosure of all matter material and necessary in the prosecution or defense of an action. Material and necessary information is that which is required to be disclosed because it bears upon the controversy at issue and will assist the requesting party in preparing for trial" (*see M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]).

Pursuant to CPLR §3126, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made...refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering judgment by default against the disobedient party." The drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands or orders was willful or contumacious. (*See Empire Enters. I.J.J.A., Inc. v Daimler Buses of North America, Inc.*, 172 AD3d 819 [2d Dept 2019]; *Hunghui Kuang v Metlife*, 159 AD3d 878 [2d Dept 2018]; *Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) Willful and contumacious conduct can be inferred from a party's repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Mears v Long*, 149 AD3d 823 [2d Dept 2017]; *Lucas v Lawrence Stam*, 147 AD3d 921 [2d Dept 2017]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].) The Court finds that movants failed to demonstrate that under the circumstances, Powell's conduct herein constituted "willful and contumacious" conduct requiring drastic relief of striking plaintiff's complaint under CPLR §3126 (*see Mesiti v Weiss*, -AD3d-, 2019 NY Slip Op 09343 [3d Dept 2019]). However, the Court will grant movants relief under CPLR sections 3124 and 3126 to compel Powell to appear for her IME and pay Dr. Hecht's reschedule fee in the amount of \$5,000.00 or be precluded from offering any evidence or testimony related to injuries allegedly sustained to her cervical and lumbar spine. This remedy is within the Court's discretion under CPLR §3126 (*see Gokey v*

*Decicco*, 24 AD3d 860 [3d Dept]; *Hilley v Sanabria*, 12 AD3d 1188 [4<sup>th</sup> Dept 2004]; *Flynn v Debonis*, 246 AD2d 852 [3d Dept 1998]). Therefore it is

**ORDERED**, that defendants' motion is granted to the extent that plaintiff's counsel is directed to tender a certified check in the amount of \$5,000.00 to defendants' counsel which constitutes the IME reschedule fee for Dr. Hecht within twenty (20) days of the filing of this Order so that plaintiff's IME may be rescheduled; and it is further

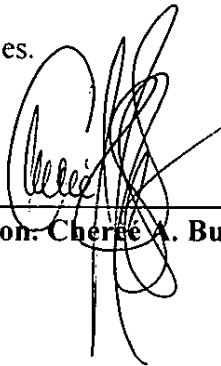
**ORDERED**, that plaintiff is directed to appear for an IME with Dr. Hecht on or before March 9, 2020. Defendants shall immediately re-notice the IME after receipt of the reschedule fee from plaintiff's counsel; and it is further

**ORDERED**, that plaintiff's failure to comply with this Order shall result in her preclusion from offering any testimony or evidence at the time of Trial.

This constitutes the decision and Order of the Court.

A copy of this Order shall be mailed to the parties.

Dated: January 14, 2020

  
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Hon. Cherie A. Buggs, JSC

**FILED**  
**JAN 22 2020**  
**COUNTY CLERK**  
**QUEENS COUNTY**