

Jandly v New Carle Place Farm Inc.

2020 NY Slip Op 34571(U)

May 8, 2020

Supreme Court, Nassau County

Docket Number: 606477/2017

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 17
Present: Hon. Sharon M.J. Gianelli

CATHERINE JANDLY, X

Plaintiff,

Index No: 606477/2017

-against -

Motion Seq. No: 003

NEW CARLE PLACE FARM INC. And
CARLE PLACE GOURMET & PRODUCE NY INC.,

Decision and Order

Defendants.

_____ X

Papers submitted:
Defendants Notice of Motion
and Affirmation in Support _____ X
Plaintiff Affirmation in Opposition _____ X
Defendants Reply _____ X

This action was commenced by the filing of a Summons and Complaint on July 5, 2017. An Answer with cross-claims was filed on July 28, 2017.

This is an action to recover for injuries sustained as a result of a trip and fall inside the New Carle Place grocery store on July 30, 2016.

Defendants now move for an Order striking Plaintiff's Complaint for a failure to pay the \$4,000.00 cancellation fee and attend an Independent Medical Examination with Dr. Lloyd R. Saberski, after Plaintiff cancelled; precluding Plaintiff from offering evidence at the time of trial regarding her physical condition due to her failure to pay the \$4,000.00 cancellation fee and attend an Independent Medical Examination ("IME") with Dr. Lloyd R. Saberski, after Plaintiff cancelled;

or compelling Plaintiff to pay the \$4,000.00 cancellation fee and attend an Independent Medical Examination with Dr. Lloyd R. Saberski;

Facts

On April 10, 2019, Plaintiff served Defendants with copies of medical records from Dr. Scott Keonig. Among other things, the records reference Plaintiff's complaints of numbness on the side of the foot; sensitivity and pain around the scar; discussion of surgery for possible nerve entrapment; and that Plaintiff would seek a pain management evaluation.

On August 13, 2019, Plaintiff served Defendants with medical records from a new treating physician, Dr. Carol Agin, and an authorization to obtain said records. These records include a three-phase bone scan for an evaluation of regional pain syndrome.

Based on Plaintiff's additional treatment, including her neurological complaints and three-phase bone scan, on September 27, 2019, Defendants served Plaintiff with a Notice of Independent Medical Examination with Dr. Lloyd R. Saberski to take place on December 11, 2019.

The Notice of Independent Medical Examination states:

"PLEASE TAKE FURTHER NOTICE, that in the event Plaintiff fails to attend the above scheduled physical examination, without the prior consent of the appointed physicians, Plaintiff and Plaintiff's attorneys will be responsible for any cancellation fee charged by the doctor."

By emails dated October 1, 2019 and October 10, 2019, Plaintiff confirmed the IME with Dr. Saberski. On December 11, 2019 at 8:42 a.m., Defendants received an email from Dr. Saberski's office that the IME was cancelled, and that Dr. Saberski's office would contact Plaintiff's office at 9:00 a.m. when the office opened.

On December 11, 2019 at 9:52 a.m., Plaintiff emailed confirming that she received notice of the cancellation from Dr. Saberski's office, and that she would reschedule the IME directly with Dr. Saberski's office.

On December 11, 2019 at 11:37 a.m., Defendants received an email from Dr. Saberski's office stating that they spoke with Plaintiff, and it was agreed that Plaintiff's IME would be rescheduled for December 20, 2019 at 12:30 p.m.

On December 19, 2019 at 10:35 a.m., Plaintiff emailed Defendants stating that Plaintiff could not attend the IME scheduled for the next day and that Plaintiff left a voicemail with Dr. Saberski's office. The reason given for the cancellation was that Plaintiff had a doctor's appointment she could not cancel. Defendants responded to Plaintiff's email stating that Plaintiff would be responsible for any cancellation fee.

On December 19, 2019, Defendants emailed Dr. Saberski's office and included Plaintiff's attorney regarding the cancellation, and that any cancellation fees should be directed to Plaintiff.

On December 19, 2019 at 11:57 a.m., Dr. Saberski's office emailed Defendants to inform Plaintiff that there is a \$4,000.00 cancellation fee that must be paid before the IME could be rescheduled. On December 19, 2019 at 12:00 p.m., Defendants forwarded said email to Plaintiff. Plaintiff did not attend the scheduled IME on December 20, 2019.

On December 27, 2019, Dr. Saberski's office emailed Defendants regarding rescheduling the IME. Defendant forwarded said email to Plaintiff and informed them that they should contact Dr. Saberski's office to reschedule the IME.

On December 30, 2019, Defendants were informed that Plaintiff refused to pay the \$4,000.00 cancellation fee.

Defendants argue that Plaintiff was aware that she would be responsible for any cancellation fee. Further, that Plaintiff also was aware that Dr. Saberski was flying to New York for the IME. After learning this, Plaintiff had the opportunity to go forward with the IME the next day so she would not be subject to the cancellation fee. Defendants argue that Plaintiff decided to cancel the IME knowing the consequences.

Plaintiff submits opposition arguing that Plaintiff had no notice of the cancellation amount or the IME doctor's cancellation policy. In fact, Plaintiff had no notice of what the doctor's cancellation policy was until February 5, 2020, more than 6 weeks after the cancellation. Plaintiff further argues that a single instance of cancelling a voluntary IME

appointment does not warrant costs or sanctions. Finally, Plaintiff argues that the reported cases do not support Defendant's Request for a \$4,000.00 cancellation fee. Specifically, Plaintiff addresses and distinguishes each case from the facts at bar. Further, Plaintiff argues that more applicable case law suggests that awards for missed IME's range from \$350.00 to \$800.00 and were awarded in circumstances where there was more than one (1) missed IME and Defendants provided invoices from their physicians. Further, Plaintiff argues that there are no cases which award IME fees for examinations that were properly cancelled prior to the appointment.

In Reply, Defendants argue Plaintiff and Plaintiff's attorneys were on notice that they would be responsible for any cancellation fee charged by the doctor. Further, that there is no requirement that a "bill or invoice" be attached. Finally, the Reply informs the Court that upon rescheduling of the IME, Dr. Saberski's office agreed to reduce the cancellation fee to \$2,000.00 provided that Plaintiff attends a rescheduled exam.

Analysis

Defendants cite to several cases for the proposition that Courts have awarded IME cancellation fees in similar cases. However, the Court finds those cases to be distinguishable on the facts as they involve multiple unexcused failures to appear for an IME in violation of prior Court Orders. Defendant further relies on the Third Department case *Flynn v. Debonis*, 246 A.D.2d 852, 668 N.Y.S.2d 274 (3d Dep't 1998), in which the Court awarded a \$600.00 to "reimburse defense counsel for charges assessed by defendants' physician." The Court notes that Defendants' papers are devoid of any evidence that there was a payment made to the IME physician that would need to

be reimbursed to defense counsel. Further, the Court notes the dramatic difference in the cancellation fee of \$4,000.00 being demanded in the underlying matter, while the amount awarded in *Flynn* was \$300.00 per missed examination.

Upon consideration of the papers submitted,

It is

ORDERED, that Defendants' motion for an Order striking Plaintiff's Complaint for her failure to pay the \$4,000.00 cancellation fee and attend an Independent Medical Examination with Dr. Lloyd R. Saberski, following Plaintiff's cancellation of same, is Denied; and

It is

ORDERED, that Defendants' motion for an Order , precluding Plaintiff from offering evidence at the time of trial regarding her physical condition due to her failure to pay the \$4,000.00 cancellation fee and attend an Independent Medical Examination with Dr. Lloyd R. Saberski, following Plaintiff's cancellation of same, is Denied; and

It is

ORDERED, that Defendants' motion for an Order compelling Plaintiff to pay the \$4,000.00 cancellation fee, is Denied; and

It is

ORDERED, that Defendants shall re-schedule the Independent Medical Examinations within sixty (60) days of the date of this Order, to be held within one-hundred and twenty (120) days of the date of this Order, or be precluded from the right to the performance of an Independent Medical Examination; and

It is

ORDERED that all parties are to appear before the Court for a conference on August 11, 2020 at 9:30 a.m. The Court will notify both sides whether the conference will be conducted remotely.

All applications not specifically addressed herein are Denied.

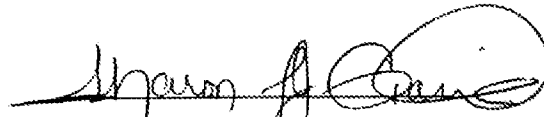
This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
May 8, 2020

ENTERED

May 15 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE


HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.