

Joyner v Saccoccio
2020 NY Slip Op 34861(U)
February 27, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 617207/17
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

ANNA L. JOYNER,

**Index No.
617207/17**

Plaintiff,

**Mot Seq: 002
MG
Decision/Order**

-against-

**DONALD SACCOCCIO and RYDER TRUCK
RENTAL, INC., 472250,**

Defendants.

x

The following papers were read upon this motion:

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Defendants seek an Order vacating plaintiff’s note of issue and certificate of readiness for trial, compelling plaintiff to appear for a further independent medical examination (IME) by neurosurgeon, Dr. Sumeer Sathi,¹ and compelling plaintiff to serve HIPAA compliant trial authorizations. Plaintiff opposes the granting of an Order vacating the note of issue and certificate of readiness for trial and compelling plaintiff to submit to a further IME by Dr. Sathi. Apparently, the request for trial authorizations has been complied with by plaintiff; therefore, that branch of this motion is moot.²

¹ Plaintiff was first examined by Dr. Sathi on September 5, 2018. Plaintiff was also examined by the defendants’ examining orthopedic surgeon on September 28, 2018.

²It has come to the Court’s attention that counsel for the parties have stipulated that the claims against Ryder Truck Rental are discontinued, that Robert Golub is added as a defendant in this action (NYSCEF Document # 101), and that an amended verified complaint has been filed naming “Robbie Golub” as a defendant, to which defendants Saccoccio and Golub have interposed an answer (NYSCEF Document #s 102, 103, 105). These actions were taken without notice to this Court, and after this matter was marked remanded for trial. Counsel for the parties shall submit a stipulation to this Court outlining the discontinuation of claims against Ryder, the reason(s) for the addition of Robert or Robbie Golub as a

This Court has already determined by Decision and Order dated July 12, 2019 that the further neurological IME to be conducted by Dr. Sathi is material and necessary to the issue of damages, considering plaintiff's January 2019 surgery and Fourth Supplemental Bill of Particulars alleging additional injuries.

The extreme difficulties in scheduling this further IME has, unfortunately, become the impetus for the instant motion. The difficulty in scheduling is attributable in various degrees to the plaintiff, counsel for the parties, and Dr. Sathi, with the relationship between the parties' counsel and Dr. Sathi's scheduling conflicts constituting the lion's share of the difficulties.

This Court is well-acquainted with the factual and procedural history of this matter as set forth in its July 12, 2019 Decision and Order, especially as it relates to the holding of the further IME. In its July 12, 2019 Decision and Order, this Court determined that defendants' opportunity to conduct the further IME would not be extended "into perpetuity," and it ordered that the further IME be held on or before August 12, 2019. The next conference calendar appearance for this action was also set for August 12, 2019.

On August 1, 2019, the Court engaged in a conference call with counsel for the parties. The further IME was scheduled for that day, but according to defense counsel, Dr. Sathi was called to participate in emergency spine surgery and was unavailable to perform the further IME. Defense counsel advised that Dr. Sathi was on vacation the following week (August 5-19). Understanding that this emergency caused the inability of Dr. Sathi to perform the IME, the Court made clear that the further IME was not waived by defendant under these circumstances, notwithstanding the Court's July 12, 2019 Decision and Order. It was discussed that the further IME should take place on August 21, 2019.

Defense counsel later memorialized the telephone conference in a letter to the Court dated August 1, 2019, with a copy sent to plaintiff's counsel. In that letter, defense counsel recounted that he and plaintiff's counsel spoke about the August 21st date between themselves and that plaintiff's counsel advised defense counsel by telephone that the August 21st date was not compatible with plaintiff's schedule. Plaintiff's counsel apparently provided defense counsel with days and times of plaintiff's availability, and after further discussions with Dr. Sathi's office, both counsels agreed that the further IME would take place on August 28, 2019, at 2:00 p.m.

On August 12, 2019, this case appeared on the Court's conference calendar, but the Court did not hold a conference with counsel. Instead, counsel for the parties executed a trial Certification Order setting the pre-trial conference for September 23, 2019. Counsel for the parties each signed the Certification Order. On the trial Certification Order there is a handwritten note reading "Further IME with Dr. Sathi scheduled & to proceed on 8/28/2019."

defendant in this action, and a request for amendment of the caption so that this Court may consider so-ordering it. The stipulation is to be submitted to the Court on or before March 17, 2020.

The handwritten note was not written by this Court, but the Court signed the trial Certification Order bearing that notation.³

On September 6, 2019, plaintiff's counsel filed a note of issue and certificate of readiness for trial in compliance with the Certification Order. On the certificate of readiness, counsel represented, *inter alia*, that physical examinations were completed and that discovery proceedings known to be necessary were completed. In the affirmation of compliance also filed by plaintiff's counsel, he wrote, "[p]ursuant to the attached Decision/Order of Court dated July 12, 2019, any further IME by Dr. Sathi is to be held on or before August 12, 2019 and that if defendants' counsel unilaterally cancels the further IME to be conducted by Dr. Sathi without consulting with plaintiff's counsel, then defendants are deemed to have waived that further IME without the necessity of further motion practice. The defendants have unilaterally canceled the further IME and it has now been deemed waived."

While the Court made those determinations and directives in its July 12, 2019 Decision and Order, plaintiff's counsel's affirmation ignores the conference call of August 1, 2019 recounted above and the handwritten note on the Certification Order concerning the re-scheduled further IME set for August 28, 2019.

On September 23, 2019, when this case next appeared on the Court's pre-trial calendar, the Court held a conference with counsel. Since defense counsel was running late, it was determined that the conference would be held with plaintiff's counsel in Chambers and defense counsel on speakerphone. During the conference, the Court was made aware of the fact that the further IME with Dr. Sathi had not been held on August 28, 2019 as had been agreed to by counsel on August 12, 2019, and as evidenced by the notation on the trial Certification Order. Apparently, the doctor's office was moving to another location on August 28, 2019 and the IME could not be held. The Court was further informed that, in the interim since the August 28th examination had to be canceled by the doctor's office, that September 23, 2019 had been selected and agreed upon by the parties as the date for the further IME. Although the Court attempted to persuade plaintiff's counsel to have his client report for the further IME on the 23rd, the very date of the court conference, plaintiff's counsel contended during the conference that the further IME had been waived and that his client, the plaintiff, would not appear for further examination. Defense counsel had already filed the moving papers for the instant motion to compel by the time the September 23, 2019 conference was held (Notice of Motion dated September 17, 2019).

According to defense counsel's affirmation in support of the instant motion, "unbeknownst to [Dr. Sathi's] office coordinator, Dr. Sathi's office was re-locating on August 28th . . ." (¶ 3, p. 5).⁴ Defendants' counsel does not state when the law firm was advised of the

³ It appears to this Court that the handwriting/printing of the note closely resembles the handwriting/printing of the name of plaintiff's counsel's law firm also appearing on the Certification Order.

⁴ This same claim that, unbeknownst to Dr. Sathi's "Office Administrator," Dr. Sathi was closing his office location where the further IME was scheduled and was establishing a new office location, is made

problem with the August 28th date, but defense counsel affirms that the September 23, 2019 further IME date was the result of “a series of telephone conversations” between the senior accounts manager for Exam Works, and the office administrator for plaintiff’s counsel, Jessica. According to defense counsel, Jessica provided to Exam Works four dates during the month of September that were acceptable for the further IME. Exam Works also provided alternate September dates and, through further telephone conversations, the respective arrived at a mutually agreeable date for the further IME: September 23, 2019. The notice of physical examination was served upon plaintiff’s counsel advising that the further IME was scheduled for September 23, 2019, at 2:00 p.m. (Affirmation in Support, ¶¶ 4, 5).

In opposition to the instant motion dated October 17, 2019, plaintiff contends that the further IME by Dr. Sathi has been waived, and that defendants have not demonstrated that the further IME is necessary. The Court does not agree that the further IME is unnecessary; in fact, the Court has already determined its necessity in its prior Decision and Order dated July 12, 2019. Moreover, the further IME was sought long before plaintiff filed the note of issue. Thus, the pivotal question to be determined herein is whether by defendants’ actions the further IME has been waived.

Notably, plaintiff’s opposition papers do not deny that the law offices agreed on the September 23, 2019 further IME date following consultation with Exam Works, notwithstanding the August 28th date written into the trial Certification Order, nor do the opposition papers contain any evidence controverting defense counsel’s affirmation in this regard. Thus, plaintiff’s assertion that the further IME is waived when plaintiff’s counsel’s own staff engaged in telephone conversations with Exam Works and defense counsel’s office to set up the September 23, 2019 further IME lacks candor and undermines plaintiff’s opposition to the instant motion to compel the further IME by Dr. Sathi.

Accordingly, that branch of defendants’ motion to compel further examination by Dr. Sathi is granted such that it is

ORDERED that the further IME by Dr Sathi is to be held on or before March 20, 2020, and it is further

ORDERED that should Dr. Sathi cancel the further IME for whatever reason, then defendants it will be deemed that defendants have waived that examination, and it is further

ORDERED that should the plaintiff fail to appear for the IME, she will be precluded from introducing at trial any evidence of injury/damages related to her January 2019 surgery and ensuing Fourth Supplemental Bill of Particulars, and it is further

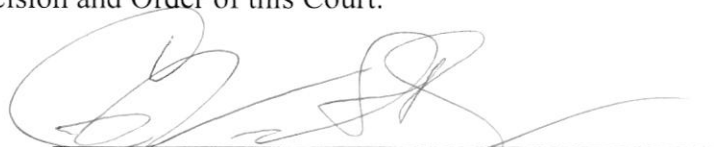
ORDERED that the branch of defendants’ motion seeking vacatur of the note of issue and certificate of readiness is denied.

in defendants’ reply papers at ¶ 5. Again, counsel does not state when his firm was informed of the problem with the August 28th date.

This Court is not inclined to entertain any further motions on the issue of compelling the further IME.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 27, 2020
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]