

Rifkin v Jordan-Jones
2020 NY Slip Op 35774(U)
December 23, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50249/2019
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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MELISSA RIFKIN,

Plaintiff,

-against-

MARIAN RUTH JORDAN-JONES, MARIAN PITTA,
LAUREN D. FIALKOW, and SUSAN FIALKOW,

Defendants.

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LEFKOWITZ, J.

Decision & Order

Index No. 50249/2019

Seq. No. 3

The following papers were read on this motion by plaintiff for an order 1. pursuant to CPLR 2221(e) granting plaintiff leave to renew the Court’s Decision and Order entered September 25, 2020, and upon renewal, granting plaintiff a protective order vacating and/or modifying the notices of defendants’ notices of for independent medical examinations (“IMEs”) and compelling defendants to either conduct their IMEs of plaintiff by remote video conference or to hold the IMEs at a later date once the COVID-19 pandemic has passed; 2. granting a protective order precluding defendants from conducting a further orthopedic IME of plaintiff by Dr. Richard Weinstein (“Weinstein”), and; 3. for such other and further relief as this Court deems just and proper:

- Notice of Motion, Affirmation in Support, Exhibits A-I
- Affirmation in Opposition (Fialkow defendants), Exhibit A
- Affirmation in Opposition (Pitta defendants), Exhibits 1-2
- Affirmation in Reply, Exhibits A-B
- NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

In the interest of judicial economy, the recitation of the facts and procedural history as set forth in this Court’s Decision and Order entered September 25, 2020 are incorporated herein. For purposes of this motion plaintiff, inter alia, seeks to renew that prior Order which denied, without prejudice with leave to renew, her request for a protective order vacating and/or modifying defendants’ IME notices and compelling defendants to conduct the IMEs by remote video

conference, or in the alternative to hold the IMEs at a later date once the COVID-19 pandemic has passed.

The basis for plaintiff's motion was that to have her appear in person would present serious health risks to her and her parents with whom she resides since she and her parents all suffer from underlying health conditions which put them at significantly higher risks should they be exposed to the coronavirus. In denying her application the Court noted that she had failed to support her claims of her and her parents' medical conditions.

In support of her present application, she submits the affirmation from her treating physician and her parents' treating physicians (Ex. F). Plaintiff submits the affirmation of Dr. Paniagua-Ryan ("Dr. Paniagua-Ryan"), her treating psychiatrist. Dr. Paniagua-Ryan affirms that she presently treats plaintiff 1-2 times per month for post-traumatic stress disorder, major depressive disorder, obsessive compulsive disorder, and binge eating disorder. She further affirms that plaintiff has a BMI of 46.4 which falls within the range of morbid obesity which the CDC has stated significantly increases the risk of severe illness or death from COVID-19. She has also reviewed the affirmations provided by Michael J. Levine, M.D. ("Dr. Levine") and Ronnie A. Hershman, M.D. ("Dr. Hershman") the treating physicians for plaintiff's parents. Dr. Paniagua-Ryan affirms that in her medical opinion to have plaintiff appear in person for her IMEs would present a medically unacceptable level of risk to her and to her parents. Dr. Levine's affirmation states that he is plaintiff's mother's cardiologist and that she has been diagnosed with several medical conditions which place her in a high risk for severe illness or death should she become infected with COVID-19, including her age (over 60 years old), hypertension, high cholesterol, and chronic obstructive pulmonary disease. He opines that if plaintiff appeared in person for her IMEs it would present a medically unacceptable level of risk to her mother. Dr. Hershman, plaintiff's father's cardiologist states that he has been diagnosed with several medical conditions which place him at a high risk for severe illness or death should he become infected with COVID-19, including, his age (over 60 years old), overweight, type 2 diabetes, hypertension, mild pulmonary hypertension, and atherosclerotic heart disease. Dr. Hershman opines that it is unadvisable for plaintiff to appear in person for her IMEs due to the risk of exposure to her father, who is also a high risk individual.

In the event the court does not grant plaintiff a protective order directing the IMEs to proceed by remote videoconference, plaintiff proposes an alternative. Plaintiff contends that insofar as the case is not yet on the trial calendar, that jury trials have not yet resumed, and that the case is likely "well over a year away" from proceeding to trial, the case should be certified for trial, with an Order that the outstanding IMEs are to be held at a later date once the COVID-19 pandemic has passed.

Additionally, plaintiff seeks to preclude a further orthopedic IME. Plaintiff notes that she appeared for an orthopedic IME with Dr. Richard Weinstein ("Dr. Weinstein") on December 4, 2019. Plaintiff states that defendants are now seeking a further examination by Dr. Weinstein (Ex. E). Plaintiff argues that based upon Dr. Weinstein's prior assessment he did not find that plaintiff had an orthopedic injury or medical condition (Ex. G) and that defendants have failed to demonstrate the necessity for a further orthopedic IME. Plaintiff states that although she

underwent a lumbar puncture procedure on February 18, 2020, this was unrelated to an orthopedic condition. The puncture was performed by Marc Dinkin, M.D., plaintiff's neuro-ophthalmologist. Plaintiff asserts that since the lumbar puncture was used to measure the cerebrospinal fluid pressure in her spine to rule out the cause of her headaches (Ex. I) and was unrelated to any orthopedic condition, no further orthopedic IME is warranted.

In opposition to the renewal of plaintiff's prior motion, the Pitta defendants re-assert their arguments raised in their opposition to plaintiff's underlying motion. It is noted that the psychiatric IME which was most recently to have been performed by Dr. Weiss has been re-noticed to be performed by psychiatrist IME William Head, Jr., M.D. ("Dr. Head") for January 5, 2021. With respect to the continued neuropsychological exam to be performed by Dr. DeBenedetto, although initially the Pitta defendants were requesting that the continued portion of the exam be conducted in person, they now contend that the entire exam will need to be re-administered due to the amount of time which has elapsed since the initial exam. In support of having this IME occur in person they reassert the cleaning procedures and minimal contacts with office personnel set forth in Dr. DeBenedetto's affirmation in opposition to the underlying motion. The Pitta defendants contend that an additional orthopedic IME is necessary because plaintiff testified at her deposition on October 1, 2020 that she started treating with a new physician, Dr. Khelemsky. Plaintiff testified that Dr. Khelemsky administered two cervical and two thoracic branch block injections. The Pitta defendants argue that the further orthopedic IME is necessitated not just due to the lumbar puncture procedure but to the new treatments by Dr. Khelemsky. The Pitta defendants contend that plaintiff will likely present this additional treatment at trial and defendants are entitled to conduct discovery in this regard.

The Fialkow defendants submit partial opposition to the motion. The Fialkow defendants are willing to agree to adjourn the IMEs until a date when plaintiff is willing and able to appear in person. The Fialkow defendants state that should the court grant this relief that the case should not be certified until such time as plaintiff appears for the IMEs as discovery would be incomplete. The Fialkow defendants do oppose the branch of the motion concerning a further orthopedic IME. They state that plaintiff testified at her recent deposition concerning the lumbar puncture procedure, branch block injections, and her future appointments to undergo two nerve burning procedures. The Fialkow defendants state that these treatments were significant enough to entitle defendants to additional authorizations and a subsequent deposition and accordingly defendants should also be allowed the additional orthopedic IME.

In reply, plaintiff first states that defendants' opposition papers were untimely filed. Plaintiff contends that since the Fialkow defendants do not oppose waiting until plaintiff is able to appear in person to conduct the IMEs and in the absence of opposition on that point by the Pitta defendants the only matter the parties disagree on is whether the case can be certified prior to the completion of the IMEs. Plaintiff argues that defendants have failed to establish the need for a further orthopedic IME. Plaintiff argues that the lumbar puncture was performed to measure cerebrospinal fluid pressure to eliminate it as a cause of her headaches. She states that the spinal injections are a continuing treatment for injuries previously claimed in her bill of particulars dated July 2, 2019. Plaintiff contends that since plaintiff's spinal injuries were claimed in her bill of particulars and she is not alleging any new injuries there is no basis for directing her to appear

for a further orthopedic IME. Additionally, plaintiff argues that the Pitta defendants improperly seek the affirmative relief of repeating the neuropsychological IME that was not provided for by the briefing schedule. Additionally, plaintiff argues that the Pitta defendants have failed to provide an affirmation from Dr. DiBenedetto that states the IME must be redone.

Analysis

“On a motion to renew under CPLR 2221, a party must show new facts to support the motion, as well as a justifiable excuse for not initially placing such facts before the court” (*Lansing Research Corp. v Sybron Corp.*, 142 AD2d 816, 819 [3d Dept 1988]; see, *Spectrum Painting Contrs. v Kreisler*, 54 AD3d 748, 749 [2d Dept 2008]; *Shapiro v State*, 259 AD2d 753 [2d Dept 1999]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]).

As a prefatory matter, although defendants filed their opposition several days after the date directed in the briefing schedule, insofar as there has been no prejudice occasioned thereby, the Court has considered those papers in the determination of this motion.

Based upon the affirmations of plaintiff’s physician and her parents’ physicians, plaintiff has established a sufficient basis to renew her prior motion and upon renewal the Court concludes that plaintiff has sufficiently established that she and her parents qualify as individuals who if exposed to the coronavirus could experience significant health complications. Under these circumstances and the continuing nature of the pandemic, plaintiff cannot presently be compelled to appear in person for IMEs. The parties are directed to use their best efforts to conduct these examinations remotely. To the extent that the parties despite their best efforts are not able to conduct the IMEs remotely, they shall be held in person at the soonest possible time that is safe for plaintiff to do so. This is in keeping with the cases that allow the court to limit discovery in order to safeguard the health of a party (see *Feng Wang v. A & W Travel, Inc.*, 130 AD3d 974 [2d Dept 2015]; *Ceron v Belilovsky*, 92 AD3d 714 [2d Dept 2012]) and this Court’s recent determinations related to remote depositions during the COVID-19 pandemic (*Fields v MTA Bus Co.*, 69 Misc 3d 632 [Sup Ct, Westchester County 2020]; *Chase-Morris v Tubby*, 69 Misc 3d 349 [Sup Ct, Westchester County 2020]). However, insofar as the filing of the note of issue with certificate of readiness signifies the completion of all known discovery (see 22 NYCRR 202.21; *Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]), the Court is unable to certify the case as trial ready while the IMEs remain outstanding.

Based upon the record before the Court it does not appear that plaintiff’s lumbar punctures are related to her orthopedic injuries so as to necessitate a further orthopedic IME. However, her treatment with Dr. Khlelmsky including four cervical and thoracic branch blocks and the nerve burning that was scheduled to occur on October 6, 2020, are sufficiently related to her orthopedic claims as to justify a further orthopedic IME limited to his treatment of plaintiff.

The request by the Pitta defendants to repeat Dr. DeBenedetto’s examination in its entirety was not authorized by the Court’s briefing schedule. Moreover, other than counsel’s

conclusory statement, the Pitta defendants have not provided any basis for repeating the tests already performed by Dr. DeBenedetto. Accordingly, such relief is denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the branch of plaintiff's motion to renew is granted and upon renewal plaintiff is granted a protective order allowing the psychiatric, and further neuropsychological IMEs to be conducted remotely to the extent possible, or alternatively, to be conducted in person at such a time when plaintiff can do so in a reasonably safe manner; and it is further

ORDERED that the branch of plaintiff's motion for a protective order concerning a further orthopedic IME is denied and defendants may conduct a further orthopedic IME consistent with the preceding decretal paragraph limited to the treatment provided by Dr. Khlelmsky; and it is further

ORDERED that the parties are directed to appear for a virtual conference with Court Attorney Referee Angela DiBiasi by Microsoft Teams, or as the Court shall otherwise direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, on January 21, 2021, at 11:00 a.m. The parties will be contacted by the Court with further instructions concerning this appearance; and it is further

ORDERED that plaintiff shall serve a copy of this Order with notice of entry upon defendants within three (3) days of entry, with proof of such service filed to NYSCEF within three (3) days thereof, or as the Court shall further direct due to the COVID-19 health emergency.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York
December 23, 2020

Joan B.
Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz,
E=jlefkowi@nycourts.gov
Reason: I am the author of this document
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Date: 2020.12.23 09:22:06-05'00'
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HON. JOAN B. LEFKOWITZ, J.S.C.

To: Service upon all counsel via NYSCEF
CC: Compliance Part Clerk