

<b>Rifkin v Jordan-Jones</b>
2020 NY Slip Op 35775(U)
September 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

-----X  
MELISSA RIFKIN,

Plaintiff,

-against-

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

Defendants.

-----X  
LEFKOWITZ, J.

**Decision & Order**

Index No. 50249/2019

Seq. No. 2

The following papers were read on this motion by plaintiff seeking the issuance of a protective order pursuant to CPLR 3103 vacating and/or modifying the notices of defendants Marian Ruth Jordan-Jones (“Jordan-Jones”) and Marian Pitta (“Pitta”) for independent medical examinations (“IMEs”) with Dr. Norman Weiss (“Weiss”) and Dr. Richard DeBenedetto (“DeBenedetto”) and compelling these defendants to conduct their IMEs by remote video conference, and for such other and further relief as this Court deems just and proper:

- Notice of Motion, Affirmation in Support, Exhibits A-M
- Affirmation in Opposition, Exhibits A-F
- Affirmation in Reply, Exhibits A-B
- Surreply
- NYSCEF File

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

*Factual & Procedural History*

Plaintiff brings this action seeking damages for personal injuries allegedly sustained as the result of a motor vehicle accident occurring on March 31, 2017. Plaintiff was a passenger in the motor vehicle driven by defendant Jordan-Jones when it was involved in a collision with a motor vehicle driven by defendant Lauren D. Fialkow. Plaintiff commenced this action by the filing of a summons and complaint on January 4, 2019. She alleges that as the result of the accident she suffered severe and permanent traumatic brain injury with a variety of

neuropsychological sequela. Issue was joined by all defendants on or before February 8, 2019. Discovery has largely been completed except for IMEs in neuropsychology and psychiatry.

Plaintiff's neuropsychological IME with DeBenedetto was started on January 31, 2020 but was suspended after three hours due to plaintiff's fatigue. It was agreed that the IME would be concluded at a later date.

Due to the intervening COVID-19 pandemic, that IME and the psychiatric IME were rescheduled several times.

In a notice dated April 27, 2020, Support Claims Services advised that plaintiff's psychiatric IME with Dr. Solomon Miskin ("Miskin") was scheduled for July 10, 2020. In a notice dated June 2, 2020, Support Claims Services advised that plaintiff's continued neuropsychological exam with DeBenedetto would occur on July 16, 2020.

The parties appeared for a virtual compliance conference on June 10, 2020 via Skype at which time plaintiff's counsel stated that due to the COVID-19 pandemic plaintiff was uncomfortable appearing in person for the IMEs and potentially exposing herself to the virus. The Compliance Conference Referee Report & Order directed counsel to "discuss the manner in which such IMEs will be completed (in person or remotely using virtual technology)" and that counsel would confirm what manner the IMEs would be conducted at the next compliance conference scheduled for June 30, 2020.

By email dated June 19, 2020 plaintiff's counsel was advised by Support Claim Services that the psychiatric IME with Miskin would occur on July 10, 2020 virtually via Zoom videoconference. The email further stated that the neuropsychological IME with DeBenedetto would occur on July 16, 2020 in his office. The email explained that DeBenedetto would conduct the examination remotely via telehealth, while his assistant would be at the office to set up the examination of plaintiff.

By notice dated June 23, 2020 Support Claims Service canceled the psychiatric IME by Miskin.

The parties appeared for a virtual compliance conference on June 30, 2020, at which time plaintiff's counsel reiterated plaintiff's concerns about appearing in person for the IMEs. Plaintiff's counsel objected to the proposed neuropsychological IME which would require plaintiff to appear personally in DeBenedetto's office, potentially exposing herself to COVID-19, while DeBenedetto would not be required to appear. The Court issued a briefing schedule allowing plaintiff to seek a protective order concerning the neuropsychological IME.

After the conference plaintiff's counsel was advised by Support Claims Services that Miskin was no longer performing IMEs and that Dr. Norman Weiss ("Weiss") would be performing plaintiff's psychiatric IME on September 9, 2020. Plaintiff's counsel was further advised that unlike Miskin, Weiss would not be conducting the IME virtually by videoconference, but that the exam would be in person. Plaintiff requested an amended briefing

schedule to include the neurological as well as the psychiatric IME. The Court issued an amended briefing schedule reflecting that request.

*The Parties' Contentions:*

Plaintiff requests that in light of the continuing COVID-19 pandemic the Court direct both IMEs to proceed virtually by video conference. Plaintiff, who lives with her parents, states that according to information from the Centers for Disease Control and Prevention (the "CDC"), she and her parents have underlying medical conditions that put them at an increased risk for contracting a severe illness from exposure to the COVID-19 virus. Plaintiff annexes a printout from the CDC website dated June 25, 2020, which states inter alia that "the risk for severe illness from COVID-19 increases with age ... people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s." The website also notes that having an underlying condition can increase the risk of contracting a severe illness as a result of COVID-19. Plaintiff states that both of her parents are in their 60's and have been diagnosed with pulmonary disease (mother) and cardiac disease and type 2 diabetes (father), and that plaintiff has been diagnosed with obesity. She states that these conditions, which are among the underlying risk factors identified by the CDC, place plaintiff and her parents at a greater risk for contracting a severe illness as a result of exposure to the COVID-19 virus.

With respect to the psychiatric IME, plaintiff argues that since Miskin had agreed to conduct that exam by remote video conference, there is no reason why Weiss cannot also conduct the exam in the same manner. While plaintiff acknowledges that defendants are entitled to the IMEs because she has placed her physical and/or mental condition at issue in this action, she argues that in light of the higher risk that the ongoing COVID-19 pandemic poses to her and her parents and that defendants' IME doctors have acknowledged that they do not need to be physically present in the room to conduct plaintiff's IMEs, the most reasonable way for plaintiff to safely appear for the IMEs is to have them conducted by remote videoconference. With respect to the neuropsychological IME, plaintiff objects to the proposal that while plaintiff must appear in person at DeBenedetto's office, he is allowed to conduct the IME from the safety of his home. Plaintiff argues that she can complete the IME by logging onto her computer or smartphone from home. Plaintiff argues that requiring her to appear in person for the IMEs is overly burdensome, would cause undue hardship, and unfairly forces plaintiff to choose between potentially exposing herself to the COVID-19 virus, posing a significant risk to her and her parents' health, or continuing to pursue her lawsuit.

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.

In opposition, defendants<sup>1</sup> state that although Miskin had originally agreed to conduct the IME remotely defense counsel was subsequently advised that Miskin was unable to conduct the exam by virtual means due to the testing he would need to administer. Defendants argue that since Miskin is no longer going to be conducting the psychiatric IME the manner in which he had originally planned to conduct the exam is irrelevant. Defendants also state the IME scheduled with Weiss has been canceled as he is undergoing surgery and will be convalescing for a few months. At the time that these motion papers were filed defendants had not yet secured an IME with a different psychiatrist and were unable to provide information concerning the circumstances under which that exam will be conducted.

Defendants argue that since DeBenedetto has already examined plaintiff for three hours he should be allowed to complete the exam. Defendants contend that the IME conducted by DeBenedetto would be performed in a disinfected and sterile environment. Defendants state that his assistant will set up the cognitive portion of the exam which DeBenedetto will monitor remotely. Defendants state that this is DeBenedetto's protocol for examining patients/claimants during the COVID-19 pandemic. Defendants annex a copy of the intake form used by DeBenedetto describing the COVID-19 precautions utilized by his office, which include, masking, maintaining appropriate distancing, sanitization of all surfaces, and the use of a disposable plastic barrier on the keyboard for any computer-based tests. Defendants contend that as a licensed mental health provider DeBenedetto is considered an essential worker and as such is required to follow the guidelines and precautions promulgated for medical facilities by the New York State Department of Health and the CDC. As part of these guidelines DeBenedetto's facility must be disinfected, the area where the exam takes place must be large enough for air circulation, and masks/face covering must be worn at all times with adherence to social distancing requirements. Defendants annex DeBenedetto's affidavit which states that his office complies with the above guidelines. He also states that while there are certain portions of the exam which can be conducted virtually over an encrypted medical conferencing link, in his opinion, plaintiff must appear in person for the administration of paper and pencil and computer-based neurocognitive and psychometric tests. He further asserts within a reasonable degree of certainty that this exam cannot be conducted virtually due to the need to administer these tests and that all reasonable precautions regarding contagion have been implemented in the design of the current neuropsychological examination procedure.

In her reply plaintiff states that when defendants designate a new doctor to perform the psychiatric IME, they should ensure that the exam will be performed by remote videoconference before designating him/her. While plaintiff appreciates the steps taken by DeBenedetto to reduce the risk of COVID-19 transmission plaintiff argues that these precautions fail to consider other logistical issues which might increase plaintiff's risk of exposure, such as when plaintiff might need to use the public restroom or take a drink of water necessitating removing her mask.

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<sup>1</sup> Insofar as defendants Lauren D. Fialkow and Susan Fialkow have not submitted papers in response to the motion, "defendants" is used to refer to defendants Jordan-Jones and Pitta.

*Analysis*

CPLR 3101(a) mandates full disclosure of all matter material and necessary in the prosecution or defense of an action. Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts. The supervision of disclosure and the setting of reasonable terms and conditions thereof rests within the sound discretion of the trial court (see generally *Ligoure v City of New York*, 128 AD3d 1027 [2d Dept 2015]).

As conceded by plaintiff, defendants are entitled to the IMEs they seek. The Court may modify or limit the circumstances by which those examinations occur (see CPLR 3101; *Kovalevsky v. Starrett City, Inc.*, 235 AD2d 398 [2d Dept 1997]), especially in situations where the examination may be detrimental to a plaintiff's health (*Feng Wang v. A & W Travel, Inc.*, 130 AD3d 974 [2d Dept 2015]; see *Ceron v Belilovsky*, 92 AD3d 714 [2d Dept 2012] [issuing protective order pursuant to CPLR 3103(a) where plaintiff demonstrated that requiring infant to testify would be detrimental to her health]). However, insofar as the party seeking a protective order bears the burden of proof (see *Borgia v Rothberger*, 148 AD3d 1109 [2d Dept 2017]), plaintiff has offered nothing to substantiate the contentions that she and/or her parents are among those individuals who are at greater risk for developing a serious illness as the result of exposure to the COVID-19 virus (see *Ceron v Belilovsky* 92 AD3d at 714-715) (granting protective order where plaintiff offered expert psychologist's opinion that requiring infant to testify would be detrimental to health). Notably, plaintiff has not submitted any support for the contention that appearing in person for an IME puts her and/or her parents at greater risk (see *Morley v BPP St Owner, LLC*, 2019 WL 2097393 [Sup Ct, New York County, May 9, 2019, Jaffe, J., Index No. 150239/2017]). The conclusory allegations in the affidavit of plaintiff's counsel, unsupported by an affidavit of a person with knowledge of the facts, are insufficient to establish the necessary basis for a protective order (*Fuhs v Fuhs*, 132 AD2d 824 [3d Dept 1987]; *Sheldon v. Kimberly-Clark Corp.*, 111 AD2d 912, 913 [2d Dept 1985]). Although the Court is sympathetic to all those who find themselves at an increased risk for developing a serious illness due to exposure to the COVID-19 virus, it cannot on the papers before it determine that plaintiff falls into that category. Should plaintiff so desire, she may refile this motion upon proper proof as directed herein.

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:

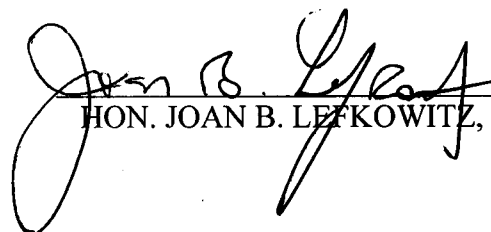
ORDERED that plaintiff's motion seeking a protective order is denied without prejudice with leave to renew within 30 days of the date of this Order upon proper proof, including the affidavit of a licensed medical provider stating that, in the provider's opinion, requiring plaintiff to appear in person for a neuropsychological or psychiatric IME presents a medically unacceptable level of risk to plaintiff and/or her parents; and it is further

ORDERED that the parties are directed to appear for a virtual conference with Court Attorney Referee Angela DiBiasi by Skype Business, or as the Court shall otherwise direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, on October 23, 2020, at 3:00 p.m., at which time it is anticipated that this matter will be certified as ready for trial. 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  
September 23, 2020

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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