

Pettinato v EQR-Rivertower, LLC

2021 NY Slip Op 33805(U)

July 19, 2021

Supreme Court, New York County

Docket Number: Index No. 159909/2016

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32

Justice

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INDEX NO. 159909/2016

LAURA PETTINATO, DUSTIN FISHLER,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005

- v -

EQR-RIVERTOWER, LLC, EQR-RIVERTOWER A, LLC, EQR-RIVERTOWER B, LLC, EQR-RIVERTOWER C, LLC, EQR-RIVERTOWER D, LLC, EQR-RIVERTOWER E, LLC, RIVER TOWER OWNER, LLC, OLDCASTLE BUILDINGENVELOPE, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 266, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284

were read on this motion to/for MEDICAL TREATMENT

Upon the foregoing documents, the motion is determined as follows:

This is a personal injury action commenced by Laura Pettinato (Plaintiff) and her husband Dustin Fishler against the above-captioned defendants. The instant motion (motion sequence number 005; NYSCEF Doc. No. 240) is brought by River Tower Owner, LLC (River Tower), one of the defendants, seeking an order, pursuant to CPLR 3121 and 3124, to compel Plaintiff to submit to a complete independent medical examination (IME) by Dr. Lawrence Lind, the physician designated by River Tower, to examine Plaintiff in regards to her claimed injuries. Plaintiff opposes the relief sought in the motion (NYSCEF Doc. Nos. 272-280). For the reasons stated below, the relief requested by River Tower in the instant motion is granted to the extent set forth herein.

Description of the background facts is derived from Plaintiff's amended complaint (Complaint; NYSCEF Doc. No. 7), the affirmation in support of the instant motion by Leslie Luke, counsel for River Tower (Def. Aff.; NYSCEF Doc. No. 242), and the affirmation of Patrick Brophy, counsel for Plaintiff, in opposition (Plf. Opp.; NYSCEF Doc. No. 272).

On or about November 23, 2016, Plaintiff commenced this action against River Tower and other defendants listed in the above-captioned case, seeking damages for alleged personal injuries (Def. Aff., ¶ 3). The incident occurred on March 16, 2016, when Plaintiff was in her apartment located at 420 East 54th Street, New York City, where she slipped while exiting the shower/bath tub in the apartment and fell onto the shower rail, due to the alleged negligence of defendants in the ownership, management and maintenance of her apartment, thus suffering

serious injuries (Def. Aff., ¶ 11; Plf. Opp., ¶ 2). Based upon her bills of particulars, Plaintiff alleges that she suffered, among other things, “a right vulvar laceration, extreme tenderness of the labia, swelling of the labia . . . severe pelvic pain . . . pudental neuraglia and dyspanerunia as a result of the subject claimed incident” (Def. Aff., ¶ 11 [referencing bills of particulars]).

Subsequent to her examination before trial, River Tower designated Dr. Lawrence Lind (Dr. Lind), a urogynecologist, to examine Plaintiff regarding her injuries (Def. Aff., ¶ 13; Plf. Opp., ¶ 5). Prior to the IME, Plaintiff’s counsel wrote to River Tower to request clarification on the parameters of Dr. Lind’s procedures, and to indicate that Plaintiff would not consent to any invasive procedure (Plf. Opp., ¶¶ 6-8). On May 14, 2019, while Plaintiff appeared for the IME, “she refused to remove any portion of her clothing,” and Dr. Lind was thus unable to perform any examination of her body parts that she claimed to have been injured (Def. Aff., ¶¶ 14-15 [referencing IME Report; NYSCEF Doc. No. 259]). Because Plaintiff failed to appear for a “proper examination,” River Tower moved to strike her Complaint or, alternatively, to compel her to appear for a “full and proper examination” (*id.*, ¶ 16). Opposing River Tower’s motion, Plaintiff submitted an affidavit of Dr. Linda Kiley (Dr. Kiley), her own urogynecologist, in which it was stated that “an unclothed examination would not be relevant” (*id.*, ¶ 21 [referencing Dr. Kiley’s affidavit dated January 24, 2020; NYSCEF Doc. No. 262]). River Tower’s motion was withdrawn without prejudice, following a conference with this Court at which River Tower was instructed to re-file its motion with an affidavit by Dr. Lind detailing the scope of Plaintiff’s examination (*id.*, ¶ 17 [referencing stipulation dated July 17, 2020; NYSCEF Doc. No. 261]).

By the instant motion, dated February 18, 2021, defendant River Tower again seeks to compel Plaintiff to submit to an IME with Dr. Lind, and attaches a supporting affidavit by Dr. Lind bearing even date (Lind Aff.; NYSCEF Doc. No. 244), as well as a memorandum of law in support of the motion (Def. Brief; NYSCEF Doc. No. 243).

It is well settled that where a plaintiff puts her physical condition at issue, the defendant may require her to submit to an independent medical examination by a physician retained and designated by the defendant for that purpose (*Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 29 [1st Dept 2019]). The law also provides, however, that in connection with such a medical examination, the plaintiff may be compelled to undergo “objective testing procedures that are safe, painless and noninvasive” (*Tidwell v Villaman*, 100 AD3d 865, 866 [2d Dept 2012]).

In support of this motion, Dr. Lind’s affidavit states that (1) in order to assess the severity of each of Plaintiff’s alleged medical conditions, a full gynecological examination that takes less than five minutes is required of her, without clothing; (2) due to Plaintiff’s refusal to remove her clothing during the May 2019 IME, he was “unable to adequately examine the subject area;” (3) while Dr. Kiley maintains that an IME without clothing would not be relevant, “a doctor who did not examine a patient undressed, who presented with Plaintiff’s claimed complaints, would be dramatically departing from standards of care;” (4) a visual inspection of the “exterior vulva” alone “would not allow me to be able to evaluate the vagina or the pudental nerve” to render an opinion regarding Plaintiff’s medical condition, as well as the mechanism and full extent of her alleged injury; and (5) “a one finger examination is needed in order to fully inspect the entire vulva,” and the examination process “would require the use of a speculum, digital exam and bimanual exam of the pelvis” (Lind Aff., ¶¶ 7-22).

In opposition, in her affidavit dated March 3, 2021 (Plf. Aff.; NYSCEF Doc. No. 278), Plaintiff states that (1) she has been advised that she would not have to remove her clothes and “submit to anything invasive,” because the law and rules “did not require me to endure such an upsetting and humiliating experience at the hands of a person I do not know;” (2) submitting to “an examination without clothes would not be relevant to or revealing of my present symptoms and conditions from my accident,” because the current main symptoms and conditions are “nerve damage for which I have been prescribed and am taking gabapentin,” as well as “depression and post-traumatic stress disorder (PTSD);” (3) there is no longer a “visible or tangible scar, so there is nothing in that respect to see or feel;” and (4) a further “invasive exam would make me re-live the trauma and bring pack [sic] the pain, anxiety and depression that I continuously struggle to overcome” (Plf. Aff., ¶¶ 4-6). Plaintiff also offered the affidavit of Dr. Linda A. Kiley, MD, dated April 3, 2021 who is board certified in both general Obstetrics and Gynecology and also the subspecialty of Female Pelvic Medicine and Reconstructive Surgery who has treated Plaintiff since November 1, 2016 (Kiley Aff.; NYSCEF Doc. No. 282). Echoing Plaintiff’s statements, Dr. Kiley asserts, in relevant part, that (1) Dr. Lind’s proposed “classic pelvic exam techniques” would not reveal Plaintiff’s current complaints, which are “mainly neuropathic pain which Gabapentin is controlling very well; surface pain after prolonged sitting; lack of flexibility on the right side; and PTSD;” (2) forcing Plaintiff to have a further IME without clothes “would not be relevant to or revealing of her present accident-related symptoms and conditions;” and (3) the proposed examination “would pose a clear and significant risk of harm . . . in potentially triggering her PTSD” (Kiley Aff., ¶¶ 9-10).

The above seemingly conflicting positions of the parties may be resolved by balancing (1) the needs of defendant River Tower to require Plaintiff’s submission to a full IME by Dr. Lind, a male physician, so as to assess the severity of Plaintiff’s alleged injuries, against (2) the concerns of Plaintiff that requiring her to undergo the IME without clothes would be “an upsetting and humiliating experience” at the hands of someone she does not know, that any digital examination of her vagina would be “invasive and unnecessary” because her current conditions are mainly neuropathic in nature, and that the procedure may trigger PTSD.

Plaintiff’s concern of being subjected to “an upsetting and humiliating experience” may be assuaged by having a female urogynecologist (designated by River Tower) to perform the IME. Notably, neither Plaintiff nor Dr. Kiley state in their affidavits that Dr. Kiley “has only examined [Plaintiff] with her clothing on,” as pointed out by River Tower’s counsel in his reply affirmation dated April 20, 2021 (Def. Reply at ¶ 9; NYSCEF Doc. No. 283). Further, it is well established that “a plaintiff is entitled to have a representative of her choice present during the IME, provided the individual does not interfere with the IME or prevent the defendant’s doctor from conducting a ‘meaningful examination’” (*Markel*, 171 AD3d at 29 [internal citations omitted]). Thus, Plaintiff may designate a person, such as Dr. Kiley, to serve as an “observer” or “watchdog” for the IME, which may deter “doctors hired by defendants from inquiring about matters beyond the scope of the particular action and keeps the IME process honest” (*id.* at 30).

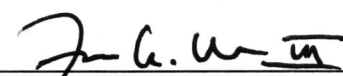
With respect to Plaintiff’s argument that a further IME is unnecessary because most, if not all, of her physical injuries are no longer visible or have otherwise healed, the argument may militate against her claim that she has “sustained injuries of a permanent nature and character”

(Complaint, ¶ 81) as a result of her slip and fall accident. In addition, with respect to Dr. Kiley’s claim that undergoing a further IME would pose a significant risk to Plaintiff and “potentially trigger her PTSD” (Kiley Aff., ¶ 10), the assertion is unpersuasive because, as pointed out by defendant, Plaintiff has failed to “offer an affidavit from her treating psychiatrist, or any mental health professional,” claiming that the IME would affect her mental health (Def. Reply, ¶ 30).

However, the demand for an exam involving use of a speculum, a digital exam and a bimanual exam of the pelvis is denied. Plaintiff established that those procedures are invasive and potentially harmful (see *D’Adamo v Saint Dominic’s Home*, 87 AD3d 966, 970 [2d Dept 2011]; see also *Ditroia v Buck-Haskin*, 99 AD3d 854 [2d Dept 2012]). Other applicable non-invasive diagnostic or investigative procedures -- such as X-ray, magnetic resonance imaging or similar techniques -- should be considered (*Tidwell*, 100 AD3d at 866 [plaintiff compelled to submit to X-ray testing of his right femur for IME]).

Accordingly, based on the foregoing, it is

ORDERED that the motion of defendant River Tower Owner, LLC (Motion Seq No 005) to compel Plaintiff Laura Pettinato to submit to a full and complete independent medical examination is granted only to the extent stated above.

<u>7/19/2021</u> DATE					 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	HON. FRANCIS A. KAHN III J.S.C.
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE