

<b>Sellan-Calero v Sugrim</b>
2022 NY Slip Op 30335(U)
January 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 522656/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31<sup>st</sup> day of January, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.  
-----X  
ANNETTE SELLAN-CALERO,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 522656/17

HARRYNARINE SUGRIM  
and IANA LEASING INC.,  
Defendants.  
-----X

Mot. Seq. No. 4

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation, and Exhibits Annexed _____	<u>69-72</u>
Opposing Affirmation and Exhibits Annexed _____	<u>73-78</u>
Affirmation in Reply _____	<u>79</u>

In this action to recover damages for personal injuries, defendants Harrynarine Sugrim and Iana Leasing Inc. (collectively, the “defendants”) move for an order: (1) striking the Supplemental Verified Bill of Particulars, dated April 23, 2020 (the “Supplemental BOP”), and precluding plaintiff Annette Sellan-Calero (the “plaintiff”) from introducing any evidence at trial as to the particulars set forth in the Supplemental BOP; or in the alternative, (2) directing the plaintiff to appear for a further IME by a date certain, and, in the interim, staying the trial of this action. The plaintiff objects.

**Background**

On December 8, 2015, the defendants’ armored transportation truck rear-ended the plaintiff’s SUV on its passenger side. As the result of the accident, the plaintiff-driver,

then 39 years old, allegedly suffered, among other injuries, a “C6-C7 disc herniation abutting the ventral aspect of the [spinal] cord” (see Verified Bill of Particulars, dated June 12, 2018 [the “initial BOP”], ¶ 4, page 4). On October 6, 2017 and again on March 6, 2018, the plaintiff underwent a non-surgical intervention in the form of a “C7-T1 Cervical Epidural Steroid Injection with Epidurogram” (*id.* at 5).

On July 24, 2019, the plaintiff submitted to an IME by the defendants’ expert orthopedist, Jeffrey Passick, M.D. (“Dr. Passick”). In a report, dated August 1, 2019, Dr. Passick concluded that, notwithstanding his IME findings of the reduced range of motion in the plaintiff’s cervical spine, she merely sustained (as relevant to her cervical spine) a “strain” from the accident, and that such strain had “resolved” by the time of his IME (see Dr. Passick’s Report at pages 5 and 8).

On December 12, 2019, the plaintiff filed a note of issue and certificate of readiness. On February 3, 2020, the plaintiff moved for partial summary judgment on liability. By decision/order, dated June 16, 2020, the court (Sheares, J.) denied the plaintiff’s motion, finding “triable issues of fact based on the discrepancy between the police report and the [p]laintiff’s [deposition] testimony.” Subsequently, the plaintiff’s appeal from Justice Sheares’ order was dismissed for failure to perfect pursuant to Rule 1250.10 (a) of the Statewide Practice Rules of the Appellate Division.

While her motion for summary judgment was pending, the plaintiff served the instant Supplemental BOP. The Supplemental BOP (and the medical records annexed thereto) disclose that in the morning of March 10, 2020, the plaintiff presented to the NY Presbyterian – Lower Manhattan hospital (the “NYP-LM hospital”) for an elective surgical intervention in the form of an anterior cervical discectomy and fusion of her cervical spine

at the C6-7 level. The plaintiff's pre-operative diagnosis was "Cervical Radiculopathy secondary to C6/7 HNP [Herniated Nucleus Pulposus] with bilateral foraminal and central stenosis," which conditions had allegedly failed to respond to the "non-operative management" (*see* Operation Summary at page 1 [NYSCEF Doc No. 71]). Shortly after the induction of general anesthesia, however, the plaintiff suffered an allergic reaction as evinced by hypotension and a bronchospasm. Surgery was stopped; the anesthesia was reversed; and the plaintiff was treated for anaphylaxis. The plaintiff stayed overnight at the NYP-LM hospital and was discharged home in the afternoon of the following day (or approximately 24 hours post-presentation), with instructions to consult with an outside allergist and then to return to her orthopedic surgeon at the NYP-LM hospital.

Following the exchange of the Supplemental BOP and the NYP-LM hospital records, the plaintiff submitted to a further EBT. The parties, however, were unable to agree to a further IME, prompting the service of the instant motion.

### Discussion

The defendants have established beyond peradventure that, pursuant to CPLR 3042 (b), they are entitled to a further orthopedic IME of the plaintiff's cervical spine. Contrary to the plaintiff's contention, the fact that orthopedic surgery on the plaintiff's cervical spine was stopped post-commencement for non-orthopedic reasons (*i.e.*, anaphylaxis) did not (at least according to the NYP-LM hospital records) obviate its alleged propriety (*see* Discharge Notice, "Hospital Course," at page 2 [*"Patient . . . is aware that she should see an allergist (as an) outpatient and follow up with (the orthopedic surgeon) to schedule surgery in the future once evaluated by (the) allergist"*] [NYSCEF Doc No. 71 (emphasis added)]).

Conclusion

Accordingly, it is

**ORDERED** that the defendants are granted leave to designate a further *orthopedic* (but no other) IME of the plaintiff, *as limited to her cervical spine* (the “further IME”), within 15 days of the date of electronic service of this decision and order with notice of entry by defense counsel on the plaintiff’s counsel; and it is further

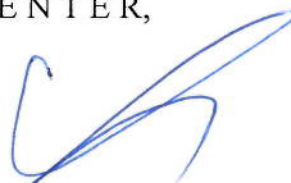
**ORDERED** that the plaintiff shall appear for the further IME within 30 days post-designation, or, failing her timely appearance for the further IME, she shall be precluded from offering medical evidence as to her alleged *cervical spine* injuries at trial; and it is further

**ORDERED** that the defendants are directed to exchange any further orthopedic IME report and/or an addendum to Dr. Passick’s orthopedic IME report, as applicable (collectively, the “further IME exchange”), within 20 days after receipt; and it is further

**ORDERED** that the parties’ next appearance in JCP-1 (which is currently scheduled for February 7, 2022 at 9:45 a.m.) is adjourned, and the trial of this action is stayed, in each instance, until the completion of the further IME and the further IME exchange.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**