

Tague v McLaren

2022 NY Slip Op 32414(U)

July 15, 2022

Supreme Court, Kings County

Docket Number: Index No. 511971/2019

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 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 15th day of July 2022.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

-----X
AMINATA TAGUE and RASHEED GITTENS,

Plaintiffs,

-against-

RODNEY MCLAREN, M.D., LILY NAZ
SHAMSNIA, M.D. and MAIMONIDES
MEDICAL CENTER,

Defendants.
-----X

DECISION AND ORDER

Index No. 511971/2019

Mot. Seq. No. 2 & 3

The following e-filed papers read herein:

Notice of Motion, Affirmations, and Exhibits Annexed
Notice of Cross Motion, Affirmations, and Exhibits Annexed
Affirmation in Opposition to Cross Motion
Reply Affirmation

NYSCEF Doc. No.:
26-30
31-47
48
49

In this action for medical malpractice and loss of consortium, plaintiffs seek an order, pursuant to CPLR §§3121 and 3124, determining that defendants have forfeited their right to a physical examination (“IME”) of plaintiff Aminata Tague. Defendants oppose the motion and cross-move, pursuant to CPLR §§3124 and 3126, to dismiss plaintiffs’ action or to compel Tague to appear for a physical examination within thirty days of the Court’s Order and preclude plaintiffs from offering testimony or evidence regarding damages if Tague does not appear.

Background

Plaintiffs commenced this action on May 30, 2019. In the September 10, 2019 preliminary conference order, Tague was ordered to submit to an IME 45 days after the completion of her deposition. She was deposed on September 28, 2021. At the deposition plaintiffs' counsel asked for the IME to be scheduled before October 15, 2021. Defendants arranged for it to be conducted on October 14, 2021, and served notice on October 11, 2021. Plaintiffs' counsel confirmed the appointment on October 12, 2021, but then canceled it on October 14, 2021.

On October 15, 2021, plaintiffs' counsel advised defense counsel that Tague was available on October 25, 2021. Defense counsel responded by indicating that Dr. Kavalier was available at 10:00 AM on that day and would schedule the IME. Defense counsel also stated that if plaintiffs wanted a more convenient time, they could contact Dr. Kavalier directly. Tague failed to appear or reschedule the IME. During the November 18, 2021 conference, plaintiffs' counsel informed defense counsel that plaintiffs moved to Egypt on October 13, 2021. This Court ordered Tague to appear for an IME in New York on or before March 15, 2022, *unless she demonstrated, upon motion, that examination in New York would cause undue hardship.*

Discussion

After commencement of any action in which the physical condition of a party is in controversy, any party may serve notice on another party to submit to a physical examination by a designated physician. *See* CPLR §3121. "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response". CPLR §3124. The moving party must demonstrate that the method of discovery sought would result in

the disclosure of relevant evidence or was reasonably calculated to lead to the discovery of information bearing on the claims. *See Pesce v. Fernandez*, 144 A.D.3d 653, 40 N.Y.S.3d 466 (2d Dept. 2016).

“The trial court has discretion when determining whether or not to dismiss a case for failure to comply with court ordered disclosure”. *Patrick v. Lend Lease (US) Constr. LMB, Inc.*, 203 A.D.3d 836, 164 N.Y.S.3d 210 (2d Dept. 2022). “This drastic remedy should only be imposed where the failure to comply is willful and contumacious”. *Id.* “A party’s willful and contumacious conduct can be shown by (1) repeated failures to comply with court ordered discovery, and inadequate explanations for the failure to comply or (2) a failure to comply with court ordered discovery over an extended period of time”. *Id.*

Plaintiffs’ Motion

Here, plaintiff Tague failed to appear for the first scheduled IME and did not respond to defendants when they attempted to schedule a second IME. Now, plaintiffs contend that they will be prejudiced in this case, due to a travel ban between the United States and Egypt. Thus, plaintiffs request that this Court take judicial notice of a travel ban between the two countries due to terrorism and the Covid-19 pandemic, pursuant to CPLR §4511(d). The travel advisory submitted by plaintiffs do not address traveling from Egypt to the United States. Moreover, the language in the travel advisory does not suggest that individuals are banned from travelling from Egypt to the United States due to the Covid-19 pandemic.

Conclusion

Accordingly, it is

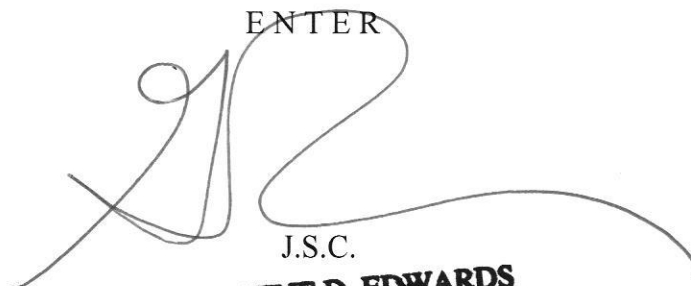
ORDERED that plaintiffs' motion determining that defendants waived their right to an IME is denied, and it is further

ORDERED that defendants' cross-motion to dismiss is conditionally granted, and it is further

ORDERED that plaintiff Tague shall appear for a physical exam on or before September 30, 2022. If plaintiff Tague fails to appear, plaintiffs shall be precluded from offering any evidence regarding damages at the time of trial, and it is further

ORDERED that defendants' counsel is directed to electronically serve a copy of this decision and order on plaintiffs' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of this Court.

ENTER

J.S.C.
HON. GENINE D. EDWARDS