

**Krzyzanowski v City of New York**

2022 NY Slip Op 33617(U)

October 20, 2022

Supreme Court, New York County

Docket Number: Index No. 157165/2016

Judge: Mary V. Rosado

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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. Mary V. Rosado**

**PART 33**

*Justice*

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**INDEX NO. 157165/2016**

MAREK KRZYZANOWSKI,

**MOTION DATE 09/12/2022**

Plaintiff,

**MOTION SEQ. NO. 003**

- v -

THE CITY OF NEW YORK, THE COMPTROLLER OF THE  
CITY OF NEW YORK, ROCKMORE CONTRACTING  
CORP., STV CONSTRUCTION INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 175, 176, 177, 178

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, and oral argument which took place on October 18, 2022, where Evi Kallfa, Esq. appeared for Plaintiff Marek Krzyzanowski ("Plaintiff") and Ilysa Cholewa, Esq. appeared on behalf of all Defendants, the Defendants' motion seeking to compel Plaintiff to appear for another neurological IME, a stay of the trial date, and an accommodation to allow their expert orthopedist to testify virtually is granted in part and denied in part.

As a preliminary matter, Part 33's part rules require leave to be sought prior to the filing of a discovery related motion such as this. No leave was sought here. However, in the interests of justice and the economy of time, the Court will entertain Defendants' motion. This case has already been adjourned twice: once pending an appeal in the Appellate Division, and a second time due to Covid-19. During the course of these adjournments, Defendants' neurological expert, Dr. Raps, contracted Covid-19 which exacerbated his Parkinson's disease to the point he is now incompetent to testify (NYSCEF Doc. 109).

Pursuant to 22 NYCRR § 202.21(d), “where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the Court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.” The incapacitation of an expert witness due to illness or death may warrant compelling a plaintiff to appear for an additional medical exam by another expert (*Nathanson v Johnson*, 126 AD2d 475, 476 [1st Dept 1987]). Similarly, an expert witness’s retirement and relocation to another state may constitute unusual and unanticipated circumstances developed subsequent to the filing of a note of issue justifying additional examinations (*Rosado v A&P Food Store*, 26 Misc. 3d 935, 936 [Sup Ct, Westchester County 2009]).

The Court finds Dr. Raps incapacitation constitutes unusual or unanticipated circumstances warranting another examination of Plaintiff. An affidavit has been produced where Dr. Raps testified that due to the progression of his Parkinson’s disease after contracting Covid-19, he has retired from the practice of medicine and is in no condition to testify at trial (NYSCEF Doc. 109). This is analogous to prior cases where an expert witness either retired or died, which warranted plaintiffs undergoing additional examinations. Therefore, the portion of Defendants’ motion seeking permission to conduct another neurological examination of the Plaintiff and compelling Plaintiff to submit to such neurological examination is granted.

The second branch of Defendants’ motion, which seeks permission to allow their orthopedic expert to testify virtually, is granted conditionally. Plaintiff’s counsel stated at oral argument that they do not oppose this branch of Defendant’s motion. However, in order to find good cause, the Court directs that the Defendants submit an affidavit from the orthopedic expert stating the reasons the expert needs to testify virtually.

The Court denies the branch of Defendants' motion which seeks a stay of the trial of this matter until a neurological exam has been held. CPLR § 2201 allows the Court to grant a stay of proceedings "upon such terms as may be just." This case has been pending since 2016 and has already been adjourned twice. The affidavit of Dr. Raps, upon which Defendants seek a stay, is dated April of 2021 (NYSCEF Doc. 109). Defendants' counsel also states in her affirmation that she was aware Dr. Raps suffered from Covid-19 in early March 2020 and was considering early retirement (NYSCEF Doc. 103 at ¶ 11). Yet, the relief Defendants seek was not made until September 12, 2022, while trial is scheduled for November 16, 2022. Should this case be stayed any further, the delay in proceedings would prejudice all parties, as further issues and complications may develop with other witnesses. Therefore, Defendants' motion is granted in part and denied in part.

*[The rest of this page is intentionally left blank.]*

Accordingly, it is hereby,

ORDERED that Defendants' motion which seeks leave to conduct an additional neurological examination of Plaintiff with a new neurological expert is granted; and it is further

ORDERED that Plaintiff Marek Krzyzanowski shall be produced for an additional neurological examination on or before November 14, 2022, by a new neurological expert named by Defendants; and it is further

ORDERED that there being no opposition, Defendants' orthopedic expert is conditionally granted permission to testify at trial virtually if an affidavit demonstrating good cause is submitted; and it is further

ORDERED that Defendants' request for a stay of trial to allow more time for Defendants to conduct an additional neurological exam of the Plaintiff is denied.

This constitutes the decision and order of the Court.

10/20/2022  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE