

Lindenberg v Yeshiva Univ.

2022 NY Slip Op 34361(U)

December 22, 2022

Supreme Court, New York County

Docket Number: Index No. 161541/2019

Judge: Richard Latin

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD LATIN **PART** **46V**

Justice

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SHIFRA LINDENBERG,

Plaintiff,

- v -

YESHIVA UNIVERSITY, SCHINDLER ELEVATOR CORPORATION

Defendant.

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INDEX NO. 161541/2019

MOTION DATE 09/30/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for EXAMINATION ORDER.

Upon the foregoing documents, it is ordered that defendants' motion and plaintiff's cross motion to compel discovery are determined as follows:

Plaintiff alleges that while riding in an elevator she sustained a traumatic brain injury when the elevator suddenly dropped several floors. Defendants Yeshiva University and Schindler Elevator Corporation move pursuant to CPLR 3124 and 3126 to: (1) compel plaintiff to submit to an independent medical examination with neuropsychologist Dr. Elkhonon Goldberg; (2) compel any third-party observer/counsel at the IME to sit in an adjacent room outside where the exam is taking place, with a door open, allowing an unobstructed view of the plaintiff and the examination process; (3) compel any third party observer/counsel at the IME to not talk or raise any objections during the testing; and (4) precluding plaintiff from offering evidence of any and all neuropsychological related symptoms, future treatment and damages, and/or exacerbation of pre-existing conditions. Plaintiff cross-moves to compel defendants to produce directly to plaintiff's counsel's office the raw data from the neuropsychological assessment to be performed by Dr.

Goldberg, as well as the scoring protocols and tests manuals used by Dr. Goldberg, or be precluded from presenting the testimony of Dr. Goldberg at trial.

As an initial matter, defendants have agreed to provide materials from plaintiff's examination (*see* NYSCEF doc. 61). Defendants agreed to provide the "test booklets, scoring protocol, and raw data," on the condition that the materials (1) not be released to any third party other than a licensed psychologist and/or neuropsychologist; (2) not be placed in the public court file; and (3) not be copied, and be returned, unaltered, at the conclusion of the litigation. Plaintiff argues that its cross-motion is not moot because defendants' proposed stipulation did not include the "test manuals." The court finds that pursuant to CPLR 3101 (a), plaintiff is entitled to all testing materials used by Dr. Goldberg, including test manuals and booklets.

The remaining issue is whether plaintiff is entitled to have her attorney in the room during the neuropsychological examination. Plaintiff does not object to submitting to the examination but argues that her attorney must be present. Defendants propose allowing plaintiff's attorney to sit in an adjacent room or hallway with a door open so that the attorney is able to see and hear the examination. Defendants submit the affirmation of Dr. Goldberg, citing to the position papers from the American Academy of Clinical Neuropsychology, the American Board of Neuropsychology, the National Academy of Neuropsychology, and the New York State Association of Neuropsychology. Dr. Goldberg states that the presence of a third-party observer "introduces concerns about the reliability and validity of test procedures and results" and the presence of a third party would conflict with his ethical obligations.

"[A] party to a civil action is generally entitled to have his or her attorney present during a physical examination conducted at its opponent's demand by its physician, provided that the attorney does not unduly interfere with the examination" (*Ramsey v New York Univ. Hosp. Ctr.*,

14 AD3d 349, 350 [1st Dept 2005]; *see also Jakubowski v Lengen*, 86 AD2d 398, 401 [4th Dept 1982] (“The possible adversary status of the examining doctor for the defense is, under ordinary circumstances, a compelling reason to permit plaintiff’s counsel to be present to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to seek damaging admissions.”). The right to have an attorney present applies to psychiatric evaluations as well (*see Ramsey*, 14 AD3d at 350). The burden is on the defendant to make a positive showing that the presence of the attorney will “impair the validity and effectiveness” of the examination (*see Matter of Alexander L.*, 60 NY2d 329, 332 [1983]; *A.W. v County of Oneida*, 34 AD3d 1236, 1238 [4th Dept 2006]).

Here, defendants failed to make the requisite showing that the presence of plaintiff’s attorney — in this particular case — would interfere with Dr. Goldberg’s examination. The affirmation of Dr. Goldberg regarding the concerns over third-party observers applies generally to all neuropsychological examinations. To find in favor of defendants “would be to effectively exclude attorneys from all neuropsychological examinations, a result which is contrary to case law” (*Arasim v Residential Mgt. Group, LLC* [Sup Ct, New York County 2017]).

Defendants point to a couple of cases in which trials courts have ordered that plaintiff’s representative observe the examination from an adjacent room via a two-way mirror, through which they could hear and see the examination (*see Delgado v. Frovar* [Sup Ct, Bronx County 2010]; *Witsch v. Schuylerville Central School District* [Sup Ct, Saratoga County 2014]). Defendants argue that the two-way mirror is functionally similar to their proposed accommodation. However, in both of those cases, the court determined that the defendant had met its burden to show that the presence of the attorney would interfere with the examination. As noted above, no such showing has been made here. As defendants have not satisfied their burden, there is no need

for defendants' proposed accommodation, and plaintiff is entitled to have her attorney present in the room at the examination.

Accordingly, it is

ORDERED that defendants' motion to compel is granted to the extent that plaintiff shall appear for a neuropsychological examination before Dr. Elkhonon Goldberg; and it is further

ORDERED that plaintiff's attorney or representative may be present inside the room during the examination, and shall neither participate nor interrupt the examination in any manner; and it is further


ORDERED that plaintiff's cross motion to compel is granted, and that within 30 days of plaintiff's examination, defendants shall provide plaintiff's counsel with the raw data from Dr. Goldberg's examination of plaintiff and the scoring protocols and testing materials, including but not limited to test manuals and booklets, used by Dr. Goldberg; and it is further

ORDERED that plaintiff shall provide defendants with an authorization for Dr. Goldberg to release his records to plaintiff's counsel; and it is further

ORDERED that the materials provided shall not be released to any third party other than a licensed psychologist and/or neuropsychologist; shall not be placed in the public court file; shall not be copied; and shall be returned, unaltered, at the conclusion of the litigation; and it is further

ORDERED that the motion and cross motion are denied in all other respects.

This constitutes the decision and order of the Court.

<u>12/22/2022</u> DATE	 _____ RICHARD LATIN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			