

Virgil v Metropolitan Transp. Auth.

2022 NY Slip Op 34594(U)

October 25, 2022

Supreme Court, Queens County

Docket Number: Index No. 705041/2018

Judge: Mojgan C. Lancman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20

-----X
CHRISTOPHER VIRGIL and NICOLE VIRGIL,

Index No.: 705041/2018

Plaintiffs,

Motion Seq. No.: 6

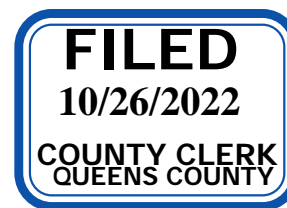
-against-

Motion Date: 6.1.2022

METROPOLITAN TRANSPORTATION AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY
(CAPITAL CONSTRUCTION COMPANY) and THE
NEW YORK TRANSIT AUTHORITY,

Motion Cal. No.: 27

Defendants.
-----X



The e-filed papers bearing NYSCEF document numbers 165-241, 216-217 and 219 were read on: (1) the motion of the defendants Metropolitan Transportation Authority, Metropolitan Transportation Authority (Capital Construction Company) and The New York City Transit Authority (collectively, the “Defendants”) for, *inter alia*, an extension of time to conduct the independent neuropsychological examination (the “Examination”) of the plaintiff Christopher Virgil; and (2) the cross-motion of the plaintiffs, Christopher Virgil and Nicole Virgil (collectively, the “Plaintiffs”), for, *inter alia*, a protective order deeming the Examination of the plaintiff Christopher Virgil (“Mr. Virgil”) waived.

The Plaintiffs commenced this action in April 2018 seeking to recover damages arising out of an accident that occurred on October 17, 2017 on the train platform of the suspended decking/safespan at Jamaica Avenue and 121st Street, Queens, New York (the “Accident”). It is alleged, in essence, that Mr. Virgil, an iron worker employed by non-party E.E. Cruz and Company, Inc., was injured while performing construction work. According to an affidavit executed by Mr. Virgil on February 8, 2019, the Accident occurred when he “... was electrocuted and thrown to the ground while performing my construction work.”

Presently before the Court is motion practice with respect to the Examination the Defendants wish to conduct relative to Mr. Virgil. For the following reasons, the Defendants’ motion is granted in part and denied in part, and the Plaintiffs’ motion is denied.

I. Background and Procedural History

The complaint alleges two causes of action. The first is brought on behalf of Mr. Virgil and alleges violations of Labor Law §§ 200, 240 and 241 [6], as well as common law negligence. The

second cause of action is advanced on behalf of Ms. Virgil, Mr. Virgil's wife, and grounded in loss of consortium. The Defendants' answer denies the material allegations of the complaint and asserts various manner of affirmative defenses.

The Plaintiffs' bill of particulars dated July 18, 2018 alleges, among other things, that Mr. Virgil has sustained "a diffuse axonal injury; traumatic brain injury; traumatic white matter tract injury; and diffuse cerebral dysfunction" as the result of the Accident.

The Plaintiffs filed a note of issue on January 31, 2020. In response, the Defendants filed a motion to, *inter alia*, strike same and to compel Mr. Virgil to submit to the Examination. The parties resolved the motion by agreeing to, among other things, have Mr. Virgil submit to the Examination in Nassau County, New York.

On November 18, 2021, Mr. Virgil appeared for the Examination at Dr. Angeles Cheung's ("Dr. Cheung") Regus Office in Valley Stream, New York. Accompanying Mr. Virgil was a third-party observer/IME Watchdog (the "IME Watchdog"), Mr. Ulysses Baguoro ("Mr. Baguoro").

Dr. Cheung did not object to the presence of the IME Watchdog during the Examination but indicated that Mr. Baguoro could not take notes during the "specialized testing portion" thereof. The Plaintiffs took a contrary position, contending that the IME Watchdog should be allowed to take notes during the entire Examination. The parties were unable to resolve this dispute. Thus, the Examination did not take place, and the present motion and cross-motion were filed.

This Court has conducted several virtual conferences to resolve the dispute, but these efforts have been unsuccessful. The Court further notes that an in-person pre-trial conference is scheduled in the Trial Scheduling Part on November 2, 2022. It is anticipated that the trial of this cause will be scheduled for May or June 2023.

II. Discussion

Pursuant to CPLR 3101(a), parties are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." Furthermore, "[t]he supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court. The Supreme Court's discretion is broad because it is familiar with the action before it, and its exercise should not be disturbed on appeal unless it was improvidently exercised" (*Encalada v Riverside Retail, LLC*, 175 AD3d 467, 469 [2d Dept 2019] [internal quotation marks and citations omitted]).

In light of the Mr. Virgil's claimed injuries, which include a traumatic brain injury, the Examination is material and necessary to the defense of this cause and is thus warranted. The Examination shall be conducted on or before January 31, 2023. The report relative thereto shall be exchanged by March 1, 2023. As noted, the trial of this cause will be scheduled for May or June of next year. Because the Plaintiffs' action shall not be delayed by the Examination and the exchange of the report relative thereto, they will suffer no prejudice.

The next issue to be considered is the IME Watchdog. New York law is settled that: “[a] plaintiff is entitled to have his or her attorney or other legal representative present during an examination as long as that individual does not interfere with the conduct of the examination. In 2017, in *Henderson v. Ross*, this Court determined that a plaintiff’s nonlegal representative may also be present during the examination, as long as that representative does not interfere with the conduct of the examination. The First and Fourth Departments also have permitted a plaintiff to have a third-party observer or watchdog, as well as other nonlegal representatives, be present during that plaintiff’s examination unless a defendant establishes a justification for excluding that third-party observer or nonlegal representative” (*Gonzalez v Red Hook Container Terminal, LLC*, 186 AD3d 1331, 1332 [2d Dept 2020] [internal citations omitted]).

In *Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28 [1st Dept 2019], it was held as follows: “[i]t 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 [internal quotation marks and citations omitted].”

The IME Watchdog shall therefore be permitted to be present for the entire Examination as long as he or she does not interfere with same (*see Gonzalez v Red Hook Container Terminal, LLC*, 186 AD3d 1331; *Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28).

The Court now turns to the extent to which the IME Watchdog can take notes during the Examination. The Plaintiffs contend that the IME Watchdog should be allowed to take notes during the entire Examination. The Defendants disagree, contending that notes should not be taken during the “specialized testing portion” of the Examination.

Dr. Cheung’s affidavit dated January 12, 2022 advances the reasons why the IME Watchdog should not be allowed to take notes during the “specialized testing portion” of the Examination. Here, the neuropsychologist explains, *inter alia*, that the validity of the test results and test security militate against such notes being taken.

With respect to the validity of test results, Dr. Cheung states that note-taking “interrupts the normal focus of the examiner and the assessment procedures” and the “necessary focus of the examinee and may influence how an examinee responds.” With respect to test security, Dr. Cheung observes that notes should not be taken “so as to protect the integrity of the test and the validity of the examination.” The Court finds that Dr. Cheung’s detailed affidavit establishes that note-taking by the IME Watchdog during the “specialized testing portion” of the Examination would interfere with the Examination and prevent Dr. Cheung from conducting a meaningful Examination. Accordingly, while the IME Watchdog shall be permitted to be present during the entire Examination, provided that he or she does not interfere with same, the IME Watchdog shall not take notes during the “specialized testing portion” thereof (*see Gonzalez v Red Hook Container Terminal, LLC*, 186 AD3d 1331; *Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28).

The remaining branch of the Defendants’ motion, which seeks the sum of \$3,600.00 from the Plaintiffs for the Examination that was cancelled on November 18, 2021, is denied. There is

no factual or legal basis for this relief. The cancellation was simply the product of a disagreement between counsel.

The branch of the Plaintiffs' cross-motion for a protective order deeming the Examination waived is denied for the reasons stated above. The branch of the cross-motion for an Order, pursuant to CPLR § 3126, requiring the Defendants to pay the fees of the IME Watchdog with respect to examinations that did not go forward is denied. On this record, there is no showing that the Defendants' conduct was willful and contumacious.

III. Conclusion

For the reasons stated above, it is hereby:


ORDERED, that the Defendants' motion is granted to the extent that the deadline to conduct the Examination is extended up to and including January 31, 2023; that the report relative to the Examination shall be exchanged by March 1, 2023; that although the IME Watchdog shall be permitted to be present during the entire Examination, he or she shall not interfere with same and shall not take notes during the "specialized testing portion" thereof; and it is further,

ORDERED, that the Defendants' motion is otherwise denied; and it is further,

ORDERED, that the Plaintiffs' cross-motion is denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
October 25, 2022



MOJGAN C. LANCMAN, J.S.C.