

**Diop v Getty Sq. Realty LLC**

2022 NY Slip Op 34735(U)

February 24, 2022

Supreme Court, Bronx County

Docket Number: Index No. 31700/2017E

Judge: Doris M. Gonzalez

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

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Seni Diop,

DECISION and ORDER  
Index No. 31700/2017E

Plaintiff,

- against -

Getty Square Realty LLC, ES Acquisition Corp. and  
Hamidi Corp. d/b/a Yonkers Fried Chicken,

Defendants.  
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Doris M. Gonzalez, J.

Defendants Getty Square Realty LLC and ES Acquisition Corp. (hereinafter, "defendants") move pursuant to CPLR 3124, compelling the plaintiff to appear for a supplemental independent medical examination (hereinafter "IME"); or, in the alternative, pursuant to CPLR 3126, precluding plaintiff from offering any evidence or supporting her claims for damages at the time of trial based upon Dr. David T. Neuman's ("Dr. Neuman") January 11, 2022 supplemental examination and January 12, 2022 supplemental narrative report, and plaintiff's CPLR 3101(d) expert exchange dated January 14, 2022.

This is a personal injury action in which plaintiff Seni Diop seeks to recover damages for injuries that she allegedly sustained on July 14, 2017, when she tripped and fell on the sidewalk adjacent to the premises located at 5 Palisades Avenue in the City of Yonkers in Westchester County. Defendants' expert Dr. Manspeizer conducted an orthopedic examination of the plaintiff on February 13, 2019.

On or about April 8, 2020, plaintiff's counsel served an Expert Witness Disclosure Pursuant to CPLR 3101(d) that identified Dr. Neuman as her expert medical physician, and enclosed a copy

of Dr. Neuman's narrative report dated August 2, 2019.<sup>1</sup> Dr. Neuman indicated that plaintiff's chief complaint was knee pain. On examination, he found, in part, as follows:

"The active flexion motion is to 120 degrees with pain in the right knee in contrast to 135 degrees (her normal motion) without pain in the left knee. The normal active flexion motion is a range between 130 to 145 degrees. Passive flexion in the right knee can occur, however, this elicits stiffness and pain. The active extension motion is to 10 degrees with pain in the right knee in contrast to 0 degrees in the left knee without pain (her normal motion). The normal active extension motion is a range between 0 to -5 degrees. Passive extension in the right knee can occur, however, this elicits stiffness and pain. The applicable motions are measured with goniometer and confirmed visually. There is crepitation on range of motion of the right knee. Strength testing in the left knee is 5/5 on resisted flexion, without pain. The flexion strength is 5-/5 in the right knee with pain. Strength testing in the left knee is 5/5 on resisted extension, without pain. The extension strength is 5-/5 in the right knee with pain."

He concludes that:

"Status post open reduction, internal fixation of a comminuted, stellate patella fracture, healed. Post-operative deconditioning, internal derangement, pain, post-traumatic arthritis, scar tissue formations, stiffness and weakness. Displaced metallic pin in posterior soft tissues of the knee. The right knee condition is causally related to the accident of Jul 14, 2017. There is a permanent condition and permanent disability in the body parts mentioned. The patient would not have these current conditions if they were not involved in this accident."

Plaintiff filed a note of issue was filed on October 2, 2019. Subsequently, on January 11, 2022, Dr. Neuman conducted a supplemental examination and subsequently issued a supplemental narrative report. He reports as follows:

"The active flexion motion is to 121 degrees with pain in the right knee in contrast to 136 degrees (her normal motion) without pain in the left knee. The normal active flexion motion is a range between 130 to 145 degrees. Passive flexion in the right knee can occur, however, this elicits stiffness and pain. The active extension motion is to 6 degrees with pain in the right knee in contrast to 0 degrees in the left knee without pain (her normal motion). The normal active extension motion is a range between 0 to -5 degrees. Passive extension in the right knee can occur, however, this elicits stiffness and pain. The applicable motions are measured with goniometer and confirmed visually. There is crepitation on range of motion of the right knee."

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<sup>1</sup> The report indicates that plaintiff's chief complaint was right knee pain, that she sustained a fracture as shown on contemporaneous x-rays, and that she underwent surgery. He further reports as follows: "

Although trial is currently scheduled to commence on February 24 2022, defendants maintain that they are entitled to conduct a supplemental IME of the plaintiff. They argue that an additional IME after the Note of Issue is filed is warranted as unusual or unanticipated circumstances exist such that an additional IME to prevent substantial prejudice. Defendants contend that "unusual or unanticipated circumstances" exist insofar as "[t]here is nothing more unanticipated than the plaintiff's non-treating medical expert performing a supplemental examination in advance of trial and more than 30 months after performing an initial examination."

In opposition, plaintiff argues that the "unusual or unanticipated circumstances" standard has not been satisfied where plaintiff's expert merely conducted a further examination. Plaintiff notes that defendants fail to allege that the report indicates that plaintiff suffered new or additional injuries, or that the nature and extend of plaintiff's injuries has changed dramatically. Moreover, plaintiff states that there are almost no differences between Dr. Neuman's October 7, 2019 narrative report and January 12, 2022 narrative report.

"[A] defendant must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination" (*Futersak v Brinen*, 265 AD2d 452, 452, 697 NYS2d 89 [2d Dept. 1999]). Here, it is apparent, as plaintiff argues, that supplemental expert report substantially conforms to the findings in the original report, and merely updates those findings. Therefore, defendants are entitled to relief only if the mere holding of the supplemental examination constitutes an unusual or unanticipated circumstances.

In *Alcantara-Pena v Shanahan* (168 A.D.3d 550, 91 N.Y.S.3d 97 [1st Dept. 2019]), plaintiff noticed a vocational rehabilitation expert, evidently for the first time, after the note of issue was

filed. The First Department nevertheless found that an unusual or unanticipated circumstance did not exist. The Court held:

“That plaintiff noticed a vocational rehabilitation expert after the filing of the note of issue does not constitute an unusual or unanticipated circumstance, because there is no evidence that she is asserting a new theory of liability and there is no indication in the record that the disclosure was served on the eve of trial (*see Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439, 439-440, 976 NYS2d 73 [1st Dept 2013]). Furthermore, defendants do not allege that plaintiff is asserting new or additional injuries or that the nature and extent of her existing injuries have changed dramatically (*see Rebollo v Nicholas Cab Corp.*, 125 AD3d 452, 2 NYS3d 471 [1st Dept 2015]; *Silverberg v Guzman*, 61 AD3d 955, 956, 878 NYS2d 177 [2d Dept 2009]; *Schenk v Maloney*, 266 AD2d 199, 200, 697 NYS2d 332 [2d Dept 1999]).” (168 A.D.3d at 550-551.)

In short, as the injuries have not changed, and as permanence was previously asserted, a further examination is not warranted under the facts of this case.

It is accordingly

ORDERED that the motion is denied, and it is further

ORDERED that all stays are vacated.

This is the Decision and Order of the Court.

Dated: 2/24/2022

  
Doris M. Gonzalez, J.S.C.