

Harrington v City of New York
2023 NY Slip Op 30210(U)
January 23, 2023
Supreme Court, New York County
Docket Number: Index No. 153433/2019
Judge: Leslie A. Stroth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

-----X

JOYCE HARRINGTON,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF EDUCATION

Defendant.

-----X

INDEX NO. 153433/2019

MOTION DATE 08/09/2022

MOTION SEQ. NO. 004

**AMENDED
DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for DISCOVERY

This action seeks damages for personal injuries allegedly sustained by the plaintiff as a result of a trip and fall incident that occurred on May 2, 2018. Defendants the City of New York and New York City Department of Education (together, the City) move for an order pursuant to CPLR 3124: (1) compelling plaintiff to provide outstanding authorizations, (2) extending the deadline for the City to designate and conduct an independent medical examination (IME), and (3) compelling plaintiff to appear at such IME.

Plaintiff served a copy of her verified bill of particulars on August 12, 2019, in which alleges that her fall resulted in exacerbations of prior injuries to the knees. See NYSCEF doc. no. 64. On February 26, 2020, a preliminary conference order (PC order) was issued in this case, directing the City to designate the plaintiff's IME within 45 days of plaintiff's deposition. See NYSCEF doc. no. 67. Plaintiff appeared for her deposition on June 3, 2020, during which she testified that she received bi-lateral knee replacement surgery prior to the accident. See NYSCEF doc. no. 68 at 33. On July 12, 2021, Plaintiff served a copy of her supplemental bill of particulars,

further alleging that as a result of the accident, she had to undergo ankle surgery. *See* NYSCEF doc. no. 69. Plaintiff filed a note of issue and certificate of readiness in this action on November 24, 2021.

The City asserts that this action is not ready for trial, because plaintiff has not provided authorizations for medical records for all treating providers regarding prior knee replacements nor has plaintiff's IME been conducted, in contravention of the February 6, 2020 PC order, which references the City's form case scheduling order. The City maintains that plaintiff put her medical condition at issue in this matter by alleging that the subject trip and fall incident caused exacerbation of prior injuries to her knees, both of which were replaced during knee replacement surgeries, and that the incident also caused her to require surgery on her right ankle. Due to plaintiff's failure to provide such authorizations, the City argues that it has been unable to obtain access to the corresponding files in order to properly defend this action and prepare for trial.

In opposition, plaintiff argues that the City failed to designate plaintiff's physical examination for over a year prior to the filing of the note of issue on November 24, 2021 and that the City did not timely demand plaintiff's authorizations. Plaintiff contends that the PC order directs the City to designate plaintiff's IME within 45 days of her EBT, which was held on June 3, 2020. As no IME was designated within 45 days of plaintiff's EBT, plaintiff argues that she deemed the IME waived. Plaintiff also argues that the CSO does not include requiring authorizations to obtain copies of actual records of all treating and examining health care providers for injuries specified in the bill of particulars. Plaintiff argues that no unusual or unanticipated circumstances have developed subsequent to the filing of the note of issue that would necessitate post-note of issue discovery. Plaintiff also maintains that the City did not make any discovery demands until the filing of the underlying motion, and no discovery remains outstanding.

Pursuant to CPLR 3121 (a), a physical examination is warranted when a party puts his physical condition in controversy. Further, the First Department has held that, “[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced.” *Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 442 (1st Dept 2017); *Linares v City of New York*, 198 AD3d 417 (1st Dept 2021). Plaintiff does not dispute that his physical condition is at issue or that medical records or an IME is relevant to the instant matter. Plaintiff only argues that the City is barred from requesting the relevant authorizations or conducting an IME due to its delay in requesting same.

Here, an IME is necessary to determine the cause and extent of plaintiff’s claimed injuries, and the City will face significant prejudice in its ability to mount a defense if deprived of the opportunity to conduct same. *See Roberson v Fordham Rent-A-Car Corp.*, 38 AD2d 535 (1st Dept 1971). Plaintiff has plainly put her medical condition at issue and has not demonstrated any prejudice that she will face in scheduling an IME or providing the relevant authorizations. Plaintiff also served a supplemental bill of particulars a year after her EBT, which alleged additional medical treatments that were causally related to plaintiff’s injuries. Therefore, the City’s is entitled to post-note of issue authorizations and to conduct plaintiff’s IME.

Accordingly, it is

ORDERED that this Court’s decision and order dated January 3, 2023 is vacated and superseded by the herein decision solely for the purpose of amending the dates below; and it is further

ORDERED that the City’s motion is granted, and the City is entitled to post-note of issue discovery as to plaintiff’s IME and all relevant authorizations, and it is further

ORDERED that plaintiff shall provide the relevant medical authorizations, including those that relate to plaintiff's knee replacement, knee replacement revision, and ankle surgeries, to the City on or before January 30, 2023,¹ and it is further

ORDERED that plaintiff's IME shall be designated on or before March 25, 2023, at which plaintiff shall appear.

This constitutes the decision and order of the Court.


HON. LESLIE A. STROTH, J.S.C.

1/23/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

¹ This decision and order is amended to change the year from "2022" to "2023".