Forman v Henkin
2023 NY Slip Op 31831(U)
May 31, 2023
Supreme Court, New York County
Docket Number: Index No. 113059/2011
Judge: Dakota D. Ramseur
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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

---X

KELLY FORMAN

Plaintiff,

- v -

MARK HENKIN,

Defendant.

---X

INDEX NO. 113059/2011

MOTION DATE 11/11/2022, 11/11/2022

MOTION SEQ. NO. 012 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 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

were read on this motion to/for DISCOVERY .

The following e-filed documents, listed by NYSCEF document number (Motion 012) 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

were read on this motion to/for STRIKE PLEADINGS .

Upon the foregoing documents, it is

Plaintiff, Kelly Forman (plaintiff), commenced this action for personal injury stemming from a June 20, 2011 fall while she was riding a horse owned by defendant, Mark Henkin (defendant). Defendant now moves pursuant to CPLR 3126 to strike plaintiff's complaint for her alleged refusal to appear for further supplemental independent medical examinations (IME), or in the alternative, compel plaintiff to appear for further supplemental IMEs. Plaintiff opposes the motion. For the following reasons, defendant's motion is denied.

Plaintiff commenced this action on November 16, 2011, by filing the summons and verified complaint. Plaintiff served a verified bill of particulars on April 6, 2013, alleging head and brain injuries, including a traumatic brain injury, spine injuries, and injuries to her extremities. In February 2013, plaintiff appeared at her first two of what would be five depositions. On September 23, 2013, plaintiff served her first supplemental verified bill of particulars, alleging, among other injuries, vertigo, dizziness, facial asymmetry, disc bulges, lumbar tears, and lower back pain, and most notably, a right shoulder labral tear and right shoulder arthroscopic surgery. On January 23, 2014, plaintiff underwent a neurology and orthopedic IME. On February 11, 2014, plaintiff underwent a neuro-ophthalmic IME. On March 10, 2014, plaintiff appeared for her third deposition, stemming from her first supplemental verified bill of particulars. On January 21 and 22, 2014 and March 14, 2014, plaintiff appeared for a three-day neuropsychiatry IME.

On January 15, 2015, plaintiff filed the note of issue and certificate of readiness. Defendant thereafter filed a motion to vacate the note of issue, which was withdrawn on March 4, 2015. The note of issue remains filed. The parties decided to continue with discovery while leaving the note of issue filed.

On June 27, 2016, plaintiff served the second supplemental verified bill of particulars, alleging further lumbar spine injuries, a lumbar spine surgery performed on December 23, 2015, and indicating that further surgeries may be required. On March 30, 2017, plaintiff appeared for her fourth deposition. In November 2017, plaintiff appeared for a second neurology IME. In September 2018, plaintiff appeared for a follow-up second series of a neuropsychiatry IMEs.

On March 27, 2018, defendant again moved to vacate the note of issue, and on June 20, 2018, another justice of this court denied the motion. The court instead stayed this matter for six months. On March 12, 2019, another justice of this court granted defendant's motion to extend the stay of trial until June 3, 2019.

On February 9, 2021, plaintiff served a third supplemental verified bill of particulars, including, traumatic brain injury, visual disturbance associated with traumatic brain injury, and various continuing treatments. On February 9, 2021, plaintiff served authorizations for her medical records addressed in her third supplemental verified bill of particulars. On July 27, 2021, plaintiff served additional authorizations for medical records involving additional treatment, including a June 7, 2021 procedure involving liposuction and injection of auto-transplanted fat into the anal canal and intersphincteric space to allegedly treat plaintiff's newly claimed fecal incontinence.

On August 29, 2021, defendant again moved to strike and vacate the note of issue and certificate of readiness.

On October 14, 2021, plaintiff served the fourth supplemental verified bill of particulars alleging additional treatments, and a newly alleged incontinence problem that plaintiff alleged resulted from the aforementioned June 7, 2021 liposuction and anal canal injection procedures. On December 20, 2021, plaintiff appeared for an additional deposition concerning the new allegations, and testified about, among other things, symptoms such as blurred and double vision, vertigo, and dizziness. Plaintiff further testified that she was considering a second incontinence procedure.

On February 1, 2022, the parties entered into a stipulation, which was "so-ordered," wherein defendant agreed to withdraw his motion to strike the note of issue (stipulation). The stipulation further provided that:

> "Defendant to designate supplemental IME(s) related to Plaintiffs further deposition testimony from 12/20/2021, if any, within 30 days, with examinations to take place within 30 days thereafter and reports to be exchanged within 45 days thereafter. Plaintiff reserves the right to object to any supplemental IME(s) so designated."

(NYSCEF doc. no. 43).

The parties further agreed that defendant is to serve "Post-EBT Demands related to Plaintiffs further deposition testimony from 12/20/2021 within 30 days, with responses to be served within 30 days thereafter" (*id.*). Additionally, the stipulation states that that parties may request a conference with the Part in the event one is needed.

On May 12 and 24, 2022, plaintiff served responses to defendant's notice to produce and supplemental notice to produce, respectively. According to defendant, he received voluminous number of records every few weeks between the end of June 2022 to the end of October 2022. Defendant states that he received records dating back to February 2019 addressing vision treatment records. Defendant further states that he received spinal treatment records for treatment after plaintiff's last ophthalmic independent medical examination in 2014. Defendant further states that the records include various treatments of which defendant was previously unaware.

In September 2022, defendant requested that plaintiff appear for a further neuro-psychiatric IME, which plaintiff refused. Defendant now argues that plaintiff should be compelled to appear for additional IMEs based on the additional treatment plaintiff underwent as addressed in plaintiff's third and fourth supplemental bills of particulars served in 2021, over four years after plaintiff's most recent neuropsychiatric independent medical examination, and over eight years after plaintiff's most recent neuro-ophthalmic, neurology, and orthopedic IMEs. Specifically, defendant's application seeks that plaintiff be compelled to appear at IMEs in the following medical disciplines: (1) neuropsychiatry; (2) orthopedic; (3) neurology; (4) neuro-ophthalmology; (5) gastroenterology; (6) neuro-physiology; (7) urology; and (8) gynecology. Plaintiff has refused to appear for a noticed orthopedic examination, a further neurology examination, and a further neuropsychiatry examination and refuses to appear for the IMEs defendant requests.

A defendant waives his or her right to conduct an independent medical examination of a plaintiff by failing to designate a physician to conduct such examination within the time period set forth in the relevant compliance conference order, and by failing to vacate the note of issue within 20 days after service of the note of issue and certificate of readiness (*see e.g. Gianacopoulos v Corona*, 133 AD3d 565 [2d Dept 2015]). Here, defendant waived the relevant IMEs by failing to designate within the time agreed upon by the parties in the stipulation. Defendant was aware it needed an additional IMEs on at least February 9, 2021, when plaintiff served the third supplemental verified bill of particulars alleging new injuries. On February 1, 2022, knowing that further discovery was needed, defendant agreed to a timeframe to designate future IMEs. Defendant could have agreed to a later date if it was concerned that it needed more time to designate or exchange discovery. Instead, defendant agreed to designate plaintiff's IME within thirty days of the February 1, 2022 so-ordered stipulation, or by March 3, 2022. On September 19, 2022, defendant requested additional IMEs, which is well after the date he agreed to designate. Again, defendant was aware when it entered the stipulation that medical records concerning plaintiff's treatment would be coming in after the time to designate plaintiff's IME stemming from the December 20, 2021 deposition passed, but agreed to the thirty day timeframe regardless.

In its discretion, the court may grant permission to conduct additional discovery after the filing of a note of issue and certificate of readiness, where the moving party demonstrates that "unusual or unanticipated circumstances" developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice (22 NYCRR 202.21[d]; *Esteva v Catsimatidis*, 4 AD3d 210, 210 [1st Dept 2004]; *see Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016] [finding that the plaintiff's expert disclosure statement after the filing of the note of issue revealed previously undisclosed surgeries "constituted the requisite 'unusual or unanticipated circumstances,' as well as 'substantial prejudice' "]). Here, defendant fails to demonstrate that plaintiff's spinal cord stimulator procedure in 2019, and incontinence surgery in 2021, both of which were not previously alleged prior to plaintiff's third and fourth supplemental bills of particulars, constitute "unusual or unanticipated circumstances." As addressed above, defendant was aware of these procedures before plaintiff's fourth deposition and, importantly, prior to agreeing to designate further IMEs within a specific timeframe. The Court notes that defendant does not cite to any newly discovered information resulting from plaintiff's authorizations demonstrating new and unanticipated claims as to the aforementioned procedures.

Plaintiff cites to *Lewis v Verizon New York Inc.* 199 AD3d 572 [1st Dept 2021]), wherein the Appellate Division, First Department, determined that a neurological IME was warranted based on the post-note of issue tests and surgical treatment of the plaintiff's sciatic nerve. However, *Lewis* is factually distinct form the instant case. Unlike in *Lewis*, where the note of issue was filed and discovery was ostensibly finalized when the plaintiff served two supplemental bills of particulars alleging new procedures were served, here, plaintiff conducted an EBT of plaintiff concerning the third and fourth supplemental bills of particulars and was aware of the need for further discovery at the time it entered into the February 1, 2022 so-ordered stipulation limiting the time to designate. Accordingly, the finding in *Lewis* is factually inapplicable to this case.

The Court also denies the balance of defendant's request for IMEs. Defendant argues that plaintiff's medical treatment has continued and broadened in scope since plaintiff's 2017 deposition. Other than the broad statement that plaintiff has received some treatment, defendant does not explain or provide any detail on why these medical treatments warrant additional IMEs. For instance, defendant argues that the third and fourth supplemental bill of particulars allege novel treatments, such as epidural injections, a stay at the hospital for "ongoing lower extremity pain," and injuries such as traumatic brain injury (NYSCEF doc. no. 32 at ¶ 25). But defendant does not claim they were unaware of these underlying injuries prior to the third and fourth supplemental verified bill of particulars. Instead, the Court finds that plaintiff is describing additional treatment for injuries defendant was already aware of, which does not constitute an "unusual or unanticipated circumstance" (*see Drapper v Horan*, 164 AD3d 1192, 1193 [1st Dept 2018] ["Defendants also failed to demonstrate that additional treatment for an injury defendants were already aware of constitutes an 'unusual or unanticipated circumstance' to warrant vacatur and a medical examination"]; *see also Jones v Seta*, 143 AD3d 482, 483 [1st Dept 2016] ["defendants have not articulated a need for a supplemental physical examination, as the IME doctor has already examined Jones, documented his or her findings, and can supplement the same upon receipt of the records relating to Jones' prior injuries and treatment"]).

Defendant also fails to demonstrate his entitlement to an IME concerning plaintiff's claim of "visual disturbance associated with traumatic brain injury" and "lumbar spine injuries." Those injuries were alleged in the in the third supplemental verified bill of particulars. Thus, defendant was aware of those alleged injuries before plaintiff's December 2021 deposition. As discussed above, defendant could have, but failed to designate IMEs for those injuries. The Court notes that defendant does not cite to any documents or medical records presenting an unanticipated claim or new injury, or any other proof of "any unusual or unanticipated circumstances subsequent to the filing of the note of issue and certificate of readiness that would warrant an additional physical examination of the injured plaintiff" (*Manzo v City of New York*, 62 AD3d 964, 965 [2d Dept 2009]).

As defendant failed to demonstrate "unusual or unanticipated circumstances," the Court will not address the issue of substantial prejudice (*Partow v Van Owners Purchasing Bureau*, Inc., 213 AD3d 578, 579 [1st Dept 2023] ["having failed to sustain their burden of demonstrating unusual or unanticipated circumstances, the court was not required to address the issue of substantial prejudice"]).

Lastly, plaintiff requests that any further IMEs be designated with the same physicians as those who previously examined her in the identical medical discipline. Counsel for defendant's memorandum of law indicates that those physicians are unavailable for plaintiff's IMEs. Accordingly, to the extent there are any additional IMEs remaining, defendant may designate new physicians in the event the previous examining physicians are unavailable.

Accordingly, it is hereby

ORDERED that defendant's motion pursuant to CPLR 3126 to strike the complaint, or in the alternative, compel additional IMEs is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant, with notice of entry, within ten (10) days of entry.

20230531160202DRAMSEUR7954A46A46C84946BEFA209F256F09A5

5/31/2023
DATE

DAKOTA D. RAMSEUR, 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**