

Huggins v 2465 Broadway Assoc. LLC

2023 NY Slip Op 32636(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 159548/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

RONNELL HUGGINS,

Plaintiff,

- v -

2465 BROADWAY ASSOCIATES LLC, NEW YORK SUN
CLUB TANNING AND CRYOTHERAPY, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

Defendant.

-----X

2465 BROADWAY ASSOCIATES LLC

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Defendant.

-----X

INDEX NO. 159548/2020

MOTION DATE 05/26/2023,
05/26/2023

MOTION SEQ. NO. 004 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595530/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103 were read on this motion to/for STRIKE PLEADINGS.

By notice of motion, defendant 2465 Broadway Associates LLC (movant) moves for an order, as pertinent here, granting it costs in the sum of \$15,000, representing fees it incurred for plaintiff's alleged cancellations of his independent medical examination (IME) appointments. Plaintiff opposes. Oral argument was held on July 18, 2023, and the remaining portions of the motion were resolved then.

Movant contends that plaintiff failed to appear for his IME on repeated occasions, without adequate notice, thus causing the IME physician to charge movant \$15,000 for the no-shows. It contends that the physician required three business days' notice of a cancelled exam in order to avoid charging a "no-show" fee (NYSCEF 78).

Movant submits a copy of the IME notices sent to plaintiff's counsel, which all contain the following language – "Please note that your office may be responsible for a no show/late cancellation fee (\$10,000) if your client should fail to appear for the exam, as scheduled, or if you fail to provide us with 3 days' notice of their need to cancel/reschedule." (NYSCEF 97).

Movant also submits a copy of the invoice sent to plaintiff's counsel regarding the missed IMEs, which contains the following charges:

- (1) 9/9/22 - \$10,000 fee – retainer fee for an IME by Dr. Andrew Casden scheduled for 9/9/22, and for which plaintiff's counsel called on 9/7/22 to reschedule;
- (2) 9/30/22 – \$0 – no show/late cancellation fee – plaintiff's counsel called on 9/22/22 to reschedule;
- (3) 12/16/22 - \$0 – no show/late cancellation fee – plaintiff's counsel called to reschedule on 12/12/22;
- (4) 12/17/22 - \$0 – no show/late cancellation fee – "the original \$10,000 retainer is forfeited after the second no show/late cancellation"; and
- (5) 2/24/23 - \$5,000 – no show/late cancellation fee of 2/24/23 IME appointment.

(NYSCEF 96).

Plaintiff denies that he failed to provide adequate notice of his inability to appear for the exams, other than the exam on September 30th, which he concededly failed to attend without notice. He contends that he timely notified the physician of the need to reschedule the September 9th and December 16th exams, and that on February 24th, he advised the physician's

office that he would be late that day and arrived for his appointment approximately 40 minutes late, but the physician refused to examine him (NYSCEF 100).

While movant contends that the physician required notice of at least three business days before charging a no-show fee, the scheduling letters do not so provide. Rather, they advise that a no-show fee will be charged if notice is not given within three days. As plaintiff was therefore not sufficiently warned that he needed to reschedule within three business days, the physician's alleged policy may not be enforced.

A review of the circumstances surrounding each exam reflects that plaintiff provided sufficient notice of his need to reschedule the September 9 and December 16 examinations. As for the February 24 examination, nothing in the scheduling letter warned plaintiff that if he arrived late for the appointment, he would not be examined and/or it would be deemed a no-show or late cancellation, and thus the physician should not have charged a no-show fee for that date.

Plaintiff thus establishes that he only missed one IME without notice, on September 30th, (even though the invoice reflects that his counsel called to cancel eight days before it). Therefore, the physician improperly charged counsel \$10,000 as a forfeit of the retainer based on plaintiff allegedly missing two appointments without sufficient notice.

Moreover, the \$5,000 fee charged, in effect, for the September 30 no-show is unsupported by anything reflecting that the fee is the per-examination fee charged by the physician or his hourly billing rate or that it is proportionate to any costs incurred by the physician by the no-show or otherwise.

While there are no recent Appellate Division cases addressing this issue, some older cases have upheld no-show IME fees, without discussion (*Gokey v Decicco*, 24 AD3d 860 [3d

Dept 2005] [\$750 total fee for two missed appointments]; *Adams v Deloreto*, 272 AD2d 875 [4th Dept 2000] [\$1,000 total fee for three missed appointments]; *Flynn v Debonis*, 246 AD2d 852 [3d Dept 1998] [\$300 fee for each of two missed appointments]; *Renford v Lizardo*, 104 AD2d 717 [4th Dept 1984] [\$350 fee for two missed appointments, or \$175 fee per appointment]).

A review of more recent cases in New York City reflects that amounts far lower than that charged here have been ordered to be paid. For example, in *Astanov v Colman*, the court ordered that plaintiff pay a no-show fee of \$430, but declined to order that he also pay a \$100 no-show fee, finding that plaintiff provided the required notice for the first rescheduled examination (2021 WL 6755381 [Sup Ct, Queens County] [Golia, J.]),

In *Janicki v Beaux Arts II LLC*, the court found that a total charge of \$2,600 for three missed IMEs was neither excessive nor arbitrary, with the charges consisting of: (1) a \$350 fee for the physician and \$300 for an interpreter, for a total of \$650, charged for each of the first two missed IMEs, and (2) a fee of \$800 for the physician and \$300 for interpreter for the last missed IME (2016 WL 1435646, 2016 NY Slip Op 30614[U] [Sup Ct, New York County 2016] [Engoron, J.]). Finally, in *Jones v 134 Elliot Pl. Assocs., LLC*, the court ordered the plaintiff to pay a total amount of \$1,000 for five missed IME appointments, or approximately \$200 per no-show (2014 WL 6075790 [Sup Ct, Bronx County] [Douglas, J.]); *see also Musumeci v Reback*, 2022 WL 1285451 [Sup Ct, Richmond County 2022] [DiDomenico, J.] [directing payment of a \$450 fee)].¹

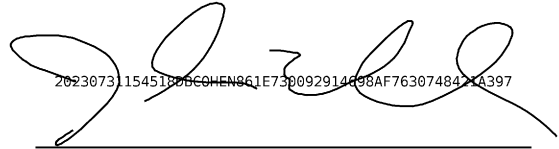
¹ Trial court cases from outside of New York City reflect Courts allowing no-show charges in line with that the New York City Courts have allowed:

- (1) *Mayhew v Ari Fleet LT*, 2020 WL 13201347 (Sup Ct, Suffolk County 2020) (Nolan, J.) - \$1,100 total fee for four missed appointments;
- (2) *Findley v Westland S. Shore Mall L.P.*, 2016 WL 11200893 (Sup Ct, Suffolk County 2016) (Farneti, J.) - \$400 fee per missed exam; and
- (3) *Hachey v Newman*, 2016 WL 11744236 (Sup Ct, Onondaga County 2016) (Gilbert, J.) - \$500 fee.

Based on the applicable caselaw, and absent evidence from the movant establishing that the \$5,000 no-show fee charged here was neither arbitrary nor excessive, it is reduced to \$500.

Accordingly, it is hereby

ORDERED, that the motion is granted to the extent of directing plaintiff to pay movant \$500 within 30 days of the date of this order, and is otherwise denied.



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7/31/2023

DATE

DAVID B. COHEN, 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