

**Wallace v City of New York**

2023 NY Slip Op 32815(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 152292/2020

Judge: Judy H. Kim

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.



between the parties in which plaintiff's counsel agreed to produce plaintiff for an IME within sixty days from November 30, 2022, i.e., by January 30, 2023 (NYSCEF Doc. No. 53 [Emails]). The City then requested that plaintiff appear for an IME on March 30, 2023 and May 9, 2023 (NYSCEF Doc. Nos. 50 [February 20, 2023 IME Notice] and 51 [April 4, 2023 IME Notice]). Plaintiff failed to appear for either IME. In a letter dated June 28, 2023, plaintiff's counsel stated that plaintiff had not received the City's IME notices and, in any event, would not appear for an IME based on the City's failure to timely notice an IME as ordered by the Court (NYSCEF Doc. No. 36 [June 28, 2023 Response to Demand]).

On June 28, 2023, the City filed the instant motion seeking an order, pursuant to CPLR §3124, compelling plaintiff to appear for a post-note of issue IME, arguing that it would be prejudiced if this matter were to proceed to trial without such an IME. Plaintiff opposes the motion, arguing that the City has waived its right to conduct an IME of plaintiff by its failure to timely designate same.

### DISCUSSION

“Trial 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, 443 [1st Dept 2017]). Here, the Court exercises its discretion and permits the City to conduct a post-note of issue IME while the case remains on the trial calendar. The City's defense would be prejudiced should it be required to proceed to trial without an IME of plaintiff while, by contrast, plaintiff has failed to point to any prejudice to her resulting from such an IME being held (See May v Am. Red Cross, 282 AD2d 285 [1st Dept 2001]; see also Hickey v City of New York, 159 AD3d 511 [1st Dept 2018]).

Even assuming, as plaintiff argues, that the City has waived its right to conduct an IME of plaintiff, the Court relieves this waiver in light of plaintiff's prior consent to appear for a post-note of issue IME, the City's good faith efforts to designate such IMEs and prompt application for the instant relief, and the lack of prejudice to plaintiff (See e.g., Spano v Omni Eng'g, LLC, 69 AD3d 922, 923 [2d Dept 2010] [waiver to conduct IME relieved where defendant designated plaintiff's IME within twenty days after the filing of the note of issue and promptly moved to compel plaintiff's appearance following plaintiff's refusal to appear for scheduled IMEs]; see also Wise v Blue, 289 AD2d 131, 131-132 [1st Dept 2001]).

In light of the foregoing, it is

**ORDERED** that the City of New York's motion to compel plaintiff to appear for a post-note of issue IME is granted; and it is further

**ORDERED** that, within twenty days from the date of this decision and order, the City of New York is directed to notice an IME of plaintiff and said IME is to be held within sixty days of the date of the notice; and it is further

**ORDERED** that the City of New York shall exchange IME reports within thirty days from the date of plaintiff's IME; and it is further

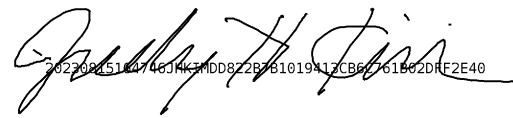
**ORDERED** that this case shall remain on the trial calendar;

**ORDERED** that there shall be no further extensions of the deadlines set forth in this decision and order without court approval and without good cause shown; and it is further

**ORDERED** that counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days of the date of this decision and order; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "Efiling" page on this court's website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).

This constitutes the decision and order of the Court.



0022000510474814K3MDD822B7B1019417CB60761062DRF2E40

8/15/2023

DATE

HON. JUDY H. KIM, 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