

Suarez v Harrison & Burrowes Bridge Constructors, Inc.
2013 NY Slip Op 34119(U)
June 24, 2013
Supreme Court, Westchester County
Docket Number: 51041/12
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
PAULO SUAREZ, a Person Under a Disability,
by ROBERT SUAREZ, his Court Appointed Guardian,

Plaintiff,

-against-

HARRISON & BURROWES BRIDGE
CONSTRUCTORS, INC., and
PCI INDUSTRIES CORP.

Defendants.

-----X
HARRISON & BURROWES BRIDGE
CONSTRUCTORS, INC.,

Third-Party Plaintiff.

-against-

PERSICO CONTRACTING & TRUCKING, INC. and
A. MANGONE SAFETY LLC,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff seeking an order permitting plaintiff's physician presence at the Independent Medical Examinations ("IMEs") of plaintiff, or in the alternative, permitting plaintiff to videotape the IMEs of plaintiff. Defendants Harrison & Burrowes Bridge Constructors, Inc. ("H & B") and PCI Industries Corporation ("PCI") oppose the motion.

Order to Show Cause
Exhibits 1-8

DECISION and ORDER

Index # 51041/12

Seq. No. 4

Motion Date: June 24, 2013

Affirmation in Opposition submitted by H&B
Exhibits A-D
Affirmation in Opposition submitted by PCI
Exhibits A-D

Upon the foregoing papers and upon oral argument heard on June 24, 2013, the motion is determined as follows:

Plaintiff commenced this action on January 25, 2012, alleging that on July 13, 2011, at a time when he was engaged in a work crew as a laborer doing repair work on a bridge site on Interstate 287 located in Port Chester, New York, he sustained serious personal injuries when a piece of equipment he was using failed, broke and struck him. Plaintiff alleged claims pursuant to Labor Law §§ 200, 240 (1) and 241 (6). Plaintiff alleged that H&B was the general contractor on this project and that it engaged PCI as a subcontractor on the project. Plaintiff further alleged that at the time of the incident he was employed by Persico Contracting & Trucking, Inc. (“Persico”), another subcontractor on the project, engaged by PCI.

Pursuant to the Compliance Conference Order filed April 12, 2013, plaintiff was to submit to examinations by a psychiatrist, a life care planner, a neuropsychiatrist, a physical medicine and rehabilitation specialist and a vocational assessment specialist by May 30, 2013 (the “IMEs”). These IMEs were cancelled pending the resolution of this motion. By letter dated April 8, 2013, plaintiff’s counsel advised H&B’s counsel¹ of plaintiff’s intention to film the IMEs. By letter dated April 12, 2013, H&B’s counsel advised plaintiff’s counsel that it objected to the videotaping of plaintiff’s IMEs. Plaintiff was given permission to make this motion by Discovery Motion Briefing Schedule filed on April 19, 2013.

Plaintiff is presently moving for an order permitting the videotaping of the IMEs, or in the alternative, permitting the presence of plaintiff’s physician at the IMEs. Plaintiff argues that it should be allowed to videotape the IMEs because plaintiff’s injuries are severe and have left him cognitively diminished to the extent that he would not be able to accurately testify about the IMEs at trial. In support of its application plaintiff submits the affidavit of Santo Steven Bifulco, M.D. (“Dr. Bifulco”) who has been retained by plaintiff’s counsel as an expert in this matter and who conducted a physical examination of plaintiff on March 8, 2013. Dr. Bifulco avers that in his medical opinion based upon his examination of plaintiff and a review of plaintiff’s medical records, plaintiff has suffered a traumatic brain injury as a result of the incident on July 13, 2011. Dr. Bifulco further avers that plaintiff would not be capable of testifying at trial concerning his own observations, memories and understanding of the particulars of the IMEs. Dr. Bifulco contends that due to plaintiff’s brain injury, he does not fully comprehend his physical and mental limitations and incorrectly reports his abilities. Plaintiff also submits the affidavit of Kofi Richson (“Richson”) who has been plaintiff’s healthcare aide since January 2, 2012. Richson avers that plaintiff has problems with his memory and understanding

¹ The third-party action had not yet been commenced at this time.

his limitations. Plaintiff also submits an Assistive Technology Evaluation performed by Carol Fuhrer. Plaintiff contends that it has presented special circumstances sufficient to permit it to videotape the IMEs.

H&B opposes the motion on the grounds that plaintiff has not established special or unusual circumstances to justify videotaping the IMEs. Initially, H&B contends that the affidavits submitted by plaintiff are inadmissible due to procedural defects, have inadmissible content or are otherwise wholly inadmissible.² Furthermore, H&B argues that plaintiff testified for two days at his deposition and was able to respond to numerous questions which required him to provide the names of various treatment providers, treatments and treatment schedules and other details concerning his personal and work history and his family members. H&B argues that since plaintiff was able to provide deposition testimony over the course of two days, he should be able to testify regarding the content of the IMEs. H&B further argues that the cases relied upon by plaintiff involved plaintiffs who were either “semi-comatose” or “incompetent” and are distinguishable from this case. H&B contends that the guardian appointed by the Court for plaintiff was effectuated while plaintiff was in a coma, but that there is nothing to indicate that plaintiff is currently unable to testify on his behalf. H&B further contends that if plaintiff is allowed to have his physician present during the IMEs, it would give plaintiff an unfair litigation advantage.

PCI opposes the motion on similar grounds noting that plaintiff was able to provide ten hours of unaided deposition testimony over the course of two days. PCI contends that the affidavits provided by plaintiff are insufficient to establish special circumstances to warrant videotaping the IMEs. PCI also argues that to allow the IMEs to be videotaped would create an uneven playing field prejudicial to the defense of this action.

Whether or not to grant an application to permit the videotaping of an examination is vested in the court’s discretion (*McNeil v State of New York*, 8 Misc3d 1028A [Court of Claims 2005]). Videotaping an examination is appropriate only in special and unusual circumstances such as where the party being examined is incompetent or comatose and unable to review the examination with his attorney or testify at trial as to the manner in which the examination was conducted (*Lamendola v Slocum, Jr.*, 148 AD2d 781 [3rd Dept 1989]). In the instant case, plaintiff has not shown any such circumstances (*compare Matter of Campbell*, 177 Misc2d 59 [Supreme Court Nassau County, 1998; an involuntarily committed mental patient at a state psychiatric hospital was entitled to videotape his psychiatric exam]; *Mosel v Brookhaven Mem. Hosp.*, 134 Misc2d 73 [Supreme Court, Suffolk County, 1986; the incompetent plaintiff who was in a semicomatose state, was permitted to videotape the physical examination]).

Nothing in plaintiff’s motion papers, or on this record, suggest that special and unusual circumstances exist to justify permitting the examinations to be videotaped.

² To the extent that any defects exist in the affidavits submitted by plaintiff, those defects are deemed non-fatal (See, CPLR 2001; *Recovery of Judgment, LLC v Warren*, 91 AD3d 656 [2d Dept 2012]).

In *Ponce v Health Ins. Plan of Greater New York* (100 AD2d 963 [1984]), the Second Department held that plaintiff, who was directed to submit to psychiatric and neurological examination by experts designated by defendants, was entitled to be examined in the presence of her attorney or other legal representative, as well as an interpreter, so long as they did not interfere with the conduct of the examinations. Similarly, the Supreme Court in Kings County in *Gray v Victory Mem. Hosp. (Id.)* found that to deny plaintiff accompaniment of his choice, be it an attorney or a psychiatrist sent by an attorney, was to infringe upon plaintiff's right to be assisted by counsel. The *Gray* Court required a compelling showing of why plaintiff's psychiatrist should not be permitted to observe the psychiatric examination, a showing that in that case defendant failed to make.

However, while the court in *Gray* did allow plaintiff's psychiatrist to be present during plaintiff's examination, plaintiff's psychiatrist was prohibited from testifying at trial on plaintiff's direct case about the procedures and methods used by defendant's psychiatrist at the examination. The Supreme Court in Schenectady County in *Grady v Phillips* (159 Misc2d 848 [1993]), likewise found that plaintiff, if he so elected, could be accompanied to his physical examination by a registered nurse designated by his attorneys since defendant had not shown any reason why the nurse should be barred from the examination. Also, in *Grange v Sweet* (4 Misc3d 470 [Supreme Court, Ulster County 2004]), the Court found that the presence at a physical examination of a party's chosen representative, including a physician, should be allowed unless the opposing party demonstrated a reason why the party's right to the presence of counsel or other representative at the physical examination should be denied. Nothing in this record demonstrates a reason to deny plaintiff's request to have a physician or an authorized representative of plaintiff's counsel present at his IMEs.

In light of the foregoing, it is:

ORDERED that plaintiff's motion is granted only to the extent that if he so elects, plaintiff may be accompanied to his independent medical examinations by a physician or an authorized representative of plaintiff's counsel provided that the presence of this person will not interfere in the conduct of the examination, his/her role is limited to that of an observer, and this person will not be permitted to provide testimony at trial on plaintiff's direct case concerning the procedures and methods utilized by those conducting the independent medical examinations; and it is further,

ORDERED that the branch of plaintiff's motion which seeks an order videotaping the IME is denied.

ORDERED that the plaintiff is to submit to such an examinations on or before July 31, 2013; and it is further,

ORDERED plaintiff shall serve a copy of this order with notice of entry upon all parties within ten days of entry; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on August 2, 2013, at 9:30 AM.

Dated: White Plains, New York
June 24, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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