Deonarine v Montefiore Med. Ctr.
2015 NY Slip Op 30218(U)
January 9, 2015
Supreme Court, Bronx County
Docket Number: 304407/08
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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MARCUS DEONARINE,

Plaintiff,

-against -

MONTEFIORE MEDICAL CENTER,

Defendant.

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Index No. 304407/08
DECISION and ORDER

Present:
Hon. SHARON A.M..AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion and Exhibits Annexed----------	1
Answering Affidavit and Exhibits----------	2
Reply Affidavit and Exhibits----------	3

Upon the foregoing papers, and due deliberation, the Decision and Order on this motion is as follows:

Defendant moves to vacate its default on a prior motion, and for leave to renew a prior motion decided by the Order of this Court. Plaintiff submits written opposition. The motion is granted to the extent indicated below.

The plaintiff seeks recovery for alleged personal injuries sustained on January 4, 2008, in this slip and fall action. The plaintiff, while this action was pending, was arrested for firearms trafficking, and sentenced on October 27, 2009. Plaintiff was deposed in a Texas prison on May 8, 2012. While there is much disagreement as to when the defendant became aware that the plaintiff was incarcerated, and when he would be deported, defendant became aware that in fact the plaintiff would be deported, and moved to dismiss the complaint based on the inability of plaintiff to appear for IMEs. In a decision dated July 9, 2012, this Court (Aarons, J.) held as follows:

> "After hearing oral argument on the Order to Show Cause on July 9, 2012, the court was made aware that plaintiff is currently incarcerated in Texas and is scheduled

> for deportation on or about August 6, 2012. Defendant has been aware of plaintiff's tentative release date since October 6, 2011, and although defendant took his deposition in Texas on May 8, 2012, defendant failed at that time to conduct any orthopedic and neurological Independent Medical Examinations ("IMEs"). The branch of the Order to Show Cause to dismiss the complaint on the grounds that plaintiff's pending deportation will make him unavailable for trial and/or preclusion of evidence of his injuries because of said unavailability is denied. Dismissal or preclusion is not warranted since plaintiff, who will be deported, is presently in the United States and at this juncture has yet to default. Furthermore, upon deportation, plaintiff may testify at deposition or trial from a foreign country via video. *Hugo Rafael Ramirez Gabriel v. Johnston's L.P. Gas Service, Inc.*, 2012 WL 2164515, 2012 N.Y. Slip Op. 04861 (4th Dept. 2012).
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> "The branch of the Order to Show Cause that seeks to compel plaintiff's IMEs and for costs of the examination and making of the motion is granted only to the extent that plaintiff is required to post security for the difference between the cost of plaintiff's orthopedic and neurological IMEs by Texas physicians as opposed to New York physicians. All IMEs should be conducted before plaintiff's deportation date of August 6, 2012."

As indicated in the affidavit of defendant's medical records administrator dated July 31, 2012, on July 12 – 17, 2012, before the plaintiff was deported, he called the offices of 8 orthopedists and 4 neurologists, none of whom were willing or able to perform an examination of the plaintiff. The plaintiff was deported to Trinidad and Tobago in August, 2012.

Defendant then submitted an Order to Show Cause to renew the motion to dismiss based on its inability to schedule IMEs. The defendant allegedly did not learn that the Order to Show Cause was signed on July 24, 2012, did not serve the Order to Show Cause, and did not appear on the return date. The Order to Show Cause was denied by Order dated July 30 based on defendant's failure to appear at the call of the motion calendar on that day.

The Court (Aarons, J.) subsequently declined to sign an Order to Show Cause for the same relief submitted on August 1, 2012.

Defendant now moves to renew the prior motion based on the inability to perform an IME of

the plaintiff, relying on the affidavit . Defendant maintains that its default on the prior Order to Show Cause was excusable, and that a meritorious defense exists. Defendant maintains that it was not possible to schedule IMEs in Texas despite diligent efforts to do so.

In opposition, plaintiff maintains that an excusable default has not been established. In addition, they maintain that an affidavit of merit has not been submitted.

The Court finds that defendant's law office failure raises a sufficient excuse for the default. *Matter of Daval-Ogden, LLC v. Highbridge House Ogden, LLC*, 103 A.D.3d 422, 961 N.Y.S.2d 33 [1st Dept. 2013] [motion court erred in finding that there was no excusable default based upon law office failure].) While the plaintiff is correct that the defendant did not submit an affidavit of merits, and submitted the depositions taken in this action only in reply, the Court finds that the defendant need not establish a meritorious defense to this action, as opposed to a meritorious claim to be made on the motion. Thus, in *Thalle Indus., Inc. v. Holubar* (121 A.D.3d 671, 993 N.Y.S.2d 366 [2d Dept. 2014]), in which a defendant defaulted in opposing a cross- motion by a co-defendant, the defaulting defendant "was required to demonstrate a reasonable excuse for her default in opposing the motion and a potentially meritorious opposition to the motion...." As is more fully discussed below, the defendant has established a meritorious basis to renew the prior motion.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][3]; *see Ali v Verizon N.Y., Inc.*, 116 AD3d 722, 723, 982 N.Y.S.2d 903 [2d Dept. 2014].) Plaintiff does dispute that the inability of the defendant to locate a Texas physician arose after the motion was decided. While plaintiff states that the defendant's efforts to locate a Texas physician were "feeble," plaintiff has not shown that any

physician not contacted was in fact available and willing to perform an examination.

In deciding the prior motion, this Court relied on case law allowing depositions to be taken while the plaintiff was in a foreign country, and then allowing the plaintiff's deposition to be admitted at trial. These cases remain good law. However, cases decided subsequent to this Court's July 9 determination have further clarified the defendant's right to an IME when the plaintiff is unable to return to the United States. As stated in *Chong v. New York Downtown Hosp.* (2012 N.Y. Misc. LEXIS 5458, 2012 NY Slip Op 32877(U) [Sup. Ct., N.Y. Co., Nov. 30, 2012]):

> "However, with regard to the medical examination, defendants make a better argument as to who shall perform it. Counsel for plaintiff suggests that a Korean doctor could do this examination, but defendants have a right to select their own physician to conduct such an examination. Therefore, after the defendants together select a physician who is agreeable to travel to Seoul, they should inform counsel for plaintiff, who will then arrange for an office for the physician to use and arrange for Ms. Chong to appear. The entire expense, presumably a considerable one, less what the doctor would normally charge for an examination in New York, will be borne by the plaintiff alone. In this action, the issue of the extent and permanency of Ms. Chong's injuries is a significant one. Therefore, the defense must be able to retain a doctor in whom they have confidence to not only perform the examination, but to be in a position to testify as well."

Similarly, in *Yu Hui Chen v. Chen Li Zhi* (109 A.D.3d 815, 971 N.Y.S.2d 1 [2d Dept. 2013]), in which the Court permitted the deposition of the plaintiff to be taken in China via Skype, the Court held that the defendant nevertheless had the right to have an IME performed by his own physicians.

> "However, with regard to the independent medical examination of the plaintiff, the same reasonable accommodation cannot be achieved. Under the unique circumstances of this case, the equities weigh in favor of permitting the defendant to designate [*817] the doctor who will conduct the independent medical examination of the plaintiff, at such location and time as the defendant shall specify (*see* CPLR 3121 [a]; 22 NYCRR 202.17 [a]). "[T]he defense must be able to retain a doctor in whom they have confidence to not only perform the examination, but to be in a position to testify as well" (*Chong v New York Downtown Hosp.*, 2012 N.Y. Misc. LEXIS 5458, 2012 NY Slip Op 32877[U], *4 [Sup Ct, NY County 2012]). The designation of the doctor who

will conduct the independent medical examination of the plaintiff shall not be limited or circumscribed by the plaintiff."

In accordance with the foregoing authorities, the defendant is entitled to have physicians of defendant's choice examine the plaintiff in Trinidad and Tobago, at the plaintiff's expenses. Accordingly, it is

ORDERED that the defendant Montefiore Medical Center shall identify physicians who will examine the plaintiff in Trinidad and Tobago, and relate the identities of these physicians to the plaintiff, together with a estimate of the cost of such examination, and thereupon, the plaintiff shall post security in an amount to secure said expenses less the cost of the examinations which defendant would have paid had said examinations been conducted in New York, and it is

ORDERED that the defendant shall serve a copy of this Order on the plaintiff with notice of entry thereon.

Dated: January 9, 2015

SHARON A. M. AARONS, J.S.C.