

<b>Vasquez v Keyspan Corp.</b>
2017 NY Slip Op 32845(U)
June 29, 2017
Supreme Court, Kings County
Docket Number: 32044/09
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of June, 2017.

P R E S E N T:  
HON. RICHARD VELASQUEZ

Justice.

-----X

CRISSEL N. VASQUEZ,

Plaintiff,

Index No.: 32044/09

-against-

Decision and Order

KEYSPAN CORPORATION, NATIONAL GRID USA,  
ROCCO DIMARTINI, JAVIER L. FERNANDEZ,  
JOSEPH J. DANTUONO and NICOLE H. FUSILLI,

Defendants.

-----X

The following papers numbered 1 to 8 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	1
Opposing Affidavits (Affirmations) _____	2
Reply Affidavits/ (Affirmations) _____	3

After oral argument and a review of the submissions herein, the Court finds as

Follows:

Defendants, KEYSPAN CORPORATION, NATIONAL GRID USA, ROCCO DIMARTINI, move by Order to Show Cause, pursuant to CPLR 3121(a) for an Order granting defendant's permission to conduct a physical examination of the plaintiff by an orthopedist chosen by said defendant, and compelling the plaintiff to submit to such

orthopedic examination, and staying the damages trial of this matter until such orthopedic examination has been held and disclosure of said orthopedist pursuant to 3101(d) has been completed. Plaintiff opposes the same.

### **FACTS**

This action arises from an automobile accident which occurred on March 31, 2009 when plaintiff was a passenger in the automobile operated by defendant, JAVIER FERNANDEZ, which was involved in the subject accident with a vehicle owned by KEYSpan CORPORATION and operated by ROCCO DIMARTINI, during his employment.

On or about February 22, 2011. At the request of defendant, a physical examination of plaintiff, regarding the injuries claimed in the instant action was conducted by Dr. Joel L. Teicher, an orthopedist.

On or about November 10, 2014 plaintiff filed a Note of Issue in this matter. Thereafter defendant's expert, Dr. Teicher became infirmed and medically unable to testify as a result of a serious degenerative brain condition.

It is undisputed that plaintiff submitted to a medical examination by a doctor designated by defendants and defendants timely provided the reports of these examinations and the expert information required by CPLR 3101 (d).

### **ARGUMENTS**

Defendants, KEYSpan CORPORATION, NATIONAL GRID USA, ROCCO DIMARTINI, contend they are entitled to have an additional medical examination by an expert because they will be severely prejudiced if they are unable to have an expert testify; the inability of their expert to testify came about by unusual and unanticipated



circumstances; and it is well within the courts purview to order an additional medical examination.

Plaintiff opposes the same contending that the defendants were well aware of their expert's condition as early as 2013 and this is not a recent development. Further, plaintiff contends that delaying this trial further will prejudice the plaintiff.

### ANALYSIS

Pursuant to CPLR § 3121. Physical or mental examination; "(a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination. (b) Copy of report. A copy of a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy. N.Y. C.P.L.R. 3121 (McKinney)

Although there is no restriction in CPLR 3121(a) on the number of examinations to which a party may be subjected, once an examination has been conducted, an additional examination shall be permitted only where the party seeking the examination demonstrates that it is necessary (*Rinaldi v Evenflo Co., Inc.*, 62 AD3d 856 [2d Dept 2009]; *Schissler v Brookdale Hosp. Ctr.*, 289 AD2d 469 [2d Dept 2001]).

There is case law dealing with the propriety of ordering a second examination due to the unavailability of the first examining physician at trial. In *Nathanson v Johnson* (126 AD2d 475 [1st Dept 1987]), the appellate court, reversing the court below, held that defendants should be permitted to conduct further examinations by a dentist and a neurologist, notwithstanding that plaintiff had been examined by a general and orthopedic surgeon designated by defendants. Defendants' designated expert had died and his examination took place. While the appellate court noted that the physician who conducted the earlier examination had died, it did not specifically reference this fact in concluding that further examinations should be allowed. Rather, the appellate court more generally cited "the particular circumstances herein presented" as well as the amount of damages (over \$2 million) sought in the action (126 AD2d at 477); see also *Rosado v. A & P Food Store*, 26 Misc. 3d 935, 938–39, 891 N.Y.S.2d 636 (Sup. Ct. 2009).

In the present case, defendant's expert, Dr. Teicher is medically unable to testify as a result of a serious degenerative brain condition. Although, plaintiff argues that the defendants were aware of this condition it nonetheless renders him unable to testify. Moreover, if a party is seeking an additional examination after the note of issue has been filed, as here, the party must demonstrate that "unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination" (*Schissler v Brookdale Hosp. Ctr.* at 470; *Futersak v Brinen*, 265 AD2d 452 [2d Dept



1999]; see 22 NYCRR 202.21). Defendant's expert, Dr. Teicher's medical condition is an "unusual and unanticipated circumstance". The court notes plaintiff's contention that the defendants have unduly delayed this proceeding by filing this motion and in the interests of justice this court will allow an additional medical examination by orthopedist expert chosen by the defendants, however, the court will ensure this is completed expeditiously. Therefore, it is hereby ordered that the defendants have 60 days from the date of this order to conduct disclosure and the medical examination of the plaintiff and provide necessary disclosures pursuant to CPLR 3101(d) and CPLR 3121. Upon defendant's failure to complete the same within 60 days of the date of this order the defendants may be precluded from conducting any additional medical examinations before trial.

Accordingly, defendant's request pursuant to CPLR 3121(a) for an Order granting defendant's permission to conduct a physical examination of the plaintiff by an orthopedist chosen by said defendant, and compelling the plaintiff to submit to such orthopedic examination is hereby Granted.

It is further ordered, that the damages portion of this trial is hereby scheduled for November 14, 2017, jury picking will be conducted on November 13, 2017.

This constitutes the Decision/Order of the Court.

Date: June 29, 2017

  
 RICHARD VELASQUEZ, J.S.C.

So Ordered  
 Hon. Richard Velasquez

JUN 29 2017

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