

<b>James v Alpha Painting &amp; Constr. Co., Inc.</b>
2018 NY Slip Op 30755(U)
April 23, 2018
Supreme Court, Bronx County
Docket Number: 302140/2010
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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DARREN JAMES, TARCY JAMES, BALTAZAR  
ANDRADE and HELENA ANDRADE,

Plaintiffs,

Index No. 302140/2010

v.

**DECISION AND ORDER**

ALPHA PAINTING & CONSTRUCTION CO., INC.,  
QUAD RENTALS, LLC AND THE TRIBOROUGH  
BRIDGE AND TUNNEL AUTHORITY and  
GREENMAN-PEDERSON, INC.,

Defendants.

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ALPHA PAINTING & CONSTRUCTION CO., INC. and  
QUAD RENTALS, LLC,

Third-Party Plaintiffs,

Third-Party  
Index No. 84150/2009

v.

BRAND ENERGY SERVICES, LLC,

Third-Party Defendant.

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THE TRIBOROUGH BRIDGE AND TUNNEL  
AUTHORITY,

Second Third-Party Plaintiff,

Second Third-Party  
Index No. 84016/2010

v.

BRAND ENERGY SERVICES, LLC, BRAND  
SCAFFOLD BUILDERS, LLC and MANUEL  
RENDEIRO,

Second Third-Party Defendants.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause, Barry S. Rothman, Esq., attorney for the third-party  
defendants/second third-party defendants Brand Energy Services, LLC (“Brand Energy”), Brand

Scaffold Builders, LLC (“Brand Scaffold”) and Manuel Rendeiro (“Rendeiro”), for an Order: a) pursuant to CPLR Rule 3126(2), precluding the plaintiff Darren James from offering any evidence at trial regarding allegations of back and ankle injuries, based on his failure and/or refusal to appear and submit to medical examinations by defendants’ experts; or, in the alternative, b) pursuant to CPLR Rule 3124, compelling plaintiff Darren James to attend independent medical examinations by Jessica Galina, M.D., regarding allegations of ankle injury, and with Jeffrey D. Klein, M.D., regarding allegations of back injury; c) granting a stay of the April 24, 2018 trial pending the hearing and determination of this order to show cause; and d) granting such other and further relief as this Court deems just and proper; and ii) the Affirmation in Opposition, dated April 19, 2018, by Andrew M. Laskin, Esq., attorney for the plaintiffs.

#### PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on April 15, 2009, under Index No. 303039/2009. Issue was joined by service of the defendants Alpha Painting & Construction Co. Inc.’s (“Alpha”) and Quad Rentals LLC’s (“Quad”), on or about June 8, 2009

A separate action was commenced by the plaintiffs against the defendant Triborough Bridge and Tunnel Authority (“TBTA”), on March 17, 2010, under Index No. 302140/2010. Issue was joined by service of the defendants TBTA’s Answer, on or about April 21, 2010. TBTA filed and served an amended answer, on or about August 19, 2010.

The defendants Alpha and Quad commenced a third-party action against Brand Energy on September 21, 2009. Issue was joined by service of the third-party defendants Brand Energy’s answer, on or about November 24, 2009. By order, dated June 29, 2010, Justice Laura Douglas consolidated the actions under Index No. 302140/2010.

The defendant TBTA commenced a second third-party action against Brand Energy, Brand Scaffold and Rendeiro, on or about July 23, 2010. Issue was joined by service of the second third-party defendants' Answer, on or about January 6, 2011.

The plaintiff filed and served an amended Summons and Complaint, on October 5, 2011, adding Greenman-Pederson, Inc. ("GPI") as a party defendant. Issue was joined by service of the defendant GPI's answer, on or about October 21, 2011.

A note of issue and certificate of readiness was filed, on or about March 25, 2013. This case was mediated and conferenced on multiple occasions. A trial of this matter is currently scheduled for April 24, 2018.

#### FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs arising from an accident that occurred on March 27, 2009, on the Whitestone Bridge, in the City and State of New York. The plaintiffs Daren James ("James") and Baltazar Andrade ("Andrade") were passengers in a boom truck which was operated by Rendeiro. The boom truck was owned by either Alpha and/or Quad. Alpha allegedly hired Brand Energy and Brand Scaffold to perform work on the bridge.

The defendant Brand Energy argues that the trial of this matter should be stayed and that the plaintiff should be compelled to appear for two independent medical examinations since Dr. Elton Strauss passed away. The defendant Brand Energy contends the plaintiff's attorney had agreed to produce the plaintiff James for an independent medical examination but reneged following the mediation of March 28, 2018.

The plaintiffs oppose the motion arguing that the defendant Brand Energy waited until the eve of trial to seek two independent medical examinations of plaintiff James. The plaintiffs contend

they will be prejudiced if the Court grants two additional independent medical examinations on the eve of trial.

#### DISCUSSION OF LAW

22 NYCRR 202.21 (d) permits the Court to authorize additional discovery “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness” that would otherwise cause “substantial prejudice.” (*Audiovox Corp. v Benyamini*, 265 AD2d 135, 140 [2000]; *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376 [1st Dept 1990])

The movant has failed to establish that there are “unusual or unanticipated circumstances” to necessitate a further independent medical examination of the James plaintiff. Based on the record before the Court, no evidence in admissible form has been submitted for the Court’s consideration to establish that Dr. Elton Strauss died. Furthermore, the movant delayed until the eve of trial to move for said independent medical examination of James having information that Dr. Strauss passed away on July 12, 2017.

ACCORDINGLY, based on the record before the Court, a review of the Court file, the applicable law, and due deliberation; it is hereby

**ORDERED**, that the defendant Brand Energy’s order to show cause is DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 23, 2018  
Bronx, New York

ENTER:

  
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HON. DORIS M. GONZALEZ, J.S.C.