

<b>Gelvez v Tower 111, LLC</b>
2018 NY Slip Op 32940(U)
November 19, 2018
Supreme Court, New York County
Docket Number: 159225/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

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EDUARDO GELVEZ and DANIELA CISNERO,  
Individually, and as husband and wife,

Index No. 159225/12  
Motion Sequences 009

Plaintiffs,

**DECISION AND ORDER**

-against-

TOWER 111, LLC, PAV-LAK CONTRACTING, INC.,  
885 AVENUE OF THE AMERICAN MANAGEMENT  
COMPANY, LLC, ATLANTIC REALTY AND  
DEVELOPMENT CORP., STONEHENGE  
PROPERTIES, LLC, STONEHENGE PARTNERS, L.P.,  
STONEHENGE PARTNERS, INC., GOLF & BODY  
NYC, LLC, and TD BANK, N.A. ENTERPRISE  
REAL ESTATE,

Defendants.

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SHERRY KLEIN HEITLER, J.S.C.

Plaintiff Eduardo Gelvez moves pursuant to CPLR 2304 and CPLR 3103 to quash a March 26, 2018 subpoena served by Defendants upon “IME WatchDog, Inc” (IME WatchDog), a company which advertises services relating to independent medical examinations (IME). It is undisputed that two IME WatchDog employees accompanied Plaintiff to his various IME’s. Defendants cross-move for an order compelling IME WatchDog to produce documents responsive to the March 26th subpoena and directing that the two employees be deposed. Both parties further move for sanctions against each other. This is the third time in this case the court has been asked to rule on discovery issues relative to IME WatchDog.<sup>1</sup>

Plaintiff alleges that he injured his neck and back on October 8, 2012 when he fell from a scaffold on a construction site. During the course of discovery Plaintiff underwent two IME’s. On

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<sup>1</sup> The court’s two prior orders on this issue, dated January 12, 2017 and January 19, 2018, respectively, are incorporated into this decision by reference.

both occasions he was accompanied by an IME WatchDog employee. The record does not contain Plaintiff's counsel's retainer letter on behalf of Mr. Gelvez with IME WatchDog.

Defendants moved to compel new IME's outside the presence of IME WatchDog and for the production of any records/reports created by IME Watchdog in connection with this case. By order dated January 12, 2017 the court denied Defendants' request for new IME's but granted their request for the reports. Among other things, the court found that Plaintiff had not demonstrated IME WatchDogs' employees or the documents they prepared in connection with this case fell within the scope of the attorney-client privilege. In accordance with that decision, Defendants served Plaintiff with a demand for the identities of the IME WatchDog employees and their files. In response Plaintiff produced their identities and reports, but did not produce their handwritten notes or their communications with Plaintiff's counsel.<sup>2</sup>

Thereafter Plaintiff underwent additional surgery and supplemented his bill of particulars. Plaintiff appeared for supplemental IME's, again accompanied by an IME WatchDog employee. Despite timely demands therefor, Plaintiff did not produce any reports prepared by IME WatchDog relative to these supplemental IME's. Defendants then moved to preclude IME WatchDog's testimony and reports. By order dated January 19, 2018, the court denied Defendants' motion to preclude but also granted Defendants leave to conduct depositions.

On or about January 23, 2018, Defendants mailed a notice to IME WatchDog of their intent to depose Messrs. Aaron and Rolon. Included with that notice was a copy of the court's January 19, 2018 order. Shortly before the noticed deposition was scheduled to take place, IME WatchDogs' President, Adam Rosenblatt, allegedly advised counsel for Defendants that he required a subpoena before he would allow his employees to be deposed. Defendants served IME WatchDog with a

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<sup>2</sup> The IME WatchDog employees who accompanied Plaintiff to his IME's have been identified as Jamal Aaron and Jorge Rolon.

subpoena on or about March 5, 2018.<sup>3</sup> Again Defendants attached a copy of the court's January 19, 2018 order. On or about March 26, 2018, Plaintiff's counsel mailed a letter to Defendants' counsel rejecting the March 5th subpoena.<sup>4</sup> Defendants served a new subpoena on IME WatchDog on March 27, 2018. Plaintiff's motion to quash followed.

The court heard oral argument on October 22, 2018. While IME WatchDog did not submit its own papers, counsel for IME WatchDog appeared in court and joined in Plaintiff's position that IME WatchDogs' employees are covered by the attorney-work product privilege (CPLR 3101(c))<sup>5</sup> and that their reports and notes are immune from discovery as "material prepared in anticipation of litigation" (CPLR 3101(d)(2)).<sup>6</sup> Defendants cross-moved to preclude Plaintiff from introducing any IME WatchDog related evidence at trial. In the alternative Defendants sought an order compelling IME WatchDog to comply with its discovery demands.

#### DISCUSSION

There can be no doubt that plaintiffs have a right to hire a representative such as an IME WatchDog employee to accompany them to IME's so long as the representative does not interfere with the examination. *Santana v Johnson*, 154 AD3d 452, 452 (1st Dept 2017) ("Plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examinations conducted by defendants' designated physician or prevent

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<sup>3</sup> Defendants' exhibit G.

<sup>4</sup> Plaintiff's exhibit B.

<sup>5</sup> CPLR 3101(c) provides that "[t]he work product of an attorney shall not be obtainable."

<sup>6</sup> CPLR 3101(d)(2) provides in relevant part that "materials otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

defendants' physician from conducting a meaningful examination."); *see also* *Martinez v Picard*, 160 AD3d 440, 441 (1st Dept 2018) ("Defendants concede that, under the Court's recent decision in *Santana v. Johnson*, they can no longer argue that plaintiff was required to show 'special and unusual circumstances' to be permitted to have a nonlegal representative present at a physical examination conducted on their behalf pursuant to CPLR 3121"). There also can be no doubt that such representatives may be deposed. *Santana*, 154 AD3d at 452 ("motion court providently exercised its discretion in granting defendants' preclusion motion only in the event that the nonparty witnesses failed to appear for depositions concerning their observations at physical examinations of plaintiffs").

Building upon *Santana*, two trial courts in New York County recently held that IME Watchdog is neither covered by the attorney-client privilege nor immune from discovery under CPLR 3101(d)(2). In *Markel v Pure Power Boot Camp, Inc*, 2017 NY Misc. LEXIS 4444 (Sup. Ct. NY. Co. Nov. 8, 2017, Reed, J.), the court declined to quash a subpoena served on the non-party IME WatchDog, finding her claim of work product privilege to be conclusory. *Id.* at \*3. The court in *Marks v 79th St. Tenants Corp.*, 2018 NY Misc. LEXIS 2774 (Sup. Ct. NY Co. Jun. 26, 2018, Bannon, J.) went a step further, explicitly holding that IME WatchDog was not covered by either the attorney work-product privilege or CPLR 3101(d)(2)'s qualified immunity for materials prepared in anticipation of litigation. The trial court decision cited by Defendants on this issue, *Barahona*, stands for the proposition that an IME WatchDog employee's notes are not discoverable pursuant to CPLR 3101(d)(2). *Barahona v Continental Hosts, Ltd.*, 59 Misc. 3d 1001, 1005 (Sup. Ct. NY Co April. 16, 2018, Silvera, J.). The *Barahona* court did not cite to the First Department's *Santana* decision and did not address whether IME WatchDogs were subject to deposition.<sup>7</sup>

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<sup>7</sup> Defendants cite another trial decision in which the court found that an IME WatchDog's notes were protected by the attorney-client privilege. That decision predates *Santana*. *Katz v 260 Park Ave. S. Condominium Assoc.*, 2016 NY Misc. LEXIS 5210 (Sup. Ct. NY Co. Apr. 15, 2016, O'Neill-Levy, J.).

Of all these trial court decisions, *Marks* is the only one to cite to the First Department's *Santana* decision. In this court's opinion, therefore, *Marks* is most consistent with current New York law. With this in mind, the court turns to the facts and arguments in this case.

Plaintiff asserts that IME WatchDog's role was no different than if his own lawyer or one of his associates or paralegals accompanied him to his IME's. Put another way, Plaintiff argues that his lawyer hired IME WatchDog as an agent to assist with the prosecution of this case, and as such, any documents, notes, and reports IME WatchDog prepared should be deemed attorney-work product and/or material prepared in anticipation of litigation. To be sure, neither side can dispute that Plaintiff hired IME WatchDog for litigation purposes. But it does not necessarily follow that IME WatchDog is immune from CPLR 3101's discovery tools. New York law allows Defendants to obtain IME WatchDog's records upon a showing that they have "substantial need of the materials in the preparation of the case and [are] unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101(d)(2). The court's reasoning in *Marks* is instructive: "IME WatchDog does not offer expert or investigatory services based on a plaintiff's underlying claim. . . . Rather, it offers eyewitness testimony of independent medical examinations conducted as part of discovery in the instant action." *Marks, supra*, at \*5. The only way for Defendants to adequately prepare for the possibility that these individuals will be called to testify at trial is to obtain their records and to depose them. And while it is true that their testimony and/or records may be duplicative, they will likely have additional if not contrary information, which Defendants have a right to pursue. *Markel, supra*, at \*3.

The most glaring flaw in Plaintiff's argument that IME WatchDog is covered by the attorney-work product privilege is the First Department's *Santana* decision. If, as the *Santana* court held, an IME WatchDog employee can be deposed, it cannot follow that IME WatchDog is covered by the attorney-work product privilege. Also, unlike an attorney or paralegal who would rarely

testify except in extraordinary circumstances, Plaintiff's counsel has indicated his intent to subpoena IME WatchDog to testify at trial.<sup>8</sup>

Finally, Plaintiff's contention that Defendants must set forth the "special circumstances" present in this case for seeking discovery from IME WatchDog as a non-party witness is inconsistent with binding and unquestionable authority going back to 2014. In *Matter of Kapon v Koch*, 23 NY3d 32 (2014), the Court of Appeals made clear that the disclosure standard for parties and non-parties is the same. That is to say, the "material and necessary" framework set forth in CPLR 3101(a) applies equally to party and non-party disclosure: there is no heightened standard for non-parties. See also *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 (1968); *Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006); *New York State Elec. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 261 (1st Dept 1990). Under *Kapon*, a non-party subpoena should only be quashed if the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious." *Id.* at 36. Plaintiff has not met that burden here.

The court has considered Plaintiff's remaining contentions, including its claim that the March 26, 2018 subpoena was untimely, and finds them to be without merit.

In light of the foregoing, it is hereby

ORDERED that Plaintiff's motion for a protective order is denied; and it is further

ORDERED that Defendants' cross-motion is granted to the extent that IME WatchDog, Inc. is directed to produce any notes taken during Plaintiff's IME's and any reports prepared in connection therewith within 15 days of service of notice of entry of this decision and order. IME

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<sup>8</sup> Plaintiff has not indicated that it seeks to qualify IME WatchDog as an expert. See *Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 489 (1st Dept 2010).

WatchDog need not produce any other communications (i.e. emails, texts) with Plaintiff's counsel;  
and it is further

ORDERED that IME WatchDog employees Jamal Aaron and Jorge Rolon are directed to  
appear for depositions within 30 days of such document production; and it is further

ORDERED that in the event IME WatchDog fails to comply with these conditions, Plaintiff  
will be precluded from calling IME WatchDog at trial and from offering their reports, notes, or  
observations as evidence; and it is further

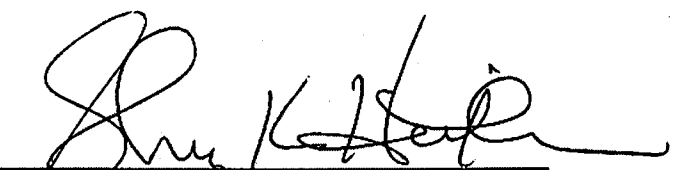
ORDERED that both the motion and cross-motion for sanctions are denied.

Counsel for Plaintiff and the Defendants are directed to appear for a compliance conference  
in Part 30 on January 7, 2018 at 9:30AM.

Defendants are directed to serve a copy of this order upon IME WatchDog, Inc. by certified  
mail within 5 days of the date of entry of this decision and order

This constitutes the decision and order of the court.

DATED: 11-19-18

  
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SHERRY KLEIN HEITLER, J.S.C.