

<b>Vailes v Molloy College</b>
2019 NY Slip Op 33931(U)
December 9, 2019
Supreme Court, Nassau County
Docket Number: 600025/2016
Judge: Arthur M. Diamond
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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

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**TASHMERE VAILES,**

**Plaintiff,**

**-against-**

**MOLLOY COLLEGE,**

**Defendant.**

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**TRIAL PART: 6**

**NASSAU COUNTY**

**INDEX NO: 600025/2016**

**MOTION SEQ #: 4, 5**

**SUBMIT DATE: 12/3/19**

**The following papers having been read on this motion:**

- Order to Show Cause (Plaintiff)..... 1**
- Order to Show Cause (Defendant)..... 2**
- Opposition ..... 3**
- Opposition ..... 4**
- Reply (Defendant)..... 5**

Plaintiff moves for an order, pursuant to CPLR §3101 for a protective order, preventing Plaintiff from being required to appear for a second independent medical examination before a different doctor. Defendant has cross-moved, also by order to show cause, for an order, pursuant to CPLR §3124, seeking to compel Plaintiff to appear for the additional independent medical examination. Both motions have been formally opposed, and Defendant has submitted reply to its order to show cause. Based upon the following, Plaintiff’s order to show cause is hereby granted to the following extent and Defendant’s order to show cause is hereby denied in its entirety.

The within action was commenced as the result of a slip-and-fall that occurred when Plaintiff was allegedly injured in the parking lot of Defendant’s property on or about February 24, 2015. This Court, in its decision and order dated August 8, 2018, granted summary judgment to Plaintiff on the issue of liability, which was affirmed by the Appellate Division, Second Department, in a Decision & Order dated September 11, 2019. *See Vailes v. Molloy College*, 175 AD3d 1348, 105 NYS3d 889 (Mem.) (2<sup>nd</sup> Dept., 2019). The parties have been awaiting jury

selection on the issue of damages in this matter, and are currently scheduled to appear in the Central Jury Part of Supreme Court, Nassau County, on January 6, 2020, at 9:30am.

At an appearance at the Central Jury Part on October 3, 2019, counsel for both sides represented to the court that they had a discrepancy with discovery; that is, Plaintiff had served upon Defendant a Fourteenth Supplemental Verified Bill of Particulars, dated September 26, 2019, which necessitated Defendant obtaining additional discovery. This new bill of particulars did not allege injuries to new portions of Plaintiff's body, but rather included the need for additional treatment to her affected right ankle. After discussing the issue further during that appearance, the parties entered into a stipulation, so-ordered by Hon. R. Bruce Cozzens, J.S.C., in which Plaintiff agreed to be appear for a further deposition and further independent medical examination within thirty (30) days of Defendant's receipt of the records from Plaintiff's expert.

According to the papers before the Court, although Defendant received an authorization to obtain Plaintiff's medical records from her expert and has processed same, the records remain outstanding. Nevertheless, Plaintiff appeared for a further deposition as agreed upon on October 31, 2019. The only issue outstanding currently is not whether Plaintiff should appear for a further independent medical examination, as Plaintiff concedes that Defendant is entitled to same. The issue before the Court is whether Plaintiff should be required to appear before a different doctor at the request of Defendant from the examining doctor who conducted the previous examination of Plaintiff in November 2017. It should be noted that Dr. Benatar, the orthopedic doctor who performed the previous examination, has an office located in Nassau County, the selected forum for litigation chosen by Plaintiff, whereas Dr. Hubbard, the new orthopedic doctor on behalf of Defendant, is located in New York County.

The supervision of disclosure and the setting of reasonable terms and conditions rests within the sound discretion of the trial court. Diaz v. City of New York, 117 AD3d 777, 985 NYS2d 695 (2<sup>nd</sup> Dept., 2014). CPLR §3103 confers a broad discretion upon a Court to fashion appropriate remedies both where abuses are threatened and where they have occurred. Lipin v. Bender, 84 NY2d 562, 620 NYS2d 744 (1994). This Court may grant a protective order to prevent abuse or to choose to suppress information improperly obtained by denying, limiting, conditioning, or regulating the use of any disclosure device. Id.

While there is no restriction in CPLR §3121(a) limiting the number of examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate

the necessity for it. Carrington v. Truck-Rite Distribution Systems, 103 AD3d 606, 959 NYS2d 258 (2<sup>nd</sup> Dept., 2013). Although a plaintiff may challenge a defendant's choice of an examining physician, the challenge must be based upon a claim of bias against the plaintiff or her attorney by the designated examining physician or prejudice against plaintiff if that examining physician is allowed to testify at trial. Lewis v. John, 87 AD3d 564, 928 NYS2d 78 (2<sup>nd</sup> Dept., 2011).

Here, the Defendant has not satisfied for this Court that unusual or unanticipated circumstances arose such that Plaintiff should be required to appear for an examination before a different orthopedist. The papers before the Court do not indicate that Dr. Benatar, the doctor who performed the prior exam, will be unavailable altogether at trial, thus necessitating examination by a different doctor, nor that he is unable or unwilling to appear for trial in the coming months. The papers before the Court also do not indicate that Dr. Benatar is unable to perform such examination due to being inadequately qualified to do so or to render an opinion for the injuries alleged by Plaintiff. The reasoning behind the change of physician appears simply a scheduling conflict, in which Dr. Benatar was unable to perform the examination within the time agreed to by the parties. Thus, Defendant has failed to satisfy for this court any type of necessity for having Plaintiff examined by a different physician.


Coinciding with the foregoing, Plaintiff has satisfied for this Court that it will be prejudiced at trial if Plaintiff is now required to be examined by a different physician. As stated in the foregoing, nothing in the moving papers before the Court indicates that Dr. Benatar, the doctor who previously performed an examination of Plaintiff, will be unavailable to appear and testify at trial based upon his examination. Should Plaintiff be examined by a new doctor, she is placed in the quandary of being forced to prepare to defend against two reviewing doctors of the same specialty, thus bolstering any opinion asserted in contravention of her damages claim. Moreover, Defendant is placed in an advantageous position of being able to choose which expert best satisfies its need with the benefit of a report from each in front of them. Simply put, to require Plaintiff to appear before a new physician of the same specialty on the eve of trial has too much potential for prejudice to Plaintiff, and thus may not be permitted. Therefore, Defendant's order to show cause to compel is hereby denied and Plaintiff's order to show cause is granted to the extent that Plaintiff need not appear for an examination with Dr. Hubbard, but must still appear for an additional examination by Dr. Benatar.

Plaintiff shall file and serve a copy of the within order with notice of entry upon Defendant within ten (10) days. Plaintiff shall appear for an independent medical examination before Dr. Benatar on or before January 3, 2020. Failure of Defendant to schedule such examination by this deadline shall result in a waiver of this additional discovery. Failure of Plaintiff to appear for such examination by the deadline if properly notified of same may result in sanctions as determined by the Court upon proper, formal application thereafter. The parties shall appear as scheduled at the Central Jury Part of Supreme Court, Nassau County, on January 6, 2020, at 9:30am.

This hereby constitutes the decision and order of this Court.

**ENTER**

DATED: December 9, 2019

  
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**HON. ARTHUR M. DIAMOND**  
**J.S.C.**

**ENTERED**  
**DEC 11 2019**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**