

<b>Ferris v MTA Capital Constr. Co.</b>
2020 NY Slip Op 30198(U)
January 21, 2020
Supreme Court, New York County
Docket Number: 160814/2013
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: TRANSIT PART: 21

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RICHARD FERRIS & LINDA FERRIS,

Plaintiff,

Index # 160814/2013

-against-

Mot Seq. 4

MTA CAPITAL CONSTRUCTION COMPANY,  
THE LONG ISLAND RAILROAD COMPANY and  
METROPOLITAN TRANSPORTATION AUTHORITY

DECISION AND ORDER

Defendant(s).

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*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Papers	Numbered	NYCEF #
Defendant's Order to Show Cause	<u>1</u>	123-147
Plaintiff's Opposition and Notice of Cross-Motion	<u>2</u>	160-176

LISA A. SOKOLOFF, J.

In this personal injury action, Defendants MTA Capital Construction Company, The Long Island Railroad Company and Metropolitan Transportation Authority, move by order to show cause for an order compelling post-note-of-issue discovery including that Plaintiff Richard Ferris submit to a neuro-psychological independent medical examination, an additional orthopedic IME and for a continued deposition.

The action arises from an incident on April 18, 2013, when Plaintiff Richard Ferris slipped down a temporary metal construction ramp while working at the MTA's East Side Access Project, injuring his left shoulder, left elbow and left knee.

Defendants contend that since Plaintiff served CPLR § 3101 expert witness exchanges for Dr. Louis E. Calabro, Plaintiffs' neuropsychological expert, alleging that

Plaintiff sustained psychological injuries including severe depression, anxiety, post-traumatic stress disorder, neuro-cognitive disorder and is disabled due to the alleged psychological conditions, and for Dr. Richard Schuster, Plaintiffs' vocational rehabilitation expert witness, whose report concludes that "if [Plaintiff s] psychiatric condition remains unabated, he will never return to the world of work and his life will remain very circumscribed and restricted as well," Defendants require an IME to rebut these experts.

Defendants also claim that since Mr. Ferris was last examined by Defendants' orthopedist on July 23, 2014, due to the lapse of time, and the lack of records indicating Plaintiff's recent condition, a further orthopedic examination is required to avoid prejudice.

Plaintiffs oppose on the grounds that Defendants have failed to establish "unusual or unanticipated circumstances" as well as "substantial prejudice" if the requested discovery is not granted. Procedural history is recited in support of its opposition: Plaintiff filed the Note of Issue March 24, 2017. On April 13, 2017, Defendants moved to strike the Note of Issue asserting that the only outstanding discovery Plaintiff failed to provide was an IRS authorization. On April 20, 2017, Plaintiff served its Affirmation in Opposition to Strike the Note of Issue, simultaneously providing an authorization for IRS records. On August 10, 2017 Defendants withdrew their motion to strike the note of issue as all discovery was complete. Thereafter, Defendants made no request for additional discovery.

On August 26, 2019, substitution of defense counsel was made. In October 2019, the substituted trial counsel requested two new IME's. According to Plaintiff's submission, because a mediation was scheduled shortly thereafter, Plaintiff agreed to submit to the vocational rehabilitation IME, but refused to submit to a neuropsychological IME. Plaintiff's counsel points out that Plaintiff chose to designate Dr. Calabro as his neuropsychological expert witness, based upon his independent findings, examination and expertise as a Workers' Compensation doctor.

As to Defendants' request for a further orthopedic IME, Plaintiff submits that Defendants have already conducted their orthopedic IME as evidenced by Dr. Ramesh Gidumal's report submitted in Defendants' CPLR § 3101 expert witness disclosure on September 3, 2014. Moreover, as noted in Plaintiff's CPLR § 3101(d) notice, Plaintiff identified as his orthopedic expert, Dr. Herbert Bessen, whose testimony will be based on an IME conducted one year earlier, on September 13, 2013. Plaintiff maintains that he has alleged the same psychological injuries since the inception of the case, and no new injuries, nor one that was not known to prior counsel and explored in Plaintiff's prior depositions or IMEs. Plaintiff contends that Defendants were aware of Plaintiff's only psychological expert witness since 2014, yet strategically chose not to request a neuro-psychological IME prior to the note of issue being filed.

The filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it (*Arons v Jutkowitz*, 9 NY3d 393 [2007]). Once the note of issue is filed, the Uniform Civil Rules for the Supreme and County Courts provide two methods for obtaining additional disclosure. Under 22 NYCRR 202.21(e), a party may move to vacate a note of issue and certificate of readiness within 20 days of service upon a showing that the case is not ready for trial or that a material fact in the certificate of readiness is incorrect. Insofar as the note of issue and certificate of readiness were filed March 24, 2017, Defendants' motion, filed on October 15, 2019, is not timely.

Alternatively, under Section 202.21(d), a court may grant permission to conduct further pre-trial discovery where "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (*Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017] [defendant's request for post-note-of-issue discovery denied where the need for future surgery was already pleaded in prior bills of particulars

and there was ample notice of plaintiff's ongoing shoulder problems far in advance of the note of issue]; *Madison v Sama*, 92 AD3d 607 [1st Dept 2012] [expert engaged by new counsel who discovered areas of inquiry that former counsel had failed to pursue was insufficient to establish unusual or unanticipated circumstances]; *Wiebusch v Bethany Memorial Reform Church*, 51 AD3d 577 [1st Dept 2008] [post-note-of-issue illness of plaintiff's prior attorney, which resulted in plaintiff being unable to obtain the return of her complete case file, constituted unusual or unanticipated circumstances]; *Gamboa v Carney*, 250 AD2d 501 [1st Dept 1998] [the effect of aging on the progress or manifestation of an infant's lead poisoning]; *Jacobs v Peress*, 23 AD2d 483 [1st Dept 1965] [error to grant post-note of issue physical examination "in the interest of having the issue of plaintiff's physical condition completely presented to the triers of the facts"];

Significantly, the fact that new counsel would prepare a case in a different manner than prior counsel does not constitute the "unusual or unanticipated circumstances" and "substantial prejudice" required under the court rules (*Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005] [injury for which defendants sought an additional IME was disclosed 11 months prior to the filing of the note of issue]; *Ward v City of Rensselaer*, 106 AD2d 719 [3rd Dept 1984]).

Although Defendants claim they are entitled to a neuro-psychological IME because Plaintiff has placed his neuro-psychological condition "front and center," they do not dispute that that they have been in receipt of Dr. Calabro's expert witness report prior to the filing of the note of issue. The same is true of the orthopedic IME. Nor does the lapse of time from the prior orthopedic IME, in and of itself, substantially prejudice Defendants (*Price v Bloomingdale's, a Div. of Federated Dept. Stores, Inc.*, 166 AD2d 151 [1st Dept 1990]). Here, Defendants have failed to demonstrate unusual or unanticipated circumstances or substantial prejudice if the requested discovery is not granted.

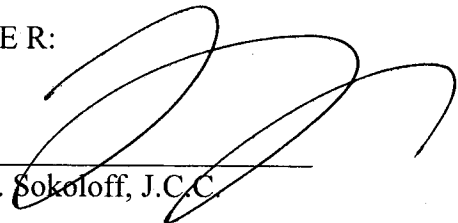
Accordingly, it is

ORDERED that Defendants' motion for an order compelling Plaintiff Richard Ferris to submit to a neuro-psychological independent medical examination, an additional orthopedic IME and for a continued deposition, is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: January 21, 2020  
New York, New York

ENTER:

  
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Lisa A. Sokoloff, J.C.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE
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