SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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THOMAS BRIELMEIER,

Plaintiff,

- v -

LEGACY YARDS TENANT, LLC,HUDSON YARDS CONSTRUCTION, LLC,ERY TENANT, LLC and TUTOR PERINI BUILDING CORP.

Defendants.

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INDEX NO. 151983/2016

MOTION DATE 3/17/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for DISCOVERY.

Motion by Legacy Yards Tenant, EEC, Hudson Yards Construction EEC, ERY Tenant EEC and Tutor Perjni Building Corp. (collectively, "Defendants"), pursuant to CPLR 3124, to compel Plaintiff Thomas Brielmeier ("Plaintiff") to appear for a post-note of issue orthopedic independent medical examination ("the IME") with Andrew N. Bazos, MD ("Dr. Bazos") is granted for the reasons stated herein.

BACKGROUND

By way of background, this is a Labor Law and personal injury claim brought by Plaintiff for injuries he sustained on November 20, 2015 at premises under construction known as the Hudson Yards Retail Building in the Borough of Manhattan, City and State of New York. (Affirm in Opp ¶ 3.)

On March 17, 2017, Defendants sent a letter to Plaintiff designating Dr. Bazos to perform the IME of Plaintiff. (Affirm in Supp, Ex A [March 17, 2017 Letter].) At the Status Conference on April 6, 2017, the prior court presiding over this matter ordered Plaintiff to appear for IMEs as designated within 30 days. (Affirm in Supp, Ex B [April 6, 2017 Status Conference Order] [NYSCEF No 15].) Plaintiff had until May 6, 2017 to appear for the IME. (*Id.*) The prior court also ordered that if Plaintiff had surgery after the IME, Defendants reserved the right to request a supplemental EBT of Plaintiff. (*Id.*) At the Status Conference on April 25, 2017, and before the IME deadline of May 6, 2017, this Court again ordered Plaintiff to attend the IMEs as designated, and again noted the potential forthcoming surgery. (Affirm in Supp, Ex C [April 25, 2017 Status Conference Order] [NYSCEF No 16].)

Defendants allege that on June 18, 2017, Dr. Bazos sent a letter to Defendants, stating that he "performed an independent medical record review regarding the claimant" and listed his findings and opinion.[1] (Affirm in Supp, Ex D.) Apparently, based on this letter, Defendants mistakenly believed that Dr. Bazos had conducted an IME. (Affirm in Supp ¶ 11.)

Defendants allege that during the Status Conference of July 18, 2017, (Affirm in Supp, Ex E [July 18, 2017 Status Conference Order] [NYSCEF No 102, 118].), they confirmed with Plaintiff's counsel that Plaintiff's IME with Dr. Bazos had been completed and the report would be exchanged. (Affirm in Opp ¶ 5; Affirm in Supp ¶¶ 11, 12.) Based on Defendants' and Plaintiff's mistaken representations, the Court ordered Defendants to serve the IME report for Dr. Bazos within 30 days. ([July 18, 2017 Status Conference Order].)

The parties appeared subsequently for status conferences on November 14, 2017, January 30, 2018, May 3, 2018, and August 14, 2018, where the Court was made to believe by both parties that the IME had taken place. (Affirm in Opp, Exs 2 [NYSCEF No 33], 3, 4, 5, respectively.) Subsequently, on the November 20, 2018 Stipulation Order, the Court stated that the discovery was complete as stipulated and agreed by both parties and ordered Plaintiff to file the Note of Issue. (Affirm in Opp, Ex 6.) Plaintiff filed the Note of Issue on December 14, 2018, stating that all physical examinations were completed and there were no outstanding discovery requests. (Affirm in Supp, Ex F [Note of Issue].) The Note of Issue did not state that any physical examination was waived. (*Id.*)

However, after the filing of the Note of Issue, the below email exchange ensued between counsel regarding the IME.

- On January 21, 2020, Brian McLaughlin ("Defendants' counsel") emailed Plaintiff's counsel Monty Doman stating:

  "I was reviewing this file and noticed that the only IME report I have from Dr. Bazos is a report on records he reviewed. You will recall that you assured me your client attended his appointment with Dr. Bazos in June 2017, which is why it was left off the July 2017 Order. However, when I recently contacted Dr. Bazos to straighten out this discrepancy, he told me he had no record of ever seeing your client. Please contact Dr. Bazos immediately to get this exam done so we can talk about resolving this case!" (Affirm in Supp, Ex G.)

- On January 30, 2020, Plaintiff's counsel Danielle Doman emailed back saying: "I have a report from Dr. Bazos that indicates Mr. Brielmier saw him on June 18, 2017." (*Id.*)

[1] Defendants' counsel enclosed Dr. Bazos's report with a cover letter to Plaintiff's counsel stating: "It is anticipated that Dr. Bazos will testify relative to his examination of Plaintiff Thomas Brielmeier on June 18, 2017, and any other related medical materials or reports of the Plaintiff, at the time of trial." (Affirm in Supp., Ex. D.)

- On February 5, 2020, Defendants' counsel wrote back: "I don't see anything showing that your client actually appeared for his exam" (*Id.*)

- On February 6, 2020, Plaintiff's counsel Danielle Doman wrote: "Our position at this point is the IME is waived." (Affirm in Supp, Ex G.)

Plaintiff alleges that Defendant's counsel then contacted Plaintiff's counsel via telephone to discuss the issue at hand. Plaintiff's counsel states that, on the said telephone call, she reiterated Plaintiff's position that the IME had been waived, due to the amount of time that had passed and based on the prior court orders. (Affirm in Opp ¶ 10.)

Defendants' counsel explains that they only recently discovered their mistake while preparing for a settlement conference and attempted to correct their mistake via email and phone, including a conference call with the Court. However, Defendants' counsel assert that Plaintiff's counsel has refused to produce Plaintiff for the IME. (Affirm in Supp ¶¶ 14, 15; Affirm in Supp, Ex G.)

ARGUMENTS

The parties disagree on the appropriate standard of review on the instant motion. Defendants argue that in order to prevail in the instant motion, the Court need only find that Plaintiff would not be prejudiced. (Memo in Supp at 2.) Plaintiff argues that for Defendants to prevail in the motion, the Court must find that Defendants would be substantially prejudiced by the denial of the instant relief and that there were unusual or unanticipated circumstances pursuant to 22 NYCRR 202.21(d). (Memo in Opp at 5.) Plaintiff notes that since a motion to vacate the note of issue has not been filed, Defendants may not seek further discovery under the less stringent 22 NYCRR 202.21(e). (Affirm in Opp ¶¶ 5, 8.)

Defendants argue that the IME would not prejudice Plaintiff for three reasons. First, Defendants are not seeking to remove this case from the trial calendar or otherwise delay the trial. (Affirm in Supp ¶ 19.) Second, Dr. Bazos was properly designated during the discovery phase of this litigation, has already reviewed Plaintiff's medical records, and his report on the same has already been exchanged. (*Id.* ¶ 20.) Third, Plaintiff still has not undergone any surgical treatment for the injuries alleged in this matter, so his condition has not substantially changed since the IME was initially designated in 2017. (*Id.* ¶ 21.)

Defendants further argue that the IME will be crucial for the current state of the injuries and, if necessary, for an assessment of the damages at the trial. Defendants further argue that because it is alleged that Plaintiff will require future surgeries and none has been conducted at this point, an IME is warranted at this time. (*Id.* ¶ 17.)

Defendants lastly argue that they believed the IME was conducted due to an "excusable law office failure" on the part of the Defendants' counsel. (Affirn in Supp ¶ 16.) Defendants contend that their mistake should be excused as Defendants' receipt of Dr. Bazos' record review report coincided with the timeline of the Court Order directing Plaintiff to attend the IME and

Plaintiff's counsel's communication that his client would do so. (*Id.* ¶ 22.) Further, Defendants argue that counsel for Plaintiff should have also been aware that Plaintiff had not attended the IME. (*Id.* ¶ 23.)

In opposition, Plaintiff argues that Defendants' lack of diligence in seeking discovery—and belatedly realizing their mistake while preparing for the trial—does not constitute an unusual or unanticipated circumstance under NYCRR 202.21(d). (Memo in Opp ¶ ¶ 6, 7, 16.) Plaintiff rejects assuring Defendants that an IME took place at the June 2017 conference. (Affirm in Opp ¶ 9.)

In reply, Defendants argue that an IME is needed to litigate Plaintiff's recently issued damages demand. (Reply Affirm ¶ 5.) Further, Defendants argue that NYCRR 202.21(d) is not the correct legal standard as the IME is not a new item of discovery "that is demanded due to developments post-dating the filing of the Note of Issue." (Memo in Reply at 2.)

DISCUSSION

Courts may grant, upon motion supported by affidavit, permission to conduct additional pretrial proceedings "to prevent substantial prejudice" where "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness." (22 NYCRR 202.21(d).) Nevertheless, where the additional proceeding concerns a plaintiff's physical examination and there is no prejudice to the other side, courts may order the physical examination out of concern to decide the case on the merits.

"Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced." (*Cabrera v. Abaey*, 150 A.D.3d 588, 588 [1st Dep't 2017] [internal quotations and citations omitted].) In assessing whether to permit such discovery, courts look to the reason why discovery was delayed and whether such delay would impair the trial in any way. (*See Cabrera,* 150 A.D.3d at 588-89; *Pickering v. Union 15 Restaurant Corp.*, 107 A.D.3d 450, 450-51 [2013]; *Smith v Mousa*, 305 AD2d 313, 313-14 [1st Dept 2003].) Generally speaking, "[i]n seeking post-note-of-issue discovery, a defendant must demonstrate unusual or unanticipated circumstances as well as substantial prejudice." (*Prevost v One City Block LLC*, 155 AD3d 531, 537 [1st Dept 2017] [citing 22 NYCRR 202.21(d)] [internal quotation marks omitted].) Usually, a lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances. (*Colon v Yen Ru Jin*, 45 AD3d 359, 359-60 [1st Dept 2007].)

Nevertheless, as one court stated, "[t]here is a line of authority holding that, where physical examinations are concerned, a party may be relieved of a waiver of its right to a physical examination where there is no prejudice to the other side, such as where the case remains on the trial calendar, where there would be prejudice if relief is not granted, and where the violation of the rules may be addressed through the payment of a monetary award." (*Spano v Omni Eng'g, LLc*, 28 Misc 3d 1201(A) [Sup Ct, Westchester Cnty 2009] [Scheinkman, J.], *affd*, 69 AD3d 922 [2d Dept 2010] [internal citations omitted].)

In the present case, although the matter is on the trial calendar and this application is filed one year after the December 14, 2019 Note of Issue and two-and-a-half years after the June 18, 2017 report by Dr. Bazos, the IME is not sought now for the first time. Defendants sought the IME before the note of issue was filed. Unfortunately, around the time of the Status Conference of July 18, 2017, Defendants mistakenly believed that Plaintiff had appeared for the IME—and Plaintiff's counsel apparently also had this same mistaken belief. The record indicates that Plaintiff's and Defendants' counsel, perhaps unintentionally and mistakenly, stipulated that the IME was conducted. Plaintiff's counsel should not benefit from their own errors and misstatements. While Defendants' counsel is not excused for this law office failure, Plaintiff's counsel also should not have stipulated that the IME was conducted. Further, Plaintiff clearly did not comply with this Court's order requiring him to appear for an IME. In this sense, Plaintiff and Plaintiff's counsel share some of the blame for bringing about the present state of affairs.

Furthermore, at present, the instant case is scheduled for an early settlement conference on April 16, 2020.[2] Based on this early settlement conference date, it is unlikely that the parties will be given a trial date before late summer. As it is unlikely to delay the trial, there is no prejudice to Plaintiff in compelling him to attend the IME.

Under these circumstances—given the nature of Defendants' law office failure, the roles that Plaintiff and Plaintiff's counsel played in bringing about the present situation, and the lack of prejudice to Plaintiff—this Court does not view that Defendants waived the IME and rather finds, in its discretion, that Plaintiff must appear for an IME before Dr. Bazos within the next sixty (60) days. [3]

[2] The Court also notes that the date for the early settlement conference is likely to be adjourned given the various restrictions on court functions due to the current COVID-19 pandemic.
[3] The parties may request another adjournment in sixty days if the IME cannot be conducted due to the COVID-19 pandemic.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Legacy Yards Tenant, EEC, Hudson Yards Construction EEC, ERY Tenant EEC and Tutor Perjni Building Corp. ("Defendants") pursuant to CPLR 3124 to compel Plaintiff Thomas Brielmeier ("Plaintiff") to appear for a post-note of issue orthopedic independent medical examination ("the IME") with Andrew N. Bazos, MD ("Dr. Bazos") is granted; and it is further

ORDERED that, within ten (10) days, Defendant shall e-file a copy of this decision and order with notice of entry;

ORDERED that Plaintiff shall appear for the IME within sixty (60) days of the e-filing of this decision and order with notice of entry; and it is further

ORDERED that compliance with this order is subject to the Administrative Order of the Chief Administrative Judge of the Courts dated March 20, 2020 (AO/71/20).

The foregoing constitutes the decision and order of this Court.

3/20/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE