

**Gibson v New York Eye & Ear Infirmary of Mount Sinai**

2020 NY Slip Op 33009(U)

September 11, 2020

Supreme Court, New York County

Docket Number: 805288/2017

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**ANNE M. GIBSON,**

**INDEX NO. 805288/2017**

**Plaintiff,**

**MOTION DATE  
MOTION SEQ. NO. 4  
MOTION CAL. NO.**

**-against-**

**NEW YORK EYE AND EAR INFIRMARY  
OF MOUNT SINAI, MEENAKASHI GUPTA,  
M.D., and NEW YORK EYE AND EAR  
INFIRMARY IPA. INC.,**

**Defendants.**

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answer — Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits

**PAPERS NUMBERED**

█  
█  
█

**Cross-Motion: Yes X No**

Plaintiff alleges damages consisting of loss of vision in her right eye following surgery by defendant Meenakashi Gupta, M.D. on July 24, 2015 for repair of a retinal detachment at defendant New York Eye and Ear Infirmary of Mount Sinai. Plaintiff alleges that Defendants failed to adequately control Plaintiff’s postoperative intraocular pressure resulting in damage to the optic nerve including the loss of vision in her right eye. Plaintiff filed the Note of Issue on June 17, 2020.

Defendants move for an Order: 1) striking the Note of Issue pursuant to 22 NYCRR 202.21 and CPLR §3124(a); and 2) compelling Plaintiff to appear for a further Independent Medical Examination at Dr. Floyd Warren’s (“Dr. Warren”) office for OCTs (Optical Coherence Tomography). Defendants’ motion was filed on July 8, 2020. Plaintiff opposes the motion.

Defendants state that they designated Dr. Warren, a neuro-ophthalmologist, to perform an Independent ophthalmological examination of Plaintiff. Defendants state that Dr. Warren performed the examination on August 12, 2019 but he was

unable to obtain adequate imaging of the OCTs. Defendants contend that patient cooperation is needed for this testing. Defendants further contend that OCTs are imperative to evaluate the nerve and retina in order to evaluate the cause and extent of Plaintiff's allegations.

Defendants contend that they requested that Plaintiff appear for a second time so that the OCTs could be obtained. Defendants assert that Plaintiff refused to appear. Defendants contend that it would be prejudicial to them to allow Plaintiff to refuse this testing. Defendants submit a copy of Dr. Warren's report as Exhibit A to their motion.

Plaintiff argues that Defendants' motion should be denied. Plaintiff argues that there are no new or additional injuries claimed and no other special circumstances that would warrant an additional physical examination of Plaintiff. Plaintiff contends that despite Plaintiff's contention, "there is no claim by Dr. Warren in his report or in any additional submission that his inability to obtain these images was due to plaintiff's lack of cooperation" or "any showing by the defendants of any special circumstances supporting their request that plaintiff be directed to submit to a further examination."

In reply, Defendants contend, "Plaintiff fails to inform this Court that she added new allegations that the defendants failed to properly interpret OCTs in an Amended Bill of Particulars on May 18, 2020 more than 10 months after the ophthalmological exam by our designated ophthalmologist Dr. Floyd Warren." Defendants contend "[t]his newly added allegation by plaintiff regarding the OCTs certainly amounts to exceptional circumstance justifying defendant's entitlement to a further IME including but not limited to OCTs." Defendants contend that "even if plaintiff had not recently raised this new allegation, Defendants are still entitled to a further IME with OCTs based on Dr. Warren's representation in his report that he was unable to obtain adequate images of either eye by OCT." Defendants contend, "Plaintiff inaccurately contends that Dr. Warren must state in his report that it was the plaintiff's failure to cooperate or refusal to have OCTs performed are the only reasons defendants would be entitled to further OCTs." Defendants nevertheless attach an Affidavit from Dr. Warren. Dr. Warren attests, "OCTs require patient cooperation, limited movement. If a patient moves, it creates motion artifact on the imaging making it inadequate." Dr. Warren further attests, "Here, as I said in my report, the OCT images were inadequate and therefore, an additional Oct (sic) is necessary in order for to fully evaluate Ms. Gibson."

In a letter to the Court dated August 10, 2020, Plaintiff's attorney requested that Defendants' reply be disregarded. Plaintiff contends that Defendants did not previously submit an affidavit from Dr. Warren and further raised "exceptional circumstances" for the first time in the reply.

In a letter to the Court dated August 13, 2020, Defendants' counsel responded that Dr. Warren's report was attached as an exhibit to their motion. Defendants further contend, "[E]ven if there were new arguments raised in the Reply, the Court of Appeals holds that that such new arguments can be considered by the lower court. *See Eujoy Realty Corp. v. Van Wagner Communications*, 22 N.Y.3d 413, 981 N.Y.S.2d 326 (2013)."

CPLR § 3101(a) generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." *Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (1968).

"Although there is no restriction in CPLR 3121 limiting the number of examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate the necessity for it." *Rebollo v Nicholas Cab Corp.*, 125 AD3d 452, 452 (1st Dept 2015) (citations omitted). Generally, a defendant must show additional injuries have been alleged since the first examination or special circumstances to warrant a second IME. *Strauss v New York Ethical Culture Soc.*, 210 AD2d 134, 134 (1st Dept 1994). "[A]fter a note of issue has been filed, as here, 'a defendant must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination.'" *Rebollo*, 125 AD3d at 452 (citations omitted).

Here, Defendants have demonstrated that a further independent ophthalmological examination of Plaintiff is warranted in light of Dr. Warren's inability to obtain the adequate imaging during the first examination. Therefore, while the Note of Issue will be maintained and not vacated, Plaintiff is directed to appear for a further IME at Dr. Warren's offices within 30 days of the date of this Order.

Wherefore it is hereby

ORDERED that Defendants' motion is granted to the extent that Plaintiff is directed to appear for a further IME at Dr. Warren's offices within 30 days of the date of this Order for the limited purposes of obtaining OCT imaging; and it is further

ORDERED that a pre-trial conference is scheduled on November 10, 2020 via TEAMS at 10:00 am.

**Dated: September 11, 2020**

ENTER:   
\_\_\_\_\_ J.S.C.

**HON. EILEEN A. RAKOWER**