

Lardiere v Site 6 DSA Owner LLC
2021 NY Slip Op 31599(U)
May 11, 2021
Supreme Court, New York County
Docket Number: 153260/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 14

Justice

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ROSARIO LARDIERE,

Plaintiff,

- v -

SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL
LLC, TACONIC INVESTMENT PARTNERS, L&M
DEVELOPMENT PARTNERS, BFC PARTNERS, L.P,
DELANCEY STREET ASSOCIATES LLC, NYU LANGONE
HEALTH SYSTEM, HUNTER-ROBERTS CONSTRUCTION
GROUP, LLC, BFC PHASE 1 DSA LLC, THE PACE
COMPANIES NEW YORK, INC., PEEPELS MECHANICAL
CORP.,

Defendant.

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SITE 6 DSA OWNER LLC, TACONIC INVESTMENT
PARTNERS, L&M DEVELOPMENT PARTNERS, DELANCEY
STREET ASSOCIATES LLC, NYU LANGONE HEALTH
SYSTEM, HUNTER-ROBERTS CONSTRUCTION GROUP,
LLC

Plaintiff,

-against-

GIL-BAR INDUSTRIES, THE PACE COMPANIES NEW YORK
INC., PEEPELS MECHANICAL CORP

Defendant.

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SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL LLC,
TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT
PARTNERS, DELANCEY STREET ASSOCIATES LLC, NYU
LANGONE HEALTH SYSTEM, HUNTER-ROBERTS
CONSTRUCTION GROUP, LLC, BFC PHASE 1 DSA LLC

Plaintiff,

-against-

SITE SAFETY, LLC, MECHANICAL PIPING SOLUTIONS

**DECISION + ORDER ON
MOTION**

INDEX NO.

153260/2018

MOTION DATE

05/07/2021

MOTION SEQ. NO.

002

Third-Party
Index No. 595818/2018

Second Third-Party
Index No. 595217/2020

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for PSYCHIATRIC & PHYSICAL EXAM.

The motion by various defendants for *inter alia* an order directing that plaintiff sit for a physical examination without an IME observer is denied.

Background

In this Labor Law action, plaintiff claims that he was hit in the head by a large pipe while working at a construction site. Defendants contend that plaintiff claims he suffered a traumatic brain injury and they designated Dr. Mills to conduct a forensic psychiatric evaluation of plaintiff. Dr. Mills maintains that he traveled from North Carolina to conduct the IME in March 2021 and that he was surprised to see that there were three people present for the evaluation, including plaintiff, plaintiff's sister and an IME observer. Dr. Mills objected to the presence of a third-party for the evaluation. The IME observer claims he simply wanted to watch the exam and take notes.

Before the exam commenced, the parties then engaged in a series of discussions about this person's presence and reached out to the Court who informed the parties that the evaluation should proceed with the IME observer, but that the observer should not intervene in any way. Unfortunately, the IME did not proceed and defendants blame plaintiff for not returning for the evaluation that day. Defendants now seek to preclude the observer from being present for the observation and seek reimbursement for the expenses incurred (including Dr. Mills' travel) related to the busted IME.

Discussion

“It is well established that a plaintiff is entitled to have a representative of her choice present during the IME, provided the individual does not interfere with the IME or prevent the defendant's doctor from conducting ;a meaningful examination”(*Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 29, 96 NYS3d 187 [1st Dept 2019]).

“No special or unusual circumstances need be shown in order for the IME observer to be present during the examination. IME observers or “watchdogs” are typically hired by plaintiff's lawyers to assist their clients in filling out forms at the examining doctor's office. More importantly, according to plaintiff, the presence of an IME observer deters examining doctors hired by defendants from inquiring about matters beyond the scope of the particular action and keeps the IME process honest” (*id.* at 30).

Plaintiff was clearly entitled to have a representative at the IME as long as the representative did not interfere with the examination. Here, there is no allegation that the IME observer did anything to obstruct the exam because the exam never began. Instead, it appears that Dr. Mills (apparently unfamiliar with New York practice) objected to the observer's presence. While that objection is understandable given that Dr. Mills is of the opinion that having an observer present alters the results, the fact is that in New York, observers are allowed and this is a New York litigation. There is no basis for this Court to bar plaintiff from having the observer present at the future IME. This is not a case where the observer fed plaintiff answers or tried to prevent the doctor from asking questions – the exam had not even started.

The Court also denies defendants' request for reimbursement related to the busted IME. According to defendants' own account of the events, it was Dr. Mills who set in motion the disagreement. Plaintiff arrived early ready to do the exam. While the Court questions why

plaintiff left, the Court also recognizes that plaintiff apparently showed up for the 9:00 am exam by 8:45 and the exam had not started by 10:45 (while the attorneys fought about the IME observer's presence). Moreover, defendants chose an expert who lives in North Carolina and apparently did not tell Dr. Mills that an observer is allowed to be present but not actively interfere. Defendants are entitled to pick whichever doctor they prefer but picking an out-of-state doctor who has to fly in for an exam has risks. One of those risks is that the exam, for whatever reason, may not go forward or not be completed and defendants might have higher travel expenses.

The Court declines to grant the alternative relief sought by defendants, which seems to demand an order restricting the actions of the observer. As stated above, the IME observer is permitted to be present and must comply with established caselaw stating that he or she cannot interfere with the doctor's exam. The Court will not issue an advisory opinion about which actions are permitted and which are not, especially where those actions are not in dispute. In other words, there is no basis to bar the IME observer from doing something he did not do.

Finally, the Court notes that at no time during the conference that day was this Court made aware that Dr. Mills refused to commence the exam. The Court was under the impression that the IME watchdog was, in Dr. Mills' opinion, acting inappropriately. And that is why the Court advised that a motion be brought, so the people who were there could swear to what happened.

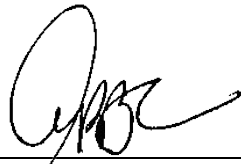
Accordingly, it is hereby

ORDERED that the motion by defendants to bar plaintiff from having an IME observer is denied in its entirety and it is further

ORDERED that the part of the motion seeking an order requiring plaintiff to pay the expenses of the failed IME is denied.

Already Scheduled Remote Conference: November 4, 2021 at 9:30 a.m. The parties may seek to advance the conference if necessary.

5/11/2021
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: