

**Rivera v Quadrum 38, LLC**

2021 NY Slip Op 32239(U)

November 10, 2021

Supreme Court, New York County

Docket Number: Index No. 157437/2020

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

HENRY RIVERA,

Plaintiff,

- v -

QUADRUM 38, LLC and LEEDING BUILDERS GROUP,  
LLC,

Defendants.

-----X

QUADRUM 38, LLC and LEEDING BUILDERS GROUP, LLC,

Third-Party Plaintiffs,

-against-

R.C. STRUCTURES INC.,

Third-Party Defendant.

-----X

INDEX NO. 157437/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595193/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for ORDER OF PROTECTION.

In this Labor Law action, Plaintiff moves for a protective order, pursuant to CPLR 3103(a), vacating Defendants’ demand for a pre-surgery physical examination. Defendants’ “Notice to Preserve and Maintain,” dated November 19, 2020 (the “notice”), demands that Plaintiff “appear for independent medical examinations (“IMEs”) prior to undergoing surgery in this matter” (Doc 11). Defendants oppose and cross-move for an order, pursuant to CPLR 3121 and 3124, compelling Plaintiff to appear for an IME prior to undergoing surgery, asserting that, if such examinations are not held before surgery, they will be seeking spoliation sanctions

because parts of his body will be changed by the procedure(s). After a review of the motion papers, as well as the relevant statutes and case law, the motions are decided as follows.

The motions are procedurally improper since they are not supported by good faith affidavits or affirmations from counsel. No motion relating to disclosure shall be filed with the court unless it is accompanied by an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion (*see* 22 NYCRR 202.7[a]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed, and any resolutions (*see* 22 NYCRR 202.7 [c]; *see also* Part 58 Rules). However, the failure of the parties to include affirmations of good faith is excusable in this instance because any effort to resolve the instant dispute non-judicially would have been futile (*Carrasquillo ex rel. Rivera v Netsloh Realty Corp.*, 279 AD2d 334 [1st Dept 2001]).

This Court grants Plaintiff's motion since notice does not "specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination" as required (CPLR 3121[a]) and is, therefore, procedurally defective.

Contrary to Defendants' contention, the facts of this case are distinguishable from *Martinez v Nelson*, 64 Misc.3d 225, 226-27 (Bronx Cty. Sup. Ct. 2019). In *Martinez*, the court considered whether a spoliation sanction was appropriate. Plaintiff's bill of particulars stated that plaintiff had been recommended for a specified spinal surgery. Defendant's IME notice contemplated an IME for the specified recommended future surgery and was followed up with letters advising of two scheduled IMEs -- neither of which the plaintiff attended since she already undergone the surgery after the initial IME notice (*Martinez*, 64 Misc.3d at 226-27). Here, Defendants served Plaintiff with a general notice "to appear for independent medical

examinations (‘IME(s)’) prior to undergoing surgery in this matter” (Doc 11), never specifying any particular IMEs. Further, plaintiff moved for a Protective Order after receiving the notice.

Defendants argue that they have a right to preserve “Plaintiff’s physical condition prior to undergoing surgical intervention which would alter [his body]” (Doc 39). Although accurate, such preservation requires a properly noticed IME, which can be sought any time “after the commencement of the action” (CPLR 3121). Thus, the defendants possess an adequate mechanism for preserving plaintiff’s physical condition with an IME prior to any surgery.

The notice also unduly burdens plaintiff by forcing the plaintiff to notify the defendant every time that he contemplates surgery and could potentially undermine the plaintiff’s ability to seek proper treatment. This undermines CPLR 3121’s specific directive that the party seeking the IME notice the examination, if one is desired.

This Court denies the branch of the cross motion seeking to compel plaintiff to appear for an IME as moot since, as acknowledged by the parties during the conference on October 21, 2021, plaintiff has already undergone surgery, and since, as stated above, the IME notice served was never in proper form. For the same reasons (the defective IME notice), the motion for a spoliation sanction is similarly denied.

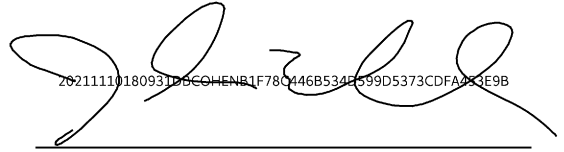
Accordingly, it is hereby:

ORDERED that Plaintiff’s motion for a Protective Order, pursuant to CPLR 3103(a), is granted; and it is further,

ORDERED that Defendants’ cross motion is denied; and it is further,

ORDERED that the parties are to appear for a virtual preliminary conference with the Court on November 23, 2021 at 2 PM, with a link to the conference to be sent via a subsequent court notice unless, prior to that day, the parties complete a bar coded preliminary conference

form, to be provided by the Part 58 Clerk, and return the same by email to SFC-Part58-Clerk@nycourts.gov at least two business days prior to the scheduled appearance, in which case the conference will be cancelled.



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HON. DAVID B. COHEN, J.S.C.

11/10/2021  
DATE

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