

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 34

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KELLY FORMAN,

Plaintiff,

Index No.: 113059/2011  
Motion Sequence No.: 007

- against -

**Amended Decision and Order**

MARK HENKIN,

Defendant.

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**ST. GEORGE, CARMEN VICTORIA, J.S.C.:**

Plaintiff commenced this action seeking damages for personal injuries that she sustained when she fell off a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive defects, memory loss, difficulties with written and oral communication, and social isolation. Defendant moves for an order, pursuant to CPLR §§ 3121 and 3124, compelling the plaintiff to appear a for a supplemental independent neuropsychiatric medical examination with Dr. Jeffrey A. Brown. Defendant also seeks to vacate the note of issue. Alternatively, defendant seeks to preclude plaintiff from submitting evidence at trial in support of her claims of traumatic brain injury and striking the portion of plaintiff's pleadings alleging traumatic brain injury. Plaintiff opposes the motion.

As a preliminary matter, this Court notes that on or about May 24, 2018 and while the instant motion (motion sequence 007) was still pending before this Court, defendant brought a motion by Order to Show Cause to vacate the note of issue (motion sequence 008). This subsequent motion was heard by Justice Lucy Billings and the motion was resolved pursuant to a stipulation "so-ordered" by the court. The June 1, 2018 stipulation provided, among other things, that the note of issue would not be vacated and that the case would remain on the trial calendar.1

As such, this Court denies the portion of this motion which seeks to vacate the note of issue so that it is consistent with the June 1, 2018 stipulation.

### Background

Plaintiff commenced this action by filing a summons and complaint on November 17, 2011. Defendant interposed his answer, and discovery ensued. Plaintiff appeared for depositions on February 20, 2013 and February 22, 2013. On September 23, 2013, plaintiff served a supplemental bill of particulars which alleged new and additional injuries. Thereafter, plaintiff appeared for a deposition on March 10, 2014. Plaintiff also appeared for several independent medical examinations, including a neuropsychiatric examination with Dr. Jeffrey A. Brown on January 21, 2014, January 22, 2014, and March 14, 2014. Plaintiff filed her note of issue on January 15, 2015. On or around June 29, 2016, plaintiff served another supplemental bill of particulars, which alleged *inter alia*, amended medical claims, including a lumbar spine surgery performed on plaintiff on December 23, 2015. On March 30, 2017, plaintiff was subsequently deposed in connection with these newly alleged claims for damages. Thereafter, defendant noticed supplemental independent medical examinations with orthopedist, Dr. Lisa Nason, and neuropsychiatrist, Dr. Jeffrey Brown. By letter dated September 13, 2017, plaintiff's counsel agreed to supplemental orthopedic medical exam, but refused to reappear for an examination by Dr. Brown.

Defendant asserts that a supplemental neuropsychiatric examination of the plaintiff is necessary based on plaintiff's deposition testimony regarding her evolving symptoms following her spinal surgery. Defendant points to plaintiff's March 30, 2017 deposition in which she testified that her stability, pain, dizziness and vertigo had worsened since her December 2015

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<sup>1</sup> The stipulation also states in relevant part, that the "trial is stayed for a period of six months (until 12/1/18) to afford parties time to obtain Facebook records."

back surgery. Defendant also notes that plaintiff testified that she had developed a new heat sensitivity in the year prior to her deposition. Further, defendant points to plaintiff's testimony regarding her daily dosage of Tramadol and Valium which had evolved from "taking it as needed." Defendant emphasizes that plaintiff's neuropsychiatric condition is at issue in this case and it is material and necessary for Dr. Brown to evaluate these developments. To support his position, defendant submits Dr. Brown's initial evaluation dated April 1, 2014, wherein Dr. Brown diagnosed plaintiff with Somatoform and/or Unconscious Symptom Exaggeration Disorder. Dr. Brown describes this disorder as one in which an individual "convinces themselves that they have problems of both physical and/or an injury related nature they did not have and/or they had not had a history of medical and/or psychiatric problems the records clearly indicate they had had" (defendant's exhibit R). In light of Dr. Brown's diagnosis and plaintiff's allegations, defendant claims it necessary to allow Dr. Brown to re-examine the plaintiff to determine the following: "i) to what extent plaintiff's lumbar surgery had been done on the basis of her subjective complaints as opposed to objective radiological and neurological data; ii) to what extent the surgery had alleviated most or all of plaintiff's subjective complaints, or whether she had only gained a temporary 'placebo' benefit from the surgery; and iii) to what extent plaintiff has had or is not planning to have additional surgical intervention, which a re-examination would help determine would or would not likely be of benefit to her." Defendant argues that it is unusual and unanticipated that plaintiff's previously plead neuropsychiatric symptoms persist into 2018, let alone that they have worsened, in light of ongoing treatment and the significant passage of time since her accident in 2011.

In addition, defendant asserts that the lengthy delay between plaintiff's first examination by Dr. Brown and the date of trial necessitates a supplemental examination as the original

examination by Dr. Brown is no longer reflective of plaintiff's condition. Defendant emphasizes that it has been seven years since plaintiff's accident, four years since plaintiff's first neuropsychiatric examination by Dr. Brown, three years since plaintiff filed her note of issue, and two years since her lumbar spine surgery had been performed. Defendant claims that during this lengthy period of time, unusual and unanticipated circumstances have arisen with regard to plaintiff's symptomology as per plaintiff's March 30, 2017 deposition. Therefore, defendant argues, he would be severely prejudiced in contesting plaintiff's claims at trial if plaintiff is not compelled to submit to a supplemental neuropsychiatric examination with Dr. Brown.

In opposition, plaintiff argues that defendant has not established unusual or unanticipated circumstances warranting a supplemental independent medical examination by Dr. Brown. Plaintiff maintains that her claims as to her neuropsychiatric condition have not changed since her first supplemental bill of particulars dated September 23, 2013. Plaintiff points to the supplemental bill of particulars dated September 23, 2013, wherein she further pled, among other things, vertigo, dizziness, and chronic posttraumatic migraines. The fact that plaintiff continues to experience the already pled sequelae for her neuropsychiatric injury, such as memory problems, brain fatigue, dizziness, or vertigo is not the type of "unusual or unanticipated circumstances" that justifies a supplemental medical examination, plaintiff contends. Further, plaintiff argues that the mere passage of time alone does not constitute an unusual or unanticipated circumstance to warrant post note of issue discovery.

#### Discussion

CPLR § 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). A plaintiff whose physical condition is in controversy may be required to submit to a physical examination, and it is “within the trial court’s discretion to require a plaintiff to submit to more than one physical examination” (*Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011]; *see* CPLR § 3121). However, the party seeking the examination must demonstrate the necessity for it (*Chaudhary*, 83 AD3d at 478). In addition, when seeking post-note-of-issue discovery, the demanding party must demonstrate “unusual or unanticipated circumstances” as well as “substantial prejudice” (*see Provost v One City Block LLC*, 155 AD3d 531, 537 [1st Dept 2017]; *see also* 22 NYCRR 202.21[d]; CPLR § 3101[d][1][i]).

The Court finds that defendant has demonstrated a need for a supplemental independent neuropsychiatric medical examination with Dr. Jeffrey Brown in view of plaintiff’s allegations as to the duration and severity of her evolving injuries in her March 30, 2017 deposition testimony along with the passage of time since Dr. Brown’s first examination. The Court notes, however, that plaintiff’s supplemental bill of particulars dated June 29, 2016 only incorporates the lumbar spine surgery from December 2015 and no new neuropsychiatric injuries were plead. Notwithstanding this, plaintiff testified to a number of symptoms that have significantly worsened or entirely new symptoms that have appeared. Plaintiff’s testimony regarding her evolving treatment and symptoms following the surgery, and that her stability, pain, dizziness, and vertigo had worsened since her December 2015 back surgery coupled with Dr. Brown’s initial diagnosis of Somatoform and/or Unconscious Symptom Exaggeration Disorder warrants a supplemental examination with Dr. Brown.

Likewise, the Court finds that the significant passage of time since Dr. Brown's initial examination, as well as plaintiff's own testimony at deposition taken on March 30, 2017 -- over two years after plaintiff's filing of note of issue, present such unusual and unanticipated circumstances to justify the supplemental neuropsychiatric examination of the plaintiff (*Korolyk v Blagman*, 89 AD2d 578, 579 [2d Dept 1982]). Additionally, of import, is the four years of appellate practice arising out of Judge Billings February 2014 Order, now affirmed by the Court of Appeals, requiring the plaintiff to provide social media discovery. This four-year delay, caused by appellate practice initiated by the plaintiff in 2014, was unanticipated and not in defendant's control. Based on the totality of these occurrences, after the note of issue was filed, it would be prejudicial to the defendant to deny him the opportunity to have his expert re-examine the plaintiff in order to submit a competing assessment of plaintiff's damages at trial (CPLR § 3121[a]). Accordingly, it is hereby

ORDERED that defendant's motion to compel is granted, and plaintiff is directed to appear for a supplemental independent neuropsychiatric medical examination with Dr. Jeffrey A. Brown within 45 days of the date of this order, and it is further

ORDERED that the defendant's motion to vacate the note of issue and strike the case from the calendar is denied; and it is further

ORDERED that, in all other respects, defendant's motion is denied.

This constitutes the Decision and Order of the Court.

**Dated:**

**ENTER:**

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**CARMEN VICTORIA ST. GEORGE, J.S.C.**