

2018 WL 4623041  
Supreme Court, Appellate Division,  
First Department, New York.

Dwight DRAPPER, Plaintiff–Respondent,

v.

Andrew John HORAN, et  
al., Defendants–Appellants.

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ENTERED: SEPTEMBER 27, 2018

#### Attorneys and Law Firms

Sweetbaum & Sweetbaum, Lake Success ([Marshall D. Sweetbaum](#) of counsel), for appellants.

Ogen & Sedaghati, P.C., New York ([Eitan A. Ogen](#) of counsel), for respondent.

[Renwick, J.P.](#), [Gische](#), [Mazzarelli](#), [Kern](#), [Moulton, JJ.](#)

#### Opinion

\*1 Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about February 2, 2018, which denied defendants' renewed motion to vacate the note of issue and direct plaintiff to appear for a medical examination, unanimously affirmed, without costs.

In his bill of particulars, plaintiff stated that he suffered injuries, including a [traumatic brain injury](#), when the car he was driving was rear-ended by a car owned and operated by defendants. Following plaintiff's disclosure

that he was suffering from headaches, and that an [MRI of his head](#) revealed traumatic injury, he filed a note of issue. Defendants, who did not notice a physical examination, then filed an untimely motion to vacate the note of issue, which Supreme Court denied.

Prior to trial, plaintiff, at defendants' request, served a supplemental bill of particulars, which stated that he had received additional medical treatment for his traumatic [brain injury](#). Defendants then renewed their motion to vacate, and asked the court to order plaintiff to appear for a medical examination.

Supreme Court properly denied the renewed motion. Defendants offered no reasonable explanation for their failure to notice a medical examination before the note of issue was filed (*Alvarez v. Feola*, 140 A.D.3d 596, 596, 33 N.Y.S.3d 700 [1st Dept. 2016] ). Defendants also failed to demonstrate that additional treatment for an injury defendants were already aware of constitutes an “unusual or unanticipated circumstance” to warrant vacatur and a medical examination (see 22 NYCRR 202.21[d]; *Allen v. Hiraldo*, 144 A.D.3d 434, 435, 41 N.Y.S.3d 213 [1st Dept. 2016]; *Schroeder v. IESI N.Y. Corp.*, 24 A.D.3d 180, 181, 805 N.Y.S.2d 79 [1st Dept. 2005]; *Arnold v. New York City Hous. Auth.*, 282 A.D.2d 378, 378, 723 N.Y.S.2d 369 [1st Dept. 2001] ).

We have considered the remaining arguments and find them unavailing.

#### All Citations

--- N.Y.S.3d ----, 2018 WL 4623041, 2018 N.Y. Slip Op. 06330