

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

NELLA LENTI-SAULO,

Plaintiff,

-against-

HEATHERWOOD HOUSE AT HOLBROOK,
LLC and HILLCREST VILLAGE APARTMENTS,
INC.,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 015796-04

MOTION SUBMISSION
DATE: 9-24-13

MOTION SEQUENCE
NO. 006

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation	X

Defendants move for an Order granting permission to schedule and hold a replacement orthopedic independent medical examination (IME) of Plaintiff; precluding Plaintiff from referencing at trial the testimony of Michael Katz, M.D. in the matter of *Bermejo v. Amsterdam*; and denying a missing witness charge at trial with regard to Michael Katz, M.D.

This is an action for personal injuries sustained by Plaintiff in an alleged slip and fall in a baby pool on Defendants' premises on July 2, 2004. Dr. Katz, an orthopedist, conducted IMEs of Plaintiff on November 3, 2006 and April 30, 2012.

On July 8, 2013, Dr. Katz testified in the trial of the case of *Bermejo v. Amsterdam*, Index No. 23985-09 before the Hon. Duane A. Hart in Supreme Court, Queens County. Based upon a tape recording that was presented, Justice Hart found Dr. Katz's testimony to be filled with lies, and severely questioned his credibility, suggesting that he should no longer be permitted to conduct IMEs and testify at trials. Defendants now contend that due to this characterization of Dr. Katz they will be unable to call him as a witness at the trial of the instant matter.

Generally, an additional IME will only be permitted "where there is shown to be a need for a more thorough disclosure of the plaintiff's physical condition". *Kordyk v. Blagman*, 89 AD2d 578 (2nd Dept. 1982). There are other instances when the court will permit an additional IME, such as when the examining physician is unavailable to testify due to an abrupt retirement and a move out of state. See *Rosado v. A & P Food Store*, 26 Misc.3d 935 (Sup. Ct., Westchester County, 2009).

However, the court has consistently held that an additional IME is not justified when the examining physician is available even if the doctor has been professionally disciplined subsequent to the examination. The concern that the plaintiff may be able to impeach the physician's credibility based upon the disciplinary action is not a sufficient basis for an additional IME. *Giordano v. Wei Zian Zhen*, 103 AD3d 774 (2nd Dept. 2013); *Carrington v. Truck-Rite Dist. Systems Corp.*, 103 AD3d 606 (2nd Dept. 2013); *Schissler v. Brookdale Hosp. Ctr.*, 289 AD2d 469 (2nd Dept. 2001).

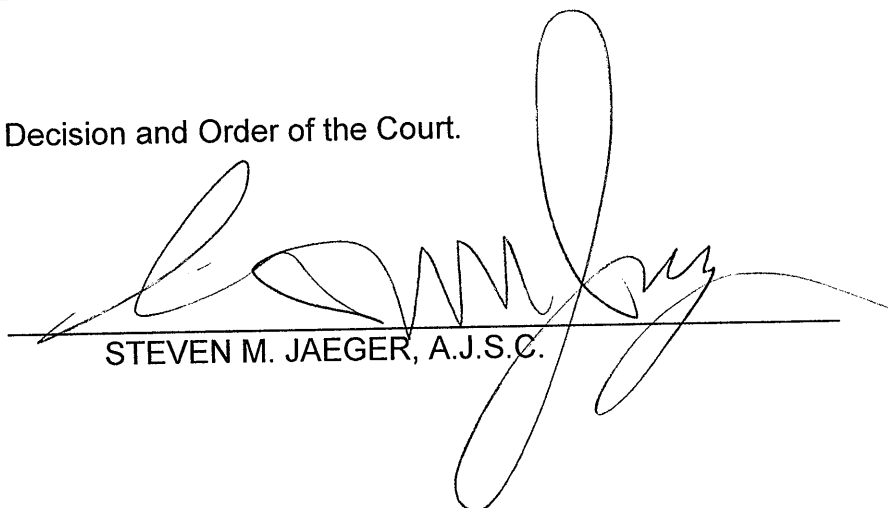
Here, Plaintiff contends that the statements made by Justice Hart are worse than if Dr. Katz had been professionally disciplined. The Court disagrees as the statements

are nothing more than the opinion of one judge based upon the facts of one case. Even if the Court were to find that Justice Hart's opinion is equivalent to being professionally disciplined, as discussed hereinabove, Defendants' concern that Dr. Katz might be impeached with Justice Hart's statements is not a valid reason for allowing an additional IME.

Accordingly, Defendant's motion for an additional IME is DENIED. The remaining relief sought by Defendants is DENIED with leave to renew before the trial judge.

This constitutes the Decision and Order of the Court.

Dated: November 6, 2013



STEVEN M. JAEGER, A.J.S.C.