

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable JAMES J. GOLIA  
Justice

IAS TERM, PART 33

-----x  
MICHAEL T. PARKER,

Index No: 4118/12

Plaintiff,

Motion Date: 09/13/13

-- against --

Cal. No: 104

Seq. No: 1

JOSEPH SULEYMANOV and EDUARD GADELOV,

Defendant(s).

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The following papers numbered 1 to 18 were read on this motion by defendants for an order granting defendants leave to conduct a further independent orthopedic examination in lieu of the orthopedic examination previously conducted by Robert Israel, M.D.

PAPERS  
NUMBERED

Order to Show Cause, Affirmation, Affidavit and Exhibits.....	1 - 8
Answering Affirmations, Affidavits and Exhibits.....	9 - 15
Reply Affirmation and Affidavit.....	16 - 18

Upon the foregoing papers it is ordered that this motion is decided as follows:

Defendants' move this court for an order granting defendants leave to conduct another independent orthopedic examination in lieu of the orthopedic examination previously conducted by Robert Israel, M.D.

While there is no restriction in CPLR 3121 (a) limiting the number of medical examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate the necessity for it (see *Rinaldi v Evenflo Co., Inc.*, 62 AD3d 856, 881 NYS2d 104 [2009]; *Huggins v New York City Tr. Auth.*, 225 AD2d 732, 733, 640 NYS2d 199 [1996]; *Young v*

Kalow, 214 AD2d 559, 625 NYS2d 231 [1995])). In addition, after a note of issue has been filed, a defendant must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination (see 22 NYCRR 202.21; Schissler v Brookdale Hosp. Ctr., 289 AD2d 469, 470, 735 NYS2d 412 [2001]; Frangella v Sussman, 254 AD2d 391, 392, 679 NYS2d 87 [1998]

Defendants argue that pursuant to a Consent Order issued by the New York State Board of Professional Medical Conduct, Dr. Israel is unavailable to testify which is an unusual and unanticipated circumstance upon which the court can direct the plaintiff to appear for a further independent orthopedic medical examination. Defendants further argue that they will be substantially prejudiced if they are deprived of Dr. Israel's expert testimony.

The fact that the examining physician was subjected to professional discipline subsequent to his examination of the plaintiff does not justify an additional examination by another physician. (Schissler v. Brookdale Hosp. Ctr., 289 A.D.2d 469, 470 [N.Y. App. Div. 2d Dep't 2001].) Additionally, since Dr. Israel is permitted to testify about acts performed, observations or finding made, or opinions and/or diagnoses rendered at any time prior to the effective date of the Consent Order, June 7, 2013 and plaintiff's independent orthopedic medical examination occurred prior to June 7, 2013, defendants have failed to demonstrate that Dr. Israel is not unavailable to testify. Defendants have also failed to demonstrate any prejudice.

Accordingly, defendants motion is denied.

This constitutes the Order of the Court.

Dated: October 31, 2013

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JAMES J. GOLIA, J.S.C.